

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

Case No: JR 831/08

Not reportable

In the matter between:

PLASTIC SIGN MANUFACTURING (PTY) LTD

Applicant

And

COMMISSIONER MPHO PHETLA N.O

First Respondent

**CENTRE FOR DISPUTE RESOLUTION:
A DIVISION OF THE METAL AND
ENGINEERING INDUSTRIES BARGAINING
COUNCIL
MARY STARK**

Second Respondent
Third Respondent

JUDGMENT

Bhoola J

Introduction

[1] This is an application to review and set aside an award of the first respondent (the arbitrator) issued under the auspices of the second respondent dated 23 April 2008, in which the third respondent (the employee) was found to have been constructively dismissed and awarded compensation equivalent to ten months' remuneration, namely R79 300.00.

Factual background

[2] The facts are largely common cause and relate to events following an altercation at the workplace between the employee and Kathleen Poultney, the Financial Manager of the applicant who was the employee's supervisor and who is also her sister.

[3] The altercation took place on 30 November 2007 when Poultney returned from leave and the employee had commenced working mornings only. The arbitrator described the evidence of the employee in this regard as follows:

4.4...The only instruction she had received from Poultney (sic) related to the doing of VAT work. She stated that during the ensuing argument with Poultney they had both screamed at each other. When Wilson intervened, she took the view that she knows that it cannot go on like this between her and Poultney. When it was put to her that she had said she is fed up, in answer she said that "wouldn't you if somebody sat next to you and screamed". She further said that she had then taken her bag and left. She further stated that she phoned her husband to tell him that she (sic) had been told to leave and had just lost her job. She further stated that on that moment the word (sic) "you are fired" was never used and further that she was so upset and had never told the employer that she does not agree with him. During the ensuing argument she was frustrated and the employer knew that she wanted to go.

Grounds of review

[4] The arbitrator committed gross irregularities in that he misconstrued the nature of the dispute referred by the employee as well as the evidence. In amplification of this submission the applicant submitted the following:

- (a) The 7.11 referral form describes the dispute as an "unfair dismissal". The employee did not tick the block to select "constructive" as the reason for her dismissal and instead selected "unknown".
- (b) In the form 7.13 request the employee stated that she was "told to leave 14/11/2007 because of personal disagreement with financial manager".

[5] Based on the aforesaid, the applicant submitted that there could have been no doubt in the arbitrator's mind that the employee was alleging an unfair dismissal and had not been constructively dismissed. Even if this were opened to

some doubt however, the applicant submitted, the evidence of the employee herself established as much during the arbitration. Her testimony was replete with references to the effect that she did not resign. She stated: “No I did not resign”; “It cannot be a constructive dismissal, I was not fired”; “...would you not be fed up if somebody told you, you have just been fired..”; “I have just been told to leave, I have just lost my job”; and “I mean I was fired, so I was told to leave anyway”. Under cross-examination she responded to a question about whether she was sure that she was not fed up and decided to leave with the reply that she was “100% sure”. In her closing argument she unequivocally stated “I did not resign my job, that is a lie” and that “I was fired”.

[6] Thus it could not have been opened to any doubt that her dispute related to an unfair dismissal not a constructive dismissal. This is further confirmed by the evidence of the three witnesses who testified on the applicant’s behalf. Therefore, the only issue before the arbitrator was the dispute of fact concerning the dismissal or resignation of the employee. In his conclusion however, the arbitrator stated: “This scenario resembles the so-called constructive dismissal cases where the employer’s conduct makes continued employment intolerable for a worker with the result that a worker terminates employment involuntarily”. The applicant submits that there was no evidence to substantiate such a finding and accordingly no *nexus* exists between the evidence and the conclusion reached by the arbitrator. This finding is even more incongruous given the correct definition by the arbitrator of the issue to be determined as “whether the employee was dismissed and, if so, whether such was procedurally and substantively unfair?”

Analysis and evaluation

[7] In evaluating the grounds of review, it would appear from the evidence that none of the prerequisites for a constructive dismissal are established or even emerged during the arbitration. In fact the first leg of the test for constructive dismissal as established in *Pretoria Society for the Care of the*

***Retarded v Loots* (1997) 18 ILJ 981 (LAC) (at page 983), i.e. that the employee must have resigned, has not been met. The court in *Loots* (supra) referred to *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC) at 638A–639B when Myburgh J set out the principles applicable to determining whether a constructive dismissal had occurred as follows :**

“...the applicant resigned, but avers that he was constructively dismissed, the first factual enquiry is whether, in resigning, the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. Similarly, where the resignation forms part of an agreement between the applicant and his former employer to terminate their relationship, once the agreement is proved (by the employer) or admitted, the enquiry is at an end, unless the applicant contends and proves that that agreement is not binding. If the applicant is unable to discharge the onus on a balance of probabilities, the Industrial Court has no jurisdiction to determine the dispute concerning the alleged unfair labour practice.

