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IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN BRAAMFONTEIN

CASE NO: JR 891/08

In the matter between:

RICCARDO FACHIN

APPLICANT

and

AGE TECHNOLOGIES JOHANNESBURG

(PTY) LTD

1ST RESPONDENT

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

2ND RESPONDENT

RAFFEE N.O.

3RD RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the third respondent, to whom I shall refer as 'the commissioner'. The arbitration proceedings were convened following on the referral of an unfair dismissal dispute to the CCMA, in which the applicant claimed that his dismissal was substantively and procedurally unfair.

The arbitration proceedings

[2] The evidence at the arbitration hearing disclosed a material dispute of fact

between the parties. It was common cause that the applicant commenced employment with the first respondent in June 2005 as a senior project engineer and that his employment terminated on 7 December 2007, after a meeting between the applicant and a director of the respondent, Jackson, on 6 December. The applicant's version of the meeting is, in essence, that Jackson required his immediate resignation, in return for which he made an offer to pay him of R80 000; R60 000 payable immediately and R20 000 a month later. The applicant asked Jackson to put the offer in writing on a letterhead, which Jackson declined to do. Jackson then told the applicant and that he should take the rest of the day off, removed the applicant's laptop and told him to go home.

[3] It is not disputed that on 7 December 2007, the applicant sent the respondent the following e-mail at 8:38 am

Hi Norman

Resignation

Please note that I would be in the office between 1200 and 1300 to hand in my resignation, as per your request in our meeting yesterday morning.

I will also be collecting my personal belongings and handling my expense claims, as well as making a copy of the personal files on my laptop.

Have a good working with reviews and see you later.

kind regards.

Riccardo Fachin

[4] It is also not disputed that after receipt of the email, Jackson, paid R60 000 into the applicant's bank account. Later the same day, the applicant submitted his letter of resignation, which reads *inter alia* as follows:

Dear Sir

Re: Letter of Resignation

1. *I refer to our conversation on the 6 December 2007 where you called me in and stated that you required by resignation with the immediate effect.. You indicated that you do not have any reason for requesting the termination of my services other than stating that the "relationship is not working". You stated further that if I tendered my resignation with immediate effect you would pay me R80 000 to resign because this was "the money that you would have to spend on legal*

services". If I were to refer the matter to the CCMA as an unfair labour practice and you stated that you would "rather give me the money" ...

5. I have taken the precaution of obtaining legal advice on the position regarding your conduct towards me and have been advised that you had committed an unfair labour practice in terminating my services with the company salary and with immediate effect. My resignation is the full tendered herewith as requested by yourself under protest due to extreme duress that you have placed on me to do so.

6. I have also taken cognizance of the fact that you have transferred the amount of R60 000 to my account this morning prior to my tendering my letter of resignation which monies I shall retain as partial settlement in lieu of compensation equivalent to 12 months remuneration which I am entitled to under the circumstances, in law, due to your unlawful conduct.

7. Simultaneously with my letter of resignation I am also serving on you details of the dispute concerning the unilateral termination of my services, to the CCMA(LRA form 7.11) in terms of which you will see that I seek compensation equivalent to 12 months of remuneration (i.e. the sum of R420 000.)

[5] Jackson's version of the meeting was that after a review of the performance of all employees and after some unhappiness on the part of the first respondent's management with the applicant's work performance, the applicant was called to a meeting with Jackson. Jackson had a mandate to try and reach an agreement with the applicant on the terms on which his employment might terminate - the first respondent was willing to negotiate a settlement in terms of which the applicant would agree voluntarily to submit his resignation, in return for payment of an agreed sum. After some negotiation, Jackson and the applicant agreed on a figure of R80 000, payable on the basis that R60 000 would be immediately payable, and the balance in a month. It was further agreed that the agreement would be confidential, and that the first respondent would give the applicant a good reference, and that the agreement was in full and final settlement. According to Jackson, the applicant had raised a question concerning the timing of the payment, as he was concerned that if he resigned prior to receiving any payment, he would not be paid. Jackson and the applicant then agreed that if the applicant decided to confirm his acceptance of the offer, he would be paid the R60 000 on confirmation, and that he would thereafter submit a formal letter of resignation. Finally, it was agreed that no decision would be taken that day and that the applicant could take the rest of the day off to discuss the situation with his family. Jackson stated that there was no animosity between them during the meeting, no harsh words were exchanged, no threats were made and the applicant's resignation was never demanded. The next morning, Jackson received the e-mail

referred to above, in which the applicant stated that he would be in later that day to hand his resignation. Based on what he considered, following the terms of the discussion the previous day, to be a acceptance of the offer made to the applicant and confirmation of the applicant's resignation, Jackson paid R60 000 into the applicants bank account and paid his outstanding expense claims. He was surprised subsequently to receive the applicant's letter of resignation cast in the terms that it was, and to learn of the referral of a dispute to the CCMA

The commissioner's award

[6] In her award, the commissioner reviewed the evidence and concluded as follows:

14. The balance of probabilities clearly indicate that the version of the respondent is more probable than that of the applicant, in that and offer was negotiated and a figure of R80,000 was agreed upon. It was on that basis that the applicant received R60,000 the next morning into his account. The applicant has simply come to the CCMA after the hope and prospect of increasing that figure. How is that the R60 000 was accepted and then subsequent thereto, the referral to the CCMA is served with the letter of resignation. This is clearly indicative of the Applicant's mala fides.

