



REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT**

CASE NO: JR2354/2010

In the matter between:

MARC HAROLD HICKMAN

Applicant

and

**MAPATO TSATSIMPE N.O.(in her capacity as
COMMISSIONER CCMA JOHANNESBURG)**

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

OBAN CONSULTING (PTY) LTD

Third Respondent

Heard: 13 October 2011

Delivered: 20 October 2011

JUDGMENT

MALINDI, AJ

1. The Applicant has brought an application for review seeking an order:

- '1. Setting aside the First Respondent's ruling dated 16 July 2010.
 2. Replacing the First Respondent's ruling dated 16 July 2010 with the following:
 - 2.1 The Third Respondent on or about January 2008 constructively dismissed Marc Harold Hickman (the Applicant).
 - 2.2 The Third Respondent is ordered to pay compensation of R774 000,00 to the Applicant.
 3. In the alternative to paragraph 2 supra, replacing the First Respondent's ruling dated 16 July 2010 with an order, which the Court deems appropriate, given the evidence led before the First Respondent.
 4. In the alternative to paragraphs 2 and 3 supra that the dispute between the Applicant and the Third Respondent be heard de novo by a commissioner of the Second Respondent other than the First Respondent.
 5. Costs of the application to be paid by the Third Respondent.
 6. Further and/or alternative relief.¹
2. In her award dated 16 July 2010, the Commissioner made the following award:
- '6. AWARD
- 6.1 In the light of my analysis above I have determined that the Applicant has not demonstrated that he was constructively dismissed.
 - 6.2 The Applicant's case is dismissed with costs on party and party scale.'
3. The grounds of review as set out in the founding affidavit² are that:
- "10. The First Respondent's ruling dated 16 July 2010 (Annexure "A" hereto) is reviewable in that:
- 10.1 she failed to apply her mind to all the evidence presented to her;
 - 10.2 she failed to apply her mind to the written submissions submitted on the Applicant's behalf and the authorities referred to therein;
 - 10.3 she ignored the minutes of the strategy meeting dated 25 January 2008, a copy of which is annexed hereto marked "B";
 - 10.4 she failed to:
 - 10.4.1 attempt to locate the bundle of heads filed with the Second Respondent; and
 - 10.4.2 advise the Applicant's representatives that (despite the undertaking given by them) she did not receive the

1 Notice of motion, pages 1-2.

2 page 11, paragraph 10 to page 12, paragraph 10.6.

Applicant's heads of argument and heads of argument
in reply;

10.5her decision was arbitrary and irrational; and

10.6she failed to objectively apply her mind to the facts, evidence and legal
submissions.”

4. Section 145(2) (a)(ii) of the Labour Relations Act 66 of 1995 (“the LRA”) provides for the review of arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration (“the commission/Second Respondent”) on the grounds that a commissioner “committed a gross irregularity in the conduct of the arbitration proceedings”.

5. The grounds of review as set out above can easily be compacted into the ground that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings.

6. However, the standard of review as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ which poses the question: ‘*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*’ is not applicable in the context of an enquiry into whether constructive dismissal happened or not.

7. In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*⁴ Tlaletsi AJA stated the enquiry as follows:

‘[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 s 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 (Edms) Bpk v Jacobs NO and others* (1994) 15 ILJ 801 (LAC) at 804 C-D, the old Labour Appeal Court considered the position in relation to the

3 2008 (2) SA 24 (CC) at paras 39-41.
4 (2008) 29 ILJ 2218 (LAC)

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 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. 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 at 804C-D:

'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 fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.'

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.'

6. The SARPA matter had been dealt with as a constructive dismissal case under Section 186(1)(b) of the LRA⁵.
7. The *Sidumo* standard would apply if dismissal had been established and the enquiry into the fairness of such dismissal was entered into. Steenkamp J in *Asara Wine Estate & Hotel (Pty) Limited v JC van Rooyen & Others*⁶ had regard to the SARPA case and stated the following:

'[20] In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration – or on review by the Labour Court – is whether the dismissal was

5 at paragraph [2].

