

IN THE LABOUR COURT OF SOUTH AFRICA
(BRAAMFONTEIN)

CASE NO: JR581/06

STRATEGIC COMMUNICATIONS COMPANY (PTY) LTD

Applicant

v

DAIRIN ASHLEY VAN NIEKERK

Respondent

JUDGEMENT

AC BASSON, J

- [1] This was an application to review and set aside the award under case number GAJB12937. The issue before the Commissioner was whether the resignation of the First Respondent (hereinafter referred to as “*the Respondent*”) constituted a constructive dismissal.

[2] Before I turn to the merits of this review application, a few preliminary remarks should be made in respect of review applications in a case where constructive dismissal is alleged: A Commissioner or Arbitrator, when deciding whether or not an employee has been dismissed in terms of section 187(1) – (f) of the Labour Relations Act 66 of 1995 (hereinafter referred to as “the LRA”) rules on whether or not the CCMA or Bargaining Council has in fact **jurisdiction** to entertain the unfair dismissal dispute that has been referred to it. It has been made clear in the decision of the Labour Appeal Court in *SA Rugby Players’ Association (SARPA) & Others v SA Rugby (Pty) Ltd & Others; SA Rugby Pty Ltd v SARPU & Another* [2008] 9 BLLR 845 (LAC) that the question before the court in reviewing such a ruling, is whether objectively speaking the facts gave the CCMA jurisdiction to entertain the dispute. The review test as laid down in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) therefore does not find application in reviewing a jurisdictional ruling:

“[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no

dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others (1994) 15 ILJ 801 (LAC)2 at 804C–D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter, provided it is understood that it

does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon's case, the court said:

"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." (At 804C–D.)

In my view, the same approach is applicable to the CCMA.

[41] The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary. "

[3] The parties before this Court argued the matter in light of the decision in *Carephone (Pty) Ltd v Marcus NO and Others* (1998) ILJ 1425 (LAC). Neither of the parties argued the review in light of the decision referred to in the previous paragraph namely whether or not there were facts before the Commissioner to give the CCMA jurisdiction to entertain the dispute. Once it has been established that the CCMA does indeed have jurisdiction, the reviewing Court will evaluate the award in respect of the *fairness* of the dismissal in light of the review test as set out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC):

“[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair”.

[4] The Respondent was employed by the Applicant as a senior Designer and Studio Manager. In addition to the contract of employment, there was also an agreement that the Respondent would receive 10% of the shares in the Applicant. It is common cause that the Respondent ultimately decided not to take up the share offer. The Respondent resigned on 1 April 2005 and provided two weeks notice thereof.

[5] It appears that the Respondent had resigned for the following reasons: Firstly, she was misled by the Applicant when she had been employed in that the Applicant never delivered on her promise to give her a 10% share (award page 9). Secondly, the Respondent alleged that she received warnings which she had viewed was a strategy to get her to leave the Applicant. It was her case that the Applicant had tried to intimidate her with false accusations and that she was not given a chance to defend herself before she received the written warnings. Thirdly, her office keys were taken away from her without any explanation and that this treatment was humiliating and demeaning.

[6] In a detailed and fairly comprehensive award, the Commissioner found that the resignation of the Respondent constituted a constructive dismissal. In respect of the complaint about the oppressive treatment, the Commissioner found that, although she accepted that the

Respondent did not resign over the dispute about the shares, it is a factor to be considered in assessing the impact of the overall conduct of the Applicant. Although there were attempts to settle the matter, the Commissioner found that when the Applicant failed to co-operate with the negotiations, the Applicant had changed her attitude towards the Respondent. In her award – and in this regard I specifically refer to paragraph 42 of the award - the Commissioner refers to various examples which all, in her view, substantiated the conclusion that the Respondent were subjected to oppressive treatment by the Applicant. More in particular, the Commissioner refers to the fact that the Respondent's keys were removed on 23 February 2005 and the fact that this was clearly a clear vote of no confidence. The Commissioner also concluded that it was not necessary for the Respondent to have followed the grievance procedure in the circumstances. In this regard the Commissioner accepted that, in light of the fact that the Respondent did raise some concerns previously through her attorney and that these grievances were not dealt with, she (the Respondent) therefore had good reason to believe that the Applicant would turn a blind eye to a formal grievance. The Commissioner concluded that the resignation was a reasonable option in response to the conduct of the Applicant which had made her continued employment intolerable. I will return to the test for a constructive dismissal hererinbelow.

