IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 329/21

AQUARIAN LIFESTYLE TRADING (PTY) LTD
T/A VESPA SOUTH AFRICA **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER AUBREY SITHOLE **Second Respondent**

NADINE MARNEWICK **Third Respondent**

Heard: **14 August 2023**

Delivered: **20 February 2024**

JUDGMENT

MAHOMED, AJ

<u>Introduction</u>

[1] Not insulated from the rest of the world, the Minister of Health at the time Zweli Mkhize on 5 March 2020 confirmed the spread of the Corona virus to South Africa. Ten days later President Ramaphosa, declared a National State of Disaster and announced measures such as immediate travel restrictions and the closure of schools from 18 March. For most school-going children this, I am sure, was met with immediate jubilation. On 17 March, the National

Coronavirus Command Council was established, *"to lead the nation's plan to contain the spread and mitigate the negative impact of the coronavirus"*.[1]

[2] By 23 March, a National Lockdown was announced, starting on 27 March. For those fortunate to be in employment (as a large segment of our population is unemployed) and as this case demonstrates management charged with running businesses this was to be the beginning of much uncertainty.

[3] There was uncertainty on the impact the closure would have on the future of businesses and for employees what was the position related to their continued employment.

[4] Whilst some of us would recall the difficulties brought about by the State of Emergency imposed by the Apartheid regime in the mid-1980's, this was different in legal form in that the pandemic was declared a State of Disaster. Unlike the State of Emergency which was designed to hold the oppressed majority under tighter control to achieve its nefarious objections to quell rising resistance across the country at the time, the State of Disaster impacted every single person in the country in one way or another. I dare say, that the effects thereof linger today as is evident by this case which is a snapshot of the effects of the lockdown on these parties.

[5] This dispute relates to whether the resignation of the Third Respondent, Ms Nadine Marnewick (Marnewick) during the pandemic constituted a constructive dismissal for the purpose of section 186 of the Labour Relations Act[2] (LRA). This is obviously a fact specific analysis which analysis was conducted by Commissioner Sithole. It his decision which is the subject of this review application.

[6] The Applicant (Company/Vespa) imports and distributes spare parts for the well-known luxury Italian scooter brand - Vespa.

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[1] Statement by the Presidency on 18 March 2020.
[2] Act 66 of 1995, as amended.

[7] Vespa was found by the Commissioner, to have constructively dismissed Marnewick in an arbitration award dated 8 February 2021. The Commissioner awarded Marnewick:

7.1 Outstanding salary in the amount of R56 635.51; and

7.2 Ten month's compensation in the amount of R175 000.00.

[8] The Company seeks to review and set aside the award. The grounds of review are that the Commissioner committed a gross irregularity and/or misconduct and/or exceeded powers invested in him in terms of the LRA as he *inter alia*:

‘i. Failed to apply his mind properly to the material facts and evidence that were placed before him;

ii. Failed to understand or to appreciate the true nature of the issue and dispute;

iii. Issued a ruling which reflects no rational, objective basis justifying the connection made by him between the evidence that was properly made available to him;

iv. Dealt with the evidence that was placed before him in a selective manner which unduly favoured the employee;

v. Conducted the proceedings in a manner which reduces the sense of impartiality on his part;

vi. Arrived at an unreasonable result;

vii. Reached a conclusion that a reasonable Commissioner would not have in light of the material facts that were before him;

viii. Analyzed the facts in a selective manner; and

ix. Took extraneous circumstances into consideration.’

[9] It is well established that the review test on the first question – whether the resignation amounted to a constructive dismissal – is correctness, not reasonableness.[3] Reasonableness is the applicable test in the second stage of the enquiry – when assessing the reasonableness of the finding of the Commissioner against his finding that the dismissal was fair/unfair.[4]

[10] I set out the material background facts in brief:

Background facts

[11] Marnewick commenced employment on 9 May 2016 as a Junior Bookkeeper and resigned with immediate effect on 26 August 2020. Her primary responsibilities related to invoicing.

[12] Following President Ramaphosa's announcement on 23 March of a Lockdown (what was to become known as Alert Level 5), the Company on 25 March 2020 resolved to temporarily lay off a number of its staff including Marnewick.

[13] Pursuant to this, on 25 March 2020 an agreement was concluded between the Company and Marnewick which provided that:

> 'The Company and the employee agree that the employment of the employee with the Company will temporarily lay-off for a period of 21 days beginning on the 26th day of March 2020 due to the President declaring the nation in a total state of Lockdown due to the COVID-19 pandemic. Therefore, the employee will only be required to return to work on the 17th day of April 2020.'

[14] So, the layoff at least, until 17 April 2020 was consensual.

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[3] *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* [2015] ZALAC 25; (2015) 36 ILJ 2245 (LAC) at para 16.