6 Case No. C272/2010: delivered on 24 August 2011 at paras 20-23.

fair; and whether the finding of the arbitrator in this regard was reasonable.

[21] In the case of an alleged constructive dismissal in terms of section 186(1)(e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the CCMA did not have jurisdiction in the first place, even though the Commissioner can only make that finding *ex post facto*.

[22] Anomalous as this may seem, I am bound by the authority in *SA Rugby*. This court also applied *SA Rugby* in *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & Others*. In that case, dealing with a constructive dismissal, Basson J explicitly held that the question of whether a dismissal had taken place goes to jurisdiction and that the review test as laid down in *Sidumo* does not find application in reviewing a jurisdictional ruling.

[23] The test I have to apply, therefore, is not whether the conclusion reached by the Commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the Commissioner correctly found that Van Rooyen had been dismissed.'

8. I proceed therefore to enquire whether the commissioner correctly found that the Applicant had not been constructively dismissed.

9. The brief background facts leading to this case as set out by the commissioner and as appears in the record of proceedings are that:

9.1 The Applicant was a 24,5% shareholder in the Third Respondent, a director of the company and employed as sales director.

9.2 The Applicant had had a long business relationship with one of the shareholders and director, David Rocke ("Rocke"), in companies that conducted the same type of business as the Third Respondent. The Applicant regarded Rocke as his mentor and friend. It was he that the Applicant spoke to whenever there were things that concerned or troubled him in

the management and business affairs of the Third Respondent.

9.3 Between August and December 2007 there were a number of issues that caused the Applicant unhappiness within the company. These essentially related to his view that there were financial irregularities that were taking place in the company and that the company was guilty of failure to comply with certain regulatory requirements and illegal conduct. The Applicant had called for a strategy meeting to be held on 25 January 2008 where he hoped his concerns and unhappiness would be addressed and resolved.

9.4 The strategy meeting for 25 January 2008 was convened. Stepping out of the prepared agenda the other three directors, led by Rocke, commenced the meeting by placing on the agenda their unhappiness with the Applicant as a shareholder and director and his performance within the company. The events that took place at the meeting of 25 January 2008 led to the Applicant eventually tendering his resignation from the company on 1 February 2008. The Applicant alleges that he was constructively dismissed.

10. The commissioner states that:

‘5.3 It is common cause that the Applicant had raised a lot of issues under his evidence in chief and conceded during cross-examinations that most of these other than warranties; the installation of fibre optic line and the meeting that took place on 25 January 2008 were not the issues that led to him resigning and consequently claiming constructive dismissal. I would therefore not waste time on those issues. The focus would be on the issues that the Applicant said led to him resigning and consequently claiming constructive dismissal.’⁷

11. An examination of the record reveals that the commissioner is correct in isolating these three issues as relevant for examining whether the Applicant was constructively dismissed. The question is whether the Third Respondent made continued employment intolerable for the Applicant by its conduct

⁷ Award, page 55, paragraph 5.3; see also page 53, paragraph 4.1.11.

when:

