

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASE NO: **JR1054/07**

In the matter between:

EVERTRADE

Applicant

and

A KRIEL N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

KIM BOTES

Third Respondent

JUDGMENT

1. This matter is an unopposed review application that was argued on 6 February 2008. Mr Snyman who appeared for the applicant referred me to the judgment of the Labour Appeal Court in Solid Doors (Pty) Ltd v Commissioner Theron and Others (2004) 25 ILJ 2337 (LAC), that I was not familiar with. I accordingly undertook to read the judgment and to deliver a brief judgment on 8 February 2008.

Facts

2. Third respondent was employed by the applicant as an Import and Distribution Clerk. On 16 February 2007 Mr Strike, the applicant's Managing Director ascertained that the third respondent was

conducting a business in opposition with the applicant's business. He was clearly upset about this and confronted the third respondent about this fact on that day. The contents of the discussion and more particularly whether Mr Strike had dismissed the third respondent, are in dispute and I shall revert to it. Be that as it may, the third respondent left her employment on that date and never returned.

3. On 19 February 2007 the third respondent referred a dispute relating to her alleged unfair dismissal to the CCMA and served a copy thereof on the applicant. Despite being in receipt of this referral, the applicant addressed a letter dated 21 February 2007 to the third respondent, advising her that she was absent without authority and calling on her to contact the applicant to explain her absence. On 27 February 2007 the applicant sent a follow up letter to the third respondent.
4. The third respondent testified at the arbitration proceedings that these letters had only come to her knowledge at the conciliation meeting, when the applicant's representative enquired about them.
5. I now turn to the disputed contents of the meeting between Mr Strike and the third respondent on 16 January 2007. It is clear that Mr Strike was upset, and rightfully so. He had just received information that the third respondent had been competing with the applicant. It is common cause that he confronted the third respondent. Mr Strike testified that he informed the Third Respondent that she had to *...go home for the day, see you on Monday...* The crux of the third respondent's evidence

was that Mr Strike told her to ...*clear out your personal belongings and go home. And then I asked him if I can work until the end of February or if I can work some sort of period, notice period, he said no he wants me to leave immediately.*

6. She then went home and phoned the CCMA in order to open a case. First respondent found that. *The version of the applicant is the most probable of what transpired in this matter.* He found that she had been dismissed. He found that the dismissal was procedurally unfair and awarded the third respondent compensation of one month's remuneration.

The test on review:

7. Mr Snyman contended that the Solid Doors judgment (supra) had the implication that:
 - 7.1. When an arbitrator had to rule on whether a dismissal occurred or not, this constituted a jurisdictional fact.
 - 7.2. A court on review had to decide for itself on an objective basis whether the jurisdictional fact in question was present or not.
8. The paragraph 29 of the Solid Doors judgment bears this out.

[29] Having established what the requirements are for a constructive dismissal, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is

a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive dismissal - the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.

9. Mr Snyman correctly contended that the third respondent had the onus to prove that she had indeed been dismissed. Bearing in mind the test, as set out in Solid Doors, I now turn to the question as to whether she had discharged that onus.
10. I do not have the benefit of having observed the witnesses when they were testifying. Accordingly I am constrained to decide the matter on ... *the absence of interest or bias, the inherent merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors.* S v Civa 1974 (3) SA 844 (T).
11. Both witnesses had an interest in their version being accepted. The requirement of *any inconsistencies or contradictions* does however

favour the third respondent. She clearly left work with the understanding that she had been dismissed. She would not otherwise have immediately phoned the CCMA in order to open a case. There is no reason on the record to find that she had referred the dismissal dispute in order to “manufacture a case” against the applicant.

12. On the other hand, the letter dated 21 February 2007, addressed by the applicant to the third respondent, certainly raises some question marks. One would have expected it to refer to the investigation into the unlawful competition and to deal with the allegation by the applicant in her referral form, that she had been dismissed. The letter does not do so, and this fact was not satisfactorily explained by the applicant at the arbitration proceedings. The other aspect that, in my view, favours the third respondent, is Mr Strike’s extreme reluctance at the arbitration to respond to the question as to the status of the third respondent at the time of the arbitration.

Conclusion:

13. In view of the foregoing I find, as the first respondent had done, that the applicant had been dismissed (and that it had to follow that such dismissal was procedurally unfair).
14. Mr Snyman, in his heads, mounted quite an attack on the decision of the first respondent to award compensation equal to one month’s

remuneration. However, in my view correctly, he did not pursue this point in argument.

In view of the foregoing, I make the following order:

The application for review is dismissed.

NIEUWOUDT AJ

DATE OF HEARING: 6 February 2008

DATE OF JUDGMENT: 8 February 2008

APPEARANCE

FOR THE APPLICANT: Mr Snyman

OF: Snyman Attorneys