[4] If the Court is satisfied that the employee was dismissed, it must apply the usual *Sidumo* reasonableness test on review of the decision as to fairness. This test focuses on the outcome: is the arbitrator's decision capable of reasonable justification on all the material that was before the arbitrator (including for reasons not considered) - *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC) at para 103; *National Union of Mineworkers and another v Rustenburg Platinum Mine (Mogalakwena Section) and others* [2015] 1 BLLR 77 (LAC); [2014] ZALAC 62 (LAC).

[15] Vespa's warehouse, however, remained open during the Lockdown as it was considered an essential service and the Company commenced trading again during Lockdown Alert Level 3, which was around June 2020.

[16] During the lay-off period, Marnewick worked for two hours. It was confirmed by the Company in evidence that Marnewick's manager had taken over her duties while she was laid off.

[17] Marnewick complained that she did not receive her full monthly salary over the lay-off (which is the point of a lay-off). She received R7 815.14 being the equivalent of accrued paid leave days on 30 April 2020. She also received the UIF TERS benefit payment (which was paid by UIF on application by an employer affected by the Lockdown) in April 2020 and May 2020 in the amounts of R7 668.15 and R6 791.79 respectively. Her monthly remuneration was R17 500.

[18] The Company had no intention of reimbursing laid-off employees the balance of their salaries. This was admitted at arbitration.

[19] Lockdown Level 5 was extended to 30 April. On the same date, a second agreement was entered into extending the lay-off period from 30 April 2020 until the upliftment of the lockdown.

[20] After the conclusion of the second agreement, the Company requested Marnewick to return her laptop as she had access to the Company's bank account. It was the version of Vespa that there was no work available for Marnewick. The laptop was obviously a tool of trade.

[21] Around May 2020, while Marnewick was still laid off, Vespa received a container of bikes. Marnewick decided to attend the workplace with her brother, to assist with the offloading of the bikes. Marnewick's testimony was that she did not intend to demand payment for such assistance. Upon her arrival, she was met with a few technicians and workshop managers who were assisting with offloading the delivery. Marnewick and her brother were requested to leave the premises because she was at the time laid off. Other

employees present were not requested to vacate the premises. It is the Company's version that they were entitled to request Marnewick to leave as offloading was not part of her duties (much did not turn on this aspect at arbitration). Why Marnewick took it upon herself to have her brother (who was also not an employee) attend the workplace at the time is bewildering as he had no right to be on the premises. This issue was also not canvassed in evidence - so, be that as it may.

[22] On 14 July 2020, Marnewick lodged a grievance. I refer to some of the salient portions below:

> '6.1. I was pressurized to sign the temporary lay off agreement, under the impression that I would not receive UIF/TERS assistance without signing same…
>
> …
>
> 6.3. The Company is no longer in lockdown, and the industry is unrestricted in terms of trade and operations. Due to this the lockdown is subsequently over for the Company, and further, the indefinite nature of the lay-off has rendered this lay-off to be unreasonable under the circumstances, and amounts to an abuse of the circumstances and Regulations which are currently in place.
>
> …
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> 6.6. I am aware that my position is currently being fulfilled by another employee, and despite no meaningful consultation, consent and/or section 189 proceedings being present, there is still work to be done in my position, which I am able to do remotely. I am capable and willing to continue working remotely, however, the Company has confiscated my laptop, and has refused me access to my laptop, and further refused to allow me to work despite being willing and able to work remotely and allowed

another employee to take over my position. I consider the refusal to allow me to fulfill (sic) my position whilst another employee tends to my duties to be an unlawful demotion…

…

11. The Company has made various statements that it is not in a financial position to pay its employees, however, no information has been provided in respect of the actual financial position of the Company, and further, as stated above, no section 189 proceedings have been instituted…

12. In light of the above, and in attempt to utilize the internal structures available to me, I request the following to be addressed and attended to immediately:

    12.1. Payment of the balance of my salary for May 2020 in the amount of R10 708.21 subject to lawful tax deductions on or before the 20th of July 2020;

    12.2. Payment of my full salary amount for June 2020 in the amount of R17 500.00 subject to lawful tax deductions, on or before the 20th of July 2020;

    12.3. That I be allowed to return to work immediately, and work remotely, if necessary;

    12.4. Payment of my full salary amount for July 2020 in the amount of R17 500.00 subject to lawful tax deductions, on or before the 31st of July 2020.'

[23] A grievance hearing was held on 23 July 2020.