- 11.1 It failed to regularise or to comply with the legal requirements when it installed a certain fibre optic line in order to carry voice traffic for clients and needed to secure connectivity to various other companies in the form of Telkom lines to provide a bandwidth to be able to do this, which the Applicant alleges was illegally installed and the situation existed from August/September 2007.
 - 11.2 It failed to resolve problems of outsourced contracts under Gregory Wilson's ("Wilson") management and that warranties on equipment sold by the Third Respondent had not been secured by back to back agreements with Three Dot Com.
 - 11.3 It recorded in the strategy meeting minutes of 25 January 2008 that the Applicant no longer has a role in the company as a director and shareholder and that he has not been performing his role in this regard, and that the other directors do not believe that he would ever fulfil a meaningful role in the company.
12. The narrowing of issues was agreed between the parties and put on record after the Applicant's legal representative had consulted with the Applicant. The following was placed on record:
- 'Mr Du Randt: Thank you, Madam Commissioner, thanks for the time. We came to an agreement, I was going to be [inaudible] by my learned friend, is that and if I can summarise this correctly, is that the commissioner will for purposes of this case, only have to consider all issues raised regarding the fibre optic line and the warranty issue. Therefore all evidence submitted in regard to the rest of the issues prior to now the 25th, all those incidents were referred to, can be disregarded.'⁸
13. Before considering the facts surrounding the issues as set out above, it is convenient to briefly set out the law on the question of constructive dismissal.

⁸ Record, page 1763, lines 10-17.

14. Section 186(1)(e) of the LRA provides that when ‘an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee’, such employee must be considered to have been dismissed by the employer. The requirement that the prospect of continued employment be “intolerable” suggests that this form of dismissal should be confined to situations in which the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign in order to protect his or her interests.⁹
15. The requirements for constructive dismissal to be established have been set out in *Solid Doors (Pty) Limited v Commissioner Theron and Others*¹⁰ as follows:
- [28] 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.’
16. Grogan¹¹ states further that:
- ‘In making out a case of constructive dismissal, employees who have resigned must generally show that they were subject to coercion, duress or undue influence. Mere unhappiness at work is not enough.’
17. As Grogan says, it is not possible to draw up a closed list of examples of employer conduct that render the situation intolerable for employees.¹² The Court’s function is to look at the employer’s conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.¹³
18. Regarding the issue of the illegal installation of the fibre optic lines, the

9 John Grogan *Workplace Law*, 9th ed, (2007) Juta , at 115.

10 (2004) 25 ILJ 2337 (LAC) at paragraph [28].

11 *Workplace Law* at 116.

12 *Workplace law* at 115.

13 *Marsland v New Way Motor and Diesel Engineering* (2009) 30 ILJ 169 (LC) at 188 G.

Applicant alleges that this was an example of how, since Wilson joined the company, unethical and unprofessional conduct entrenched itself. The Applicant testified that he made other partners aware that the fibre optic lines were installed illegally and that nobody took him seriously or heeded his warnings.

19. Wilson had suggested to the other directors that he could put up a fibre optic line illegally to provide the connectivity required at no charge to the company. The Applicant had raised his concerns and objections when the suggestion was made between June and August 2007 but Wilson went ahead to hire the installation equipment and proceeded with the installation of the fibre optic lines during August/September 2007.
20. The Applicant has contended that the commissioner ought to have taken into account that he had been compelled to work under circumstances where an illegal act was being committed by the employer. Whilst in general, South African law does not condone illegality and that the courts will not enforce the terms or obligations which flow from an illegal contract, the rule may be relaxed to prevent injustice.¹⁴ The rule will not strictly apply in this particular case because the Applicant is not being coerced to enforce any illegal activity. He is the one alleging that the employer is involved in an illegal activity which he cannot condone and finds intolerable.
21. Regarding the issue of warranties, it had been a matter of concern to the Applicant from about March 2007 when they embarked on a campaign to clear what the Applicant called a minefield of financial irregularities. He was given an assurance by both Rocke and Wilson that the warranties had been put in place by the end of November 2007 only to be contacted by Three Dot Com later in January 2008 saying that the Third Respondent had still to secure these warranties.
22. The relationship between the Applicant and Rocke had deteriorated over the past year because Rocke had failed to reign in Wilson. The Applicant had been 'so dissatisfied with things' that he asked for the strategy meeting of 25

14 "*Kylie*" v CCMA and Others (2010) 31 ILJ 1500 (LAC).

January 2008.