15. The applicant made the following concession during cross-examination when asked about the reasons he had the rest of the day off:

(to) think about the offer he gave me.

16. No mention of 'request' or invalid, demand' was made.

Findings

1, The applicant has not discharged the onus in proving a constructive dismissal.

Grounds for review

[7] The grounds for review are not articulated with any degree of precision. The applicant contends *inter alia* that the commissioner had to determine whether or not the first respondent had compelled the applicant's resignation under duress, and if so, whether or not on the facts and evidence before her, the applicant had been unfairly dismissed. Alternatively, the applicant contends that the commissioner was required to decide whether they had been a meeting of the minds between him and Jackson, resulting in a binding agreement of settlement been concluded based on

the terms proposed by Jackson and whether the applicant had accepted the offer on those terms and if so, whether the offer and acceptance of it would obviate the necessity to determine whether or not an unfair labour practice had been perpetrated by the acts of the respondent against the applicant. In particular, the applicant claims that in the proceedings before the commissioner, the first respondent's conduct was implicitly challenged with regard to substantive and procedural fairness. In his heads of argument, the applicant's representative contends that the real dispute between the parties was an unfair dismissal, which was effectively clothed as a resignation, that the commissioner's finding in regard to the offer and acceptance is "patently wrong".

[8] The applicant's approach to these proceedings is misconceived. First, it overlooks the essence of the commissioner's ruling, and secondly, it ignores the proper approach to an application for review. What the commissioner found was that the applicant had failed to prove the existence of dismissal. It should be recalled that the dispute referred to the CCMA by the applicant was an unfair dismissal dispute. The applicant had never claimed that he was the victim of an unfair labour practice, nor was an unfair labour practice dispute referred to the CCMA. What was before the commissioner, as both parties to these proceedings acknowledge, was a dispute of fact in relation to the events of 6 December 2007. In effect, Jackson testified that he made an offer to the applicant terms of which the applicant would be paid a sum of money in return for the applicant tendering his resignation. The applicant's case, short of unnecessary detail, was that he had been forced to resign. In other words, the commissioner had to decide whether, as a matter of fact, the applicant's employment had been terminated by mutual agreement (in which case, there was no "dismissal" the purposes of section 186) or whether the applicant had resigned in circumstances in which the first respondent had made his continued employment intolerable. The commissioner was not required to determine the substantive and procedural fairness of what the applicant claimed to be a dismissal – it is only once the existence of dismissal has been established that the onus shifts to the employer party to establish that a dismissal was substantively and procedurally fair. The commissioner, as she was required to do, decided which of the versions before her was the more probable. She found that the fact of the payment of R60,000 to the applicant supported the probabilities that the parties had negotiated and concluded an agreement. She considered too the fact that the applicant in its cross-examination had used the word "offer" in the context of a discussion on the time-off afforded to

the applicant to consider Jackson's proposal. Finally, she took into account that the e-mail sent to Jackson by the applicant on the morning of 7 December 2007 made no reference to any demand that he resign. The commissioner also alludes to the fact that the applicant, despite denying the existence of an agreement relating to the termination of his employment, failed to return the R60 000 paid to him on 7 December. Had the applicant genuinely believed that there was no agreement, he would have tendered return of the money.

[9] This court is entitled to interfere with the commissioner's decision if and only if the decision is one to which no reasonable decision-maker could come (see *Sidumo & another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)). In my view, the applicant has failed to establish that the decision under review falls outside of the band of decisions to which reasonable people could come on the evidence before the commissioner. In effect, the applicant seeks to overturn the arbitration award on the merits, and in particular, seeks the correction of what he contends to be substantive errors of fact on the part of the commissioner. In doing so, the applicant fails to distinguish between an appeal and review. This court is not concerned with the correctness of the commissioner's decision; what is in issue is whether it is a reasonable decision. The applicant has failed to establish that the commissioner's finding is not unsupported by the evidence, that it is based on speculation entirely disconnected from the evidence, supported by evidence that is insufficiently reasonable to justify the decision, or made in ignorance of evidence that was not contradicted (see A Myburgh '*Sidumo v Rusplats*: How the Courts deal with it' (2009) 30 ILJ 1).

[10] In short, I am not persuaded that the commissioner's ruling that the applicant had failed to establish the existence of a dismissal is a decision that is so unreasonable that on the applicable test, it stands to be reviewed and set aside. The application must accordingly fail. There is no reason why an order for costs should not follow the result.

I accordingly make the following order:

The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application 24 February 2011

Date of judgment 28 February 2011

Appearances

For the applicant: Adv O Lagrange instructed by Biccari, Bollo & Mariano Inc.

For the respondent: Adv H Gerber, instructed by Mills & Groenewald Attorneys