[24] On 15 July 2020, the Company advised staff who were laid off that there was uncertainty about whether UIF TERS benefits would be extended and that payments would most likely end in June 2020. The letter provided further that

the relevant employees would remain laid off until *"matters have been clarified by our Government".*

[25] On 24 July 2020, the Company provided Marnewick with a "Grievance Solution Proposal" whereby Marnewick was required to provide the following information to the Company:

> 'A. We have evaluated the possibility of staff rotations… We request that if staff rotation would occur, who would you be rotating with at the office.
>
> B. Regarding the employee(s) that you would propose rotating with, what are the skills that you possess that the other employee does not in order for you to carry out that function within the workplace?'

[26] Marnewick, through her attorneys Kern Armstong & Associates, addressed a letter to the Company on 29 July 2020 in reply. In essence, the letter set out the following proposals:

26.1 That Marnewick worked three and a half days a week, and that she was willing to work remotely;

26.2 Marnewick receive 70% of her salary, with UIF TERS supplementing the balance so long as the benefit exists;

26.3 That the above arrangement be implemented for two months, after which Marnewick would return to her ordinary working hours and salary; and

26.4 That Marnewick was open to being retrenched should the Company remain under financial strain.

[27] The Company chose not to reply to the proposal made by Marnewick at the time. Its rationale was that the proposal was unreasonable and demanding.

This may well be so, but Marnewick was owed a response from the Company setting out its position to her proposal.

[28] At the hearing of the review application it was confirmed by Counsel for the Company that there was indeed no response from the Company at the time to either Marnewick or her attorneys. Put differently, Marnewick was left guessing and in limbo.

[29] With no reply forthcoming from the Company, Marnewick tendered her resignation on 26 August 2020 and made the demand for amounts alleged to be outstanding in respect of salary for May – August 2020 and annual leave days accrued from 1 May – 26 August 2020.

[30] At the hearing of the review application I enquired whether the conclusion of the lay-off agreement was indued by a misrepresentation by the Company in respect of the receipt of the TERS benefit. Counsel for the Company accepted that it was.

[31] What is apparent from the facts is that Marnewick was not consulted by the Company during the tumultuous period in which it, like all other employers, found themselves. It acted for instance on a frolic without consultation/engagement with Marnewick, acted egregiously in misrepresenting the basis of qualification of the TERS benefit to induce a lay-off agreement, failed to respond to a counter-proposal made by Marnewick in the grievance process, had another employee take on her responsibilities and in effect kept Marnewick at a distance at a time when it should have engaged her to keep her appraised of its financial position and its impact on staff which ostensibly justified its difficult position. This would have been a reasonable approach taken by the Company. Yet this is not how management conducted the business at the time.

[32] Marnewick must be found to have made a reasonable effort to preserve the employment relationship[5] on these facts which is an important consideration in a claim of constructive dismissal, the Commissioner found that she discharged such obligation.

[33] The evidence demonstrates that she engaged the Company and at the critical juncture post the grievance, where she made her concerns plain to management, she was simply stonewalled by the Company. Had there been a response from the Company post the grievance, a resignation may well have been premature.

<u>CCMA arbitration</u>

[34] On 28 August 2020, Marnewick referred a claim of an alleged constructive dismissal dispute to the CCMA together with a claim for outstanding salary. The arbitration was convened on 18 January 2021.

[35] Marnewick was represented by an attorney, whilst the Company was represented by its Managing Direct Mr Andrew John Reid (Reid).

[36] Marnewick presented a bundle comprising of, *inter alia*, various correspondence exchanged, the temporary layoff agreements and documents which confirmed various payments made by the Company, payslips of the relevant periods and UI19 Forms. Vespa’s documentary evidence consisted of, *inter alia*, correspondence, agreements and staff rules. Strangely, no evidence of Vespa's alleged financial strain over the period in question was discovered. So, there was no evidence of the alleged underlying financial difficulty presented before the Commissioner. This was also not lost to the Commissioner who identified that such evidence was lacking on the part of the Company.

<u>Analysis</u>

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[5] *Albany Bakeries Ltd v Van Wyk & others* (2005) 26 ILJ 2142 (LAC); [2011] JOL 27545 (LAC).

[37] The Commissioner found on the evidence that there was a constructive dismissal.[6]

[38] It is common cause that Marnewick resigned. The being the first factor in a claim of constructive dismissal. The second factor is that the reason for the termination must be that the continued employment has become intolerable for the employee with the test for intolerability being an objective one.[7] As indicated above objectiveness is fact specific and requires a correct analysis by the Commissioner. The circumstances must be demonstrated to be "*insufferable and too great to bear*"[8] and be such that no reasonable employee could be expected to put up with them. The employee must show something more than bad treatment, or a *"difficult, unpleasant or stressful working environment"*[9] and the employee must show that there was no reasonable alternative.[10] The Commissioner found that the evidence demonstrated such facts. Thirdly, the intolerability must have been of the employers making. On this requirement it cannot be gainsaid - the circumstances which gave rise to the lockdown were not the making of the employer. This is incontrovertible on these facts. This is also a question of causation. Reid put it thus in his evidence: "*We did not choose Covid, we did*

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[6] The requirements for the establishment of a constructive dismissal were confirmed in *Solid Doors (Pty) Ltd v Theron NO and Others* [2004] ZALAC 14; (2004) 25 ILJ 2337 (LAC) at para 28. In this case, the court held as follows: *"It should be clear from the above that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present"*.