23. The examination of the minutes of the strategy meeting reflect that after the Applicant had left the meeting, the meeting proceeded to discuss company related issues such as the need to start a black economic empowerment (BEE) arm, the loss of the IBM contract, finances of the company, operations of the company, the budget for 2008, and an analysis of the company's strengths, weaknesses, opportunities and threats (SWOT).

24. The following was recorded regarding the Applicant:

'It was brought up by DR (David Rocke) that MH (Marc Hickman) no longer has a role in the company as a director and shareholder as he has not been performing his role in this regard and there is disbelief between all the shareholders that he would ever fulfil a meaningful role. MH stated that he disagreed with us however he realised that he was outvoted and said that with the sentiment around the table he would rather not be a director and a shareholder and that we should make him an offer for his shares.

Marc excused himself from the meeting and it was agreed that he would meet again on Saturday morning 08:00 to discuss offers.'

25. After the Applicant had left the meeting, his situation was discussed further and the following is recorded:

'The question was asked if Marc exits should we request a hand-over period or should he leave immediately. It was unanimously agreed that it would be better if he leaved immediately. (Emphasis added)

A list of customers that MH had involvement in was made and a plan for each customer put in place on MH exit from the company.

...

MARC'S BUY OUT

Should sufficient documentation be in existence and made available from Marc an offer to be made of Marc of R500 000 non negotiable made up of R106 000 loan account and R394 000.

Should this information not be sufficient an offer to clear Marc's loan account is to be made.'

26. Various handwritten annotations are made on the face of the minutes. One that is relevant is in relation to the paragraph about the Applicant's buy-out. It reads 'In discussion – MH would like to stay'. The Applicant testified that this annotation was brought about after he had had a meeting with Rocke on

Saturday, 26 January 2008.

27. At the meeting of 26 January 2008, the Applicant met Rocke who presented him with two notices to attend a board meeting of the Third Respondent and Oban Services on 8 February 2008, the purpose of which was:
'(1) (To) decide on whether to proceed with disciplinary action against Marc Hickman for gross misconduct;
(2) To determine whether Marc Hickman should be suspended from work on full pay, without loss of benefits, pending the outcome of the disciplinary enquiry;
(3) To agree on whether Marc Hickman should be removed as a director from Oban Consulting (Pty) Ltd/Oban Services (Pty) Limited.'
28. The two notices are identical save for the fact that the one refers to the Third Respondent and the other to its subsidiary.
29. On Monday, 28 January 2008, the Applicant went to work as usual and requested a meeting with Rocke. He tabled an offer to him that the remaining directors purchase his shares at a fair price and that he would like to continue working for the Third Respondent, albeit in a different role such as in a commission only basis. The mechanics of the commission basis arrangement would be that he would split the profit 'on those potential clients and the potential business, for some of them were existing business, but there was new business within those clients on a 50/50 basis with the Third Respondent'.
30. At the meeting of 28 January 2008 with Rocke, the Applicant asked Rocke about the envisaged disciplinary hearing and he told Rocke that in his view the disciplinary hearing was a rouse. Rocke had responded 'Marc, you have been there before, it is just simply a process and you know, it must just take its course.'
31. While he was discussing with Rocke on 28 January 2008, the Applicant noticed a copy of the minutes of the meeting of 25 January 2008. He returned to Rocke's office about an hour later in his absence and made

himself a copy of the minutes.

32. The Applicant continued doing his work until Wednesday, 30 January 2008, when he confronted Rocke in his office where he asked him whether they have had any discussions regarding his offer. He also suggested to Rocke that it would be the right thing to do to cancel or withdraw the disciplinary hearing while they were involved in negotiations. Rocke's response had been 'Marc, it is simply a process, do not concern yourself with it and no, will not withdraw'.

