OCHSE v. HAUMANN.

1910. *July* 4, 5, 6 and 12. MAASDORP, C.J., and FAWKES and WARD, JJ.

Master and servant.—Wrongful dismissal.—Justification.—Insolence. —Competing with employer.—Bonâ fide claim to fees.

Where insolence relied on as justification for dismissal of a servant occurs on one single occasion, it must be of a very aggravated character.

Where O, the servant of H, an attorney, had accepted from A, a personal friend, as a Christmas present a promise of the difference between £50 and the amount for which he could obtain an option to purchase a farm, after O and his brother had gratuitously promised A to do their best to get a farm for him, and O had not pressed his claim on its being repudiated by A, *Held*, that the transaction did not afford a just or sufficient ground for the dismissal of O, and that O had not in any sense competed with H in his business by accepting the promise.

Where O had retained the commission on a life insurance policy effected through the office of H, his employer, and contended that he had a right to the commission under an agreement with H, *Held*, that as O *bonâ fide* believed that he was entitled to claim the commission, this was not a sufficient ground for dismissal.

The plaintiff had entered the service of defendant as his articled clerk in the year 1904. He qualified as an attorney in 1909. On the 1st October, 1909, plaintiff entered into a contract of service with defendant for a term of five years, the former's remuneration to consist of a percentage on the profits of the business. Plaintiff was given notice of dismissal by defendant on the 17th January, 1910. The plaintiff brought an action for wrongful dismissal, claiming £1000 damages. The defendant pleaded justification, the particulars on which he relied being the following :—

(1) On or about the 14th January, 1910, the defendant informed the plaintiff that he would not engage one Vogel, the brother-in-law of the plaintiff, as a bookkeeper, whereupon the

plaintiff lost his temper and stated that he refused to work with the person whom defendant proposed to employ as book-keeper, and that he would not agree to the continual changing of clerks, and then left the room, slamming the door behind him.

(2) That for about a week previous to and including the 17th January, 1910, the plaintiff discourteously and deliberately failed and refused to greet the defendant, although seeing and being engaged in business with him on each of the days during the said period.

(3) About February, 1909, an insurance was effected on the life of one Abendroth through the defendant as agent for the Southern Life Assurance Co., Ltd., the negotiations therefor being conducted by plaintiff, who, however, failed to cause any entry of the matter to be made in defendant's books, but received and retained on his own account the commission therefor, amounting to 12s., which properly belonged to the said business.

(4) (This charge was not relied upon.)

(5) In or about the month of July, 1907, in his capacity as managing clerk to defendant, plaintiff transacted certain business for one Van Aardt in connection with the transfer of certain of the Harrismith town lands, but the plaintiff failed to have any entry of the said transaction made in the defendant's books, and has since charged and claimed from the said Van Aardt the sum of £15 on and for his account in respect of the work so performed.

(6) (This charge was not relied on.)

(7) The plaintiff has at divers times during his said service as managing clerk claimed to be and acted as though he were a partner in the defendant's said business.

Blaine, K.C. (with him *Brebner*), for the defendant: Claiming to be a partner is good ground for dismissal. See *Amor* v. *Fearon* (48 R.R. 584); *Hart* v. *Pickles* ([1909] T.H. 244).

In an action for wrongful dismissal a master may use as evidence to defend the case facts that came to his notice since the institution of the action to show, *e.g.* that the servant had

competed with his master. A servant must show fidelity to his master, and may not compete with him. See Maasdorp's *Institutes of Cape Law*, vol. 3, p. 247; *Queen* v. *Eayrs* (11 S.C. 330; *Nourse* v. *Farmers' Co-operative Co., Ltd.* (19 E.D.C. at p. 317). It is not necessary to prove that the master has actually been prejudiced. See *Pearce* v. *Foster* (L.R. 17 Q.B.D. at p. 542).

P. U. Fischer (with him *De Jager*), for the plaintiff, the latter conducting the case.

Cur. adv. vult.

Postea (July 12):—

MAASDORP, C.J.: The plaintiff, an attorney practising at Harrismith, sues defendant, another attorney practising there, for the sum of £1000 as damages for wrongful dismissal, alleging that he entered the defendant's service in March, 1904, under an agreement made at that time, which agreement was modified or enlarged on the 16th September, 1909, and that he was wrongfully dismissed from the said service on the 17th January, 1910.

The defendant admits the agreement of service, with certain qualifications, which for the purposes of this case it is unnecessary to specify, and also admits giving plaintiff notice of dismissal on the 17th January, 1910, but alleges that he was justified in doing so owing to certain disrespectful, impertinent and insulting behaviour on the part of the plaintiff to him and certain misconduct of his in the management of the business and lack of fidelity to the defendant's interests, and he sets forth what purports to be certain seven particulars. Of these the fourth and sixth were withdrawn by counsel during the course of the case, so that only five remain to be dealt with by the Court.