[7] *National Health Laboratory Service v Yona and Others* [2015] ZALAC 33; (2015) 36 ILJ 2259 (LAC); *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* [2018] ZALCJHB 13; (2018) 39 ILJ 1568 (LC) at 15-16.

[8] *Solidarity obo Van Tonder v Armaments Corporation of South Africa (SOC) Limited and Others* [2019] ZALAC 55; [2019] 8 BLLR 782 (LAC).

[9] *Gold One Ltd v Madalani and Others* [2020] ZALCJHB 180; (2020) 41 ILJ 2832 (LC) at para 46; *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2019] ZALCJHB 275; [2020] 3 BLLR 280 (LC) at para 50.2; *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* [2010] ZALAC 10; (2010) 31 ILJ 2331 (LAC).

[10] *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC) at paras 33-34.

not choose layoffs, it happened". Reid is only partly correct in that whilst the Company was not responsible for the pandemic, its response thereto was entirely within its control and so was how it chose to deal with its employees.

[39] The manner upon which it dealt with the pandemic in its workplace and *vis-à-vis* Marnewick is the causation door into which the Commissioner was to step and in respect of which he found the conduct of the Company to constitute a constructive dismissal.

[40] More could have been done by the Company to maintain the working relationship which would on a conspectus easily have been achieved by *inter alia*, proper consultation pre and post the grievance hearing, being transparent, not misrepresenting the TERS entitlement. The lodgment of the grievance was a clear sign of discontent on the part of Marnewick and the letter addressed by her attorney demanded a reply from the Company. Yet, the Company chose not to do so and this on a conspectus of all the evidence placed Marnewick in a position which rendered her continued employment intolerable.

[41] It is also apparent from the record that the facts put up of the alleged intolerable situation were not sufficiently disputed by Reid to show that these were not objectively speaking facts which made employment intolerable.

[42] Having found a constructive dismissal, it was for the Company to prove that the dismissal was fair.[11] It failed to do so as is apparent from the record.

[43] Accordingly, on the facts before the Commissioner, I cannot find that his finding was either incorrect on the jurisdictional question or unreasonable on the fairness of the dismissal as it were.

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[11] *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC) at para 10*. "Once, it has been proven that a constructive dismissal has occurred, the onus shifts to the employer to prove that it did not act unfairly. A two-stage approach is thus envisaged. The central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair. A court will consider the circumstances with a view to establishing whether the employer's conduct was justified".*

[44] Turning to compensation, I am alive to the fact that this decision of the Commissioner is not an exercise of a narrow discretion such that this court is precluded from interfering with it.[12] However, the decision as to the amount of compensation awarded requires that this court ascertain whether a limited ground for interference exists before it can vary the quantum.[13] But to do so, there must be a pleaded ground of review which will attract the attention of this court where the award appears on the high end of the compensation scale. The review application is, however, lacking in this regard meaning that there is no specific attack on the discretion of the commissioner in the award of compensation. For such reason, I cannot find a basis to interfere with the quantum of compensation awarded despite some debate on such point at the hearing of this application. My hands are tied as a court of review which does not sit on appeal against an award of the Commissioner.

[45] Furthermore, there is no specific challenge to the award made in respect of the outstanding salary under the Basic Conditions of Employment Act[14] (BCEA). By this I mean that the application for review is framed under the LRA. With no review premised upon the BCEA there is no legitimate review mounted to the portion of the award, which deals with salary and for such reason such aspect of the award must accordingly stand.[15]

[46] In the circumstances, the following order is made:

<u>Order</u>

1. The review application is dismissed.

2. There is no order for costs.

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[12] *Kemp t/a Centralmed v Rawlins* [2009] ZALAC 8*;* (2009) 30 ILJ 2677 (LAC).
[13] *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (2021) 42 ILJ 1643 (CC).
[14] Act 75 of 1997.
[15] This is a basic premise of a long line of jurisprudence and what Professor Cora Hoexter refers to as the routes/pathways to securing administrative justice through judicial review.

I. I. Mahomed

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate Samantha Jackson
Instructed by:	Vermulen Attorneys
For the Third Respondent:	Advocate Sinako Lindazwe
Instructed by:	Kern Armstrong & Associate