33. On the same day, Wednesday, 30 January 2008, the Applicant approached his attorney for legal advice. He told his attorney that on the reading of the minutes it is clear that his dismissal is a *fait accompli* and therefore that fighting the disciplinary action would be a futile exercise. In his view, it was clear from the minutes that the other three directors wanted an immediate break and were not interested even in a hand-over period or continuing employment in any capacity. His attorney advised him that he has a case for constructive dismissal. He decided to resign. The resignation occurred on 1 February 2008 before the Board meeting scheduled for 8 February 2008. The letter reads as follows:

'1. In light of recent events, of which you are aware, and which events will be more fully set out at the appropriate time and in the appropriate forum, my continued employment with Oban Services (Pty) Limited and Oban Consulting (Pty) Limited has been rendered intolerable.

2. Furthermore, certain irregularities, which I do not wish to be a party to and cannot condone, have occurred in regard to the business practises of Oban Services (Pty) Limited and Oban Consulting (Pty) Limited. I will expand upon these irregularities at the appropriate time and in the appropriate forum.

3. In the circumstances, I have been left with no choice but to resign as an employee and as a director of Oban Services (Pty) Limited and Oban Consulting (Pty) Limited with immediate effect, which I hereby do.

4. Kindly forward to me the necessary documentation for me to sign in order to formally resign as a director of Oban Services (Pty) Limited and Oban Consulting (Pty) Limited.

5. All my rights are reserved, including my right to refer a dispute to the CCMA in respect of constructive dismissal.'

34. After setting out the Applicant's and Respondent's evidence, the commissioner correctly set out the requirements for constructive dismissal and relied on the case of *Smithkline Beecham (Pty) Ltd v CCMA and Others*¹⁵ that an employee who claims to have been constructively dismissed should prove that the employer's conduct was so intolerable/unbearable to a point where he/she had no choice but to resign. The *Smithkline* dictum has to be qualified by the dictum in *Jordaan v CCMA*¹⁶ where Davis JA says that the continuing work relationship needs to have become 'so intolerable that no reasonable option, save for termination is available.'
35. The commissioner concluded that the Applicant had failed to discharge the onus on him to prove that he resigned because of the intolerable conduct by the Respondent. She concluded that the Applicant was unhappy as a shareholder and he decided to leave and be paid his shares.¹⁷
36. The commissioner also rejected the Applicant's contention that the issues relating to the fibre optic lines and outstanding warranties on equipment sold to clients constitute conduct that rendered continuing employment intolerable and that the Applicant had not lodged any formal grievance or complaint regarding these matters. She found that the Applicant resigned because he was not happy as a shareholder about how the business was run. In her view, the fact that the Applicant had suggested that his shares be purchased and that he be allowed to work as an employee, albeit on a commission basis, shows that the Applicant did not find it intolerable to work for the Third Respondent.¹⁸
37. The commissioner also came to the conclusion that since she had found that the Applicant had failed to discharge the onus that he was constructively dismissed there would be no point therefore in her assessing whether his dismissal was fair because this enquiry is only permissible if it is held that constructive dismissal has been established.

15 (2000) 9 ILJ (LC).

16 [2010] 12 BLLR 1235 (LAC) 1239 B-E.