If the applicant does discharge the onus, the next enquiry, in a case in which the applicant contends that he was constructively dismissed, is whether the employer did constructively dismiss him.

The onus is on the employee to establish that there was a constructive dismissal: *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) at 775D–776I; Grogan *Riekert’s Basic Employment Law* (2 ed) at 69; PAK le Roux & André van Niekerk *The SA Law of Unfair Dismissal* at 84.”

[8] In my view, the approach taken by the arbitrator reflects a manifest failure to apply his mind to the legal test for constructive dismissal as well as to the evidence led, and would render his award unreasonable under the test pronounced in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC). However, the applicant advances various additional grounds of review, including the failure to provide reasons for the relief awarded and the failure by the arbitrator to apply his mind to the fact that the employee had not discharged the onus of proving the fact of her dismissal. In regard to the latter submission the following is apposite:

(a) The employee conceded in cross-examination that “the word

fired was not used”;

(b) The employee did not dispute the evidence of Roy Wilson that the applicant did not dismiss her;

(c) The cumulative evidence of Poultney, Wilson, Joyce and Russell, who corroborated each other’s versions was that the employee said that she was taking her bags and leaving;

The evidence of Russell is uncontested as the employee elected not to cross-examine her;

The arbitrator made no credibility findings against any of the applicant’s witnesses.

[9] Mr Jackson submitted, for the employee, that had the arbitrator applied his mind to the above evidence he would have determined that the fact of the dismissal was not proven. In rejecting Wilson’s evidence that the employee had resigned he concludes:”[T]his cannot be the case for it is trite law that the termination of the employment during a ‘heated argument’ cannot be considered as legally binding”. There is no foundation in law for this illogical conclusion.

[10] It was submitted in opposition that the arbitrator was required to determine whether there had been a dismissal in the conventional sense and it is clear that he understood this task. However, a number of common cause facts emerged from which the conclusion was inescapable that there had been a constructive dismissal. These include that :

- (a) the employee left her employment;
- (b) she was extremely upset because of a work-related altercation with her superior who is also her sister.

[11] Mr Campanella submitted on the employee’s behalf that her evidence therefore, on the basis of which the arbitrator justifiably reached his conclusion that she had been constructively dismissed, was that she understood that she was not welcome. The arbitrator was required to deal with the dispute fairly and expeditiously and he did so by finding on the evidence that the employee was intolerably treated and that any person in those circumstances would have left. Once the legal niceties are excluded, it is clear that the employee left and whether her belief that she was dismissed can be objectively justified is not the test. It is sufficient that her termination was at the instance of the employer and that constitutes a dismissal.

Thus although the award can be criticised, there is on the whole clearly an application by the arbitrator of his mind to the issues and evidence and an objective assessment of the evidence.

[12] In essence this amounts to a submission that because the employee left she can reasonably be considered to have resigned. This is however not a conclusion that can justifiably be reached by a decision-maker applying his mind to the evidence before him. In fact, the employee conceded that the conflict emanated from a personal family dispute and this is what the arbitrator should have found. The evidence establishes that there were personal dynamics that led to the incident in question and the sense of grievance felt by the employee, hence her conduct. There was moreover no evidence to show that the employer had created an intolerable situation, another requirement of the legal test for constructive dismissal. On the contrary, the evidence was that Wilson had moved his wife to reduce the conflict at work. To justify the conclusion of constructive dismissal the evidence had to show that she had resigned as a result of an intolerable situation created by the employer and this was clearly not established. Given that the full circumstances of the dispute appear from the record, Mr Jackson argues for granting of the review as well as substitution with an appropriate order to the effect that the referral is dismissed. I agree with Mr Campanella that it is not in the interests of the expeditious resolution of dispute to remit the matter for reconsideration by another arbitrator.

[13] Also, given my view on the veracity of the primary ground for review, I do not consider it necessary to deal with the further grounds of review based on procedural irregularities, except to state that they reflect a manifest lack of understanding of the process of eliciting evidence for the purposes of the arbitration and could not have been endorsed by a reasonable decision-maker as promoting the resolution of the dispute.

[14] In the premises, I make the following order:

The award is reviewed and set aside, and is substituted with an order that the referral is dismissed. The third respondent is to pay the applicant's costs.

Bhoola J

Date of Hearing : 20 April 2011

Date of Judgment : 5 May 2011

Appearances

For the Applicant: Adv BM Jackson instructed by Jurgens Bekker Attorney

For the Third Respondent: Adv J Campanella instructed by L. Cirone Attorney At Law