The first particular has reference to some alleged impertinent conduct of the plaintiff on the 14th January, 1910, and with reference to this the Court has come to the conclusion that the defendant was a man of a very sensitive nature, that he had for some time previous to the 14th January begun to think that the

plaintiff was getting too large for the office and that he exaggerated, perhaps unconsciously, what actually took place. The Court therefore, after carefully considering the evidence given by the defendant and plaintiff as to what occurred on that date, is of opinion that the conduct of the plaintiff afforded no just cause of dismissal. We would like to add that where the insolence relied on occurred on a single occasion, it must be of a very aggravated character to justify dismissal (see the cases of *Callo* v. *Brouncker*, 4 C. & P. 518, and *Edwards* v. *Levy*, 2 F. & F. 94). Similar remarks apply to the second particular.

The third charge is that the plaintiff received and retained for his own benefit certain commission on the premium paid by a certain Abendroth upon a policy of life insurance, which commission properly belonged to, and ought to have been paid by plaintiff into, the defendant's business. To this the plaintiff replied that he retained the commission for himself under an agreement between him and defendant that he, the plaintiff, was to be entitled to the commission on the first payment of premium of fire insurance business introduced by him and to the commission on the first payment of all life insurance policies, whether the business was introduced by him or not, alleging that the difference between the fire and life insurance policies consisted in the fact that in the case of fire policies the persons wishing to insure usually came to the office and consequently the office had as much claim to the commission on the first as on all subsequent payments of premium, unless the plaintiff specially introduced any particular insurance, in which case he was entitled to the first commission. In the case of life policies people did not usually come to the office to insure, but a good deal of personal canvassing was required, and therefore the office had no equitable claim to the commission on the payment of the first premium, and the plaintiff alleged that it was agreed that he should have the first commission on all life policies, whether introduced by him or not. The defendant admitted this agreement as far as the fire policies were concerned, but denied it as regards life policies, alleging that the same proviso applied to both, namely, that the agreement only applied to business introduced by the plaintiff. Without deciding what was the actual agreement

between the parties, though the Court is inclined to accept the plaintiff's version, especially as it was sworn that similar agreements obtain in other offices in Harrismith, we are of opinion that the plaintiff *bonâ fide* believed that he was entitled to claim the said commission, and that therefore this charge also falls to the ground.

Passing on to the seventh charge, namely, that the plaintiff on various occasions claimed and acted as though he were a partner in defendant's business, no particulars were given in the plea with regard to this alleged claim or representation, but two cases were specially relied on at the trial of the case, namely, those of Hoyser and Van Aardt. Of these Hoyser was not produced as a witness, and there was no evidence whatsoever as regards the representation to him. Van Aardt was produced, and he swore that plaintiff told him "he was a made man; Haumann had taken him as a partner." But this was absolutely denied by plaintiff, who stated that the most he had said to him or anybody else was that he was nicely fixed up with Haumann. The Court is not inclined to believe Van Aardt. He was clearly influenced by personal spite against plaintiff, and was ready to exaggerate his language and to damage him in the eyes of the Court as much as possible. We regard this charge also, therefore, as not established.

The fifth ground of dismissal—to our minds the most important and difficult to decide—remains to be considered. It is alleged that in July, 1907, the plaintiff in his capacity as managing clerk of defendant transacted certain business for Van Aardt in connection with certain Harrismith town lands, but failed to enter the transaction in defendant's books, and that he has since charged and claimed from Van Aardt the sum of £15 for and on account of the work so performed. Here also, for the reasons already given, the Court is not prepared to believe Van Aardt when his evidence conflicts with that of plaintiff, and the Court is thrown back on the version of the transaction given by plaintiff himself. From this it appears that before coming to Harrismith, Van Aardt had been a personal friend of plaintiff and his brother Jim at Barkly East. In December, 1906, plaintiff and his brother, with the knowledge of defendant, were

carrying on farming at Majoor's Drift in the Harrismith district. During that month Van Aardt visited Harrismith, and one night during his stay happened to be spending the evening at plaintiff's house, where plaintiff's brother was also present. In the course of the conversation Van Aardt asked the two brothers to try and get him a farm, to which they replied they would do their best. Later on Van Aardt saw plaintiff again and told him of a refusal with respect to the lease of certain town lands which had been given by one Welsh, who was the holder of the lease, to Ireland and McFunn for £275, which refusal was to terminate on the 1st January, 1907. He asked plaintiff to do his best to buy this refusal from Ireland for him, saying he was prepared to spend £50, to which plaintiff replied that he would do his best. Van Aardt then added: "Well, Charlie, whatever you buy at for less than £50 you can look upon as a Christmas present." Plaintiff subsequently bought the refusal from Ireland for £35, and paid him by cheque drawn on the account of Ochse Brothers at the Natal Bank. He at the same time advised Van Aardt by wire of the purchase and asked him to remit him £310, that is to say, the £275 which Ireland had to pay to Welsh and the £35 actually paid by him to Ireland for the refusal, without making any mention of the £15 which Van Aardt had said he might look upon as a Christmas present. A cheque for the amount of £310 was accordingly sent by Van Aardt to plaintiff, the cheque being drawn by a Mr. Norton of Barkly East in favour of plaintiff, which cheque was cashed by plaintiff, and £275 paid over by him to Welsh and the balance of £35 retained to repay himself the amount paid to Ireland. It will be seen, therefore, that no claim for the £15 was at that time made by plaintiff, nor was any direct claim for the amount at any time made by plaintiff upon Van Aardt. No entry of the amount was at any time made by him, and the transaction was never at any time treated by him as a matter of business, but purely as a matter of personal friendship. In fact it was not till August, 1908, that any mention of the matter was made at all. At that time plaintiff's brother was arranging a settlement of accounts with Van Aardt in connection with the latter's joint farming operations with Ochse Brothers, and wrote to ask plaintiff whether he had