17 Award, page 56, paragraph 5.4.1.

18 Record, page 56, paragraphs 5.4.2 and 5.4.3.

38. I cannot come to the conclusion that the decision reached by the commissioner is wrong. The commissioner is correct about the issues that she had to decide and demonstrated a full appreciation of the whole conspectus of the evidence before her. Based on the evidence as a whole as set out in her award, she correctly reached the decisions that she came to. I will elaborate and add to her reasoning below.
39. It requires emphasising that the Applicant accepted that he would be 'exited' as a shareholder and director and that negotiations would start on how he could be retained as an employee in the same or other position including on a commission basis. He therefore did not find it intolerable working for the Third Respondent even at the time that he was told that he no longer has a role in the company as a director and shareholder. He also did not find the situation as it existed on 25 January 2008 likely to endure for a period that justified termination of the relationship. He in fact testified that the fibre optic line and warranties issues were not the cause for his resignation and that he would not have resigned if he had not seen the minutes of the strategy meeting of 25 January 2008 on 28 January 2008.
40. If the illegal fibre optic line and warranties issues were not the cause for the Applicant's resignation then his resignation has to be considered as from 25 to 30 January 2008. The only thing that happened in this period that would have prompted the Applicant's resignation is what happened at the strategy meeting, receipt of the special board meeting notices, Rocke's refusal to cancel or withdraw the notice for a special board meeting where potential disciplinary action was to be discussed and the Third Respondent's 'delay' to make the Applicant an acceptable offer when he confronted Rocke on Wednesday, 30 January 2008.
41. It is clear from the above that the Applicant was advised by his attorney to resign in order to avert the risk of a dismissal if the disciplinary action was proceeded with. His voluntary conduct was to resign. It was not the employer's conduct that coerced the resignation.
42. The same result will apply even if this period were taken together with the

other two issues. Neither, on their own or taken together, created an intolerable environment for the Applicant.

43. What is more probable is that the Applicant resigned in order to avoid the disciplinary action for gross misconduct which Rocke had indicated will not be withdrawn when the Applicant met him on Wednesday, 30 January 2008.
44. Furthermore, the Applicant's contention that his dismissal was a *fait accompli* is not as clear cut as he suggests. Although the minutes of 25 January 2008 state that the three other directors do not believe that the Applicant 'would ever fulfil a meaningful role' in the Third Respondent, the directors asked themselves whether **if** [emphasis added] the Applicant exited the Third Respondent as a shareholder and director he should serve a hand-over period or whether he should leave immediately. This is not a conclusive statement that there was rigidity about when he could leave and that it would all be dependant on whether he does exit or not. However, it was the directors' view that if he exited as a shareholder/director and employee 'it would be better if he leaved (sic) immediately'. The Applicant could, and should, have fought these allegations at the Board meeting or at the disciplinary hearing if it ever materialised.
45. The arrangements that were made regarding how to manage the Applicant's customers were based on the contingency plan in the event that he would have left immediately or even if he left after serving notice but before another director sales or person in a similar position was employed.
46. It was also decided at the strategy meeting to convene a special board meeting to consider and decide on the issues set out in the notices. In other words, the drawing of the notices for the Board meeting on 8 February 2008 was not an after-thought. It had been decided at the meeting of 25 January 2008.
47. It is clear from these notices that it was still open to the Applicant to challenge the other directors' view of 25 January 2008 that he no longer had a role as shareholder/director in the Third Respondent. It is also clear that

had the directors concluded that there were grounds to institute disciplinary action, it would have had to be decided whether he should be suspended or not pending the hearing. Furthermore, whether the Applicant should be dismissed for a dismissible offence or not would have been the decision of the enquiry, not that of the Board.

48. The Applicant decided to resign in order not to subject himself to this process. The probabilities are that he chose the constructive dismissal route over the risk of being dismissed for poor performance. An employee who resigns rather than face a disciplinary enquiry will not generally be held to have been constructively dismissed.¹⁹

49. Steenkamp J in *Asara Wine Estate & Hotel (Pty) Ltd v J C van Rooyen and Others*²⁰ considered the recent dictum of the LAC in *Jordaan v CCMA*²¹ where the Court cited with approval its earlier decision in *Old Mutual Group Schemes v Dreyer*²² where Conradie JA said:

'Buitendien sou so 'n werknemer wat uit die bloute bedank dit gewoonlik moeilik vind om 'n hof te oortuig dat hy werklik konstruktief ontslaan is. Die bewyslas rus op die werknemer ... Die bewyslas is nie 'n ligte een nie ... Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgever die voorsetting van sy diens onuithoudbaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld, maar hom nie aanstaan nie. Net soos ontslag is 'n gedwonge bedanking 'n allerlaaste opsie. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar nog ander uitweë is nie.'

and Davis JA, concurring with the dictum in *Dreyer* said:

'This dictum represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.'