[7] The Applicant took issue with the fact that the Commissioner took into account the fact that the Respondent was not given a chance to defend herself before she received written warnings. In this regard the Commissioner held that the Respondent was denied her right to defend herself prior to having this sanction imposed on her. I am in agreement with the view of the Commissioner that an employee must be afforded a chance to defend herself before a warning is imposed. This does not, however, imply that there should be a hearing in the sense of a disciplinary hearing. Written warnings are a more formal act than a mere verbal or oral warning. By giving an employee a written warning, the employer is entitled in subsequent disciplinary proceedings to rely on those warnings as proof that the employee had been warned of similar conduct in the past. Grogan in his book "Workplace Law" 9th edition clearly states at paragraph 99 that:

"The issuing of a written warning should be preceded by a proper inquiry, during which the employees concerned should be allowed to state their cases and produce witnesses, if necessary."

I agree with the sentiments expressed by Grogan. At the very least, an employee should be afforded the right to be heard in the sense that

she should be afforded an opportunity to be heard before a written warning is imposed. The fact that the Respondent was denied the right to be heard before a written warning was imposed contributed to the general oppressive treatment to which she was subjected to especially in light of the fact that the allegations leveled against her were serious.

[8] I am also in agreement that the Respondent had reason to believe that her grievances would not be attended to particularly in light of the fact that the Respondent's attorney did bring it to the attention of the Applicant that the Respondent had grievances. I am further in agreement that the fact that the Respondent's keys were removed from her constituted a clear vote of no confidence in her and that this act only added to the general oppressive treatment which she received from her employer. I am also in agreement with the assessment of the evidence in respect of the Respondent's alleged poor workperformance. I am further in agreement with the assessment that if the Respondent's performance and conduct did deteriorate to the extent Mcleod alleged that it did, the Applicant would have held a disciplinary hearing or a proper assessment hearing.

[9] I am therefore satisfied that sufficient evidence was presented to the Commissioner that substantiated a claim of dismissal. In coming to a

decision I also had regard to the recent decision of the Constitutional Court in *Strategic Liquor Services v CCMA & Others* (Case CCT 33/09 [2009] ZACC 17) where the Court held as follows in respect of what constitutes a constructive dismissal:

"There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no "choice". The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable."

I am satisfied that the Applicant made continued employment for the Respondent intolerable.

[10] I must briefly deal with the argument raised on behalf of the Applicant that it was impossible in the context of a constructive dismissal to find

that a dismissal was substantively and procedurally unfair. This submission is clearly unfounded: Although it is true that the issue of procedural fairness will not normally arise in the context of a constructive dismissal, there is nonetheless still an onus on the employer to prove that the dismissal was fair. In terms of the LRA a dismissal may be unfair where there was no valid and fair reason to dismiss and secondly where no fair procedure was followed. The fact that the Commissioner stated that the dismissal was procedurally unfair, does not, in my view constitute an irregularity to the extent that it renders the award reviewable. The fact of the matter is, the Commissioner understood his functions in the sense that he understood that he had to evaluate not only whether or not there was a *dismissal* as contemplated by the Act, but also, once a dismissal was established, whether or not that *dismissal* was **unfair**. It is clear from the provisions of Section 186(e) of LRA 1995 that it envisages a two-stage approach - First, onus on employee who resigns or leaves to prove that continued employment made intolerable by employer's conduct - Second, onus on employer to show that dismissal not unfair. Landman J in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 ILJ 1240 (LC) and in particular at 1250C-F:

'In my opinion, having regard to the scheme of the new Act, the two-stage approach is to be followed.

First of all an employee who resigns or leaves her place of employment (or may be said to have deserted) must prove that this was not the case and that the employer dismissed her by making the continued employment intolerable. The onus on this leg is upon the employee. If this is established then the second stage is arrived at.

The second stage concerns an evaluation of whether or not the dismissal was unfair. This is certainly true of substance but clearly the provisions relating to procedure are not relevant.

The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is so is however a matter of fact and no general principle can or should be laid down.'

I am therefore of the view that this argument has no merit.

[11] The Applicant also took issue with the fact that the Commissioner did not set out on what basis he arrived at the order of compensation. It is not correct that the Commissioner did not justify the amount of compensation arrived at. What is required is that the Commissioner exercises a discretion in a judicial manner taking into account relevant factors. The Commissioner did exercise a discretion and I am of the view that the conclusion arrived at is reasonable. This is evident from the award where the following is stated: *“The applicant is entitled to compensation and in considering what would be just and equitable, I have taken all the circumstances into account including the fact that the applicant was employed by the respondent for less than a year and that she found alternative employment soon after resigning.”* Although mindful of the fact that it is not for this Court to point out what it would have awarded the Applicant, it certainly cannot be said that the award of 5 month’s compensation is excessive taking into account the circumstances as set out in the award. In the event, the review on this ground must fail.

[12] In light of the foregoing the review application is dismissed. In respect of costs, I can find no reason in law and fairness why costs should not follow the result. In the event the following order is made:

1. The review application is dismissed.
2. The Applicant is ordered to pay the costs.

AC BASSON, J

DATE OF JUDGEMENT: 23 JULY 2009