any charges that ought to be debited against Van Aardt; whereupon plaintiff wrote to his brother the letter of the 26th August, 1908 (exhibit 14), in which he mentions amongst other things the amount of 15s., being the amount of stamps, &c., in the matter of the cession of the lease to Van Aardt, and the £15 which had been promised as a Christmas present. Upon the plaintiff's brother attempting to debit this amount of £15 against Van Aardt, the latter objected to it and explained the circumstances, whereupon the former said he was not going to bother about it, and the amount was struck out of the account. These being the circumstances of the case, the Court is of opinion that they cannot be regarded as affording a just or sufficient ground for dismissal. The service rendered by plaintiff to Van Aardt was a purely non-professional service, which Van Aardt originally requested of both plaintiff and his brother, and was undertaken by them gratuitously, but for which Van Aardt later on made a promise of a present to plaintiff, which he subsequently repudiated. It was not a matter in which the plaintiff can be said in any sense to have competed with the defendant in his business.

Judgment must therefore be for the plaintiff as regards all the charges raised by the defendant, the Court being of opinion that the defendant was not justified in dismissing the plaintiff. This being so, the defendant's first claim in reconvention, namely, for an interdict, must be dismissed as a necessary consequence of the judgment in convention.

There remain the money claims made by defendant in his second claim in reconvention. With respect to these we have the accounts rendered by the defendant to plaintiff and to Ochse Brothers on the 28th February, 1910 (exhibit 17). From these it would appear that there was a credit balance in favour of the plaintiff personally of £11, 0s. 5d. In addition to this there were some debits in the account of Ochse Brothers on which plaintiff was personally liable, namely, the sums of £50 and £100 and the interest charges connected with the same. The sum of £50 was advanced by defendant to plaintiff for the expenses of his admission as attorney. The sum of £100 was advanced by defendant for the purpose of assisting plaintiff in meeting certain cheques

drawn by Ochse Brothers, which they had no funds to meet; but plaintiff gave defendant a promissory note for the amount, and was therefore personally liable, though it appears to have been debited by the defendant to the account of Ochse Brothers. The defendant will therefore be entitled to payment of the amount of £50 with interest from the 22nd April, 1909, and £100 with interest from the 16th September, 1909, less the amount of £11, 0s. 5d., due by him to the plaintiff.

As to the amount of damages on the claim in convention, the plaintiff would as a general rule have been entitled to the payment of his salary to the end of his term under the contract, less any amount he may earn or may reasonably have been expected to earn between the date of dismissal and the termination of the contract. Owing, however, to the defendant's application for an interdict restraining plaintiff from practising at Harrismith under the terms of their agreement, the case practically resolved itself into a question as to the right of the defendant to claim such interdict. If the plaintiff was rightfully dismissed, defendant would have been entitled to the interdict, but otherwise not. In consequence of this the question of the amount of damages was more or less lost sight of, and in addition to this the plaintiff's counsel stated that his client had been doing very well on his own account since the dismissal. Under these circumstances heavy damages cannot be allowed. At the same time the defendant's charges of misconduct placed a stigma upon the plaintiff which he was obliged to clear away, and those charges have been persisted in up to the last and were made the foundation for defendant's claim for an interdict, and the Court is of opinion that £20 will meet the justice of the case.

Judgment will therefore be for the plaintiff in convention for the sum of £20, and for the plaintiff in reconvention for £50 with interest from the 22nd April, 1909, and for £100 with interest from the 16th September, 1909, less £11, 0s. 5d.

As regards the costs, it is quite clear that the claim in reconvention would very easily have been settled between the parties without coming into Court, if it had not been for the larger matter of the dismissal. In addition to this there cannot have been any extra costs in connection with the claim in recon-

vention, and the costs of the action must therefore be paid by the defendant in convention, such costs to include the costs of the application for the interdict, plaintiff to have his witness expenses.

FAWKES and WARD, JJ., concurred.

Plaintiff's Attorneys: *Marais & De Villiers;* Defendant's Attorney: *G. A. Hill.*