50. Steenkamp J found it to be a correct statement of the law that where the employee has the option of facing a disciplinary hearing but resigns, there

¹⁹ *Workplace law* at 117

²⁰ Case No. C272/2010, delivered 24 August 2011.

²¹ [2010] 12 BLLR 1235 (LAC) at 1239 B-E.

²² (1999) 20 ILJ 2030 (LAC) at 2036.

can be no talk of constructive dismissal.²³ He found that facing a disciplinary hearing is an alternative to resigning.²⁴

51. The conclusions that the commissioner reached were based on the version of the Applicant and the admissions or concessions made by the Respondent's witnesses. On the consideration of the evidence as a whole, the commissioner, based on the evidence before her, correctly came to the conclusion that the Applicant has failed to discharge the onus that he bears of establishing constructive dismissal. The commissioner therefore did not commit a gross irregularity in the conduct of the arbitration proceedings as envisaged in Section 145 of the LRA.
52. It was argued on behalf of the Applicant that I should find that by not referring to the illegality of the fibre optic line the commissioner had committed an error of law which amounts to a gross irregularity.
53. Similarly, I was urged to find that the commissioner's failure to deal with the dispute of facts whether the Applicant's performance was poor or not constitutes a gross irregularity entitling the Applicant to have the award reviewed and set aside.
54. Lastly it was argued on behalf of the Applicant that because the commissioner had had no regard to the Applicant's heads of argument when deciding the matter, the Applicant was denied a fair hearing because the Applicant's submissions on factual and legal points were lost to the commissioner who slavishly followed the Respondent's submissions.
55. In *Southern Sun Hotel Interests (Pty) Limited v CCMA and Others*,²⁵ Van Niekerk J held that:

'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant ... and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

²³ See also *Smithkline* at 45.

²⁴ at [39] [42].

²⁵ [2009] 11 BLLR 1128 (LC).

and in *SA Airways (Pty) Limited v Blackburn & Others*²⁶ that:

'Here, in order to succeed on review, the applicant does not have to prove that the result of the award was unreasonable (i.e. incapable of justification), but rather that the result may have been different if the commissioner had acquitted himself or herself properly.' (original emphasis)

and in *Sasol Mining (Pty) Limited v Ngeleni and Others*²⁷

'... if the act of process-related unreasonableness equates to a latent gross irregularity, then, in order to succeed on review, the applicant would have to establish no more than that the result of the award may (and not would) have been different if the commissioner had properly acquitted him or herself' (original emphasis)

56. It is trite law that the mere fact that a commissioner does not refer to certain facts in his/her award does not necessarily imply that he/she did not apply his/her mind to them.²⁸ An inference may be drawn that a commissioner failed to apply the mind to the issues if "a matter of great significance or relevance to one or more of such issues" is not referred to in the award. Such matter of great significance or relevance must be critical to the issue of relief sought.²⁹
57. The question whether the Respondent changed tactic in respect of the reasons why it believed that the Applicant could play no further meaningful role in the Third Respondent would be relevant only if the second enquiry – i.e. whether the dismissal was fair if the Applicant establishes constructive dismissal – were to be entered into. Since the Applicant has failed to establish constructive dismissal, this factor is irrelevant to the first enquiry. It will be remembered that the minutes of the strategy meeting stated that the Applicant was a poor performer whereas in these arbitration proceedings the Respondent argued that it was prepared to negotiate a new role in sales for the Applicant because he is a good salesperson.
58. Regarding the question of the illegal fibre optic line, the commissioner found that this issue, which was common cause as far as its illegality was

26 [2010] 3 BLLR 305 (LC) at 313 D-E.

27 [2011] 4 BLLR 404 (LC) at para [10].

28 *Country Fair Foods (Pty) Limited v CCMA and Others* (1999) 20 ILJ 1701 (LAC) at 1717 C/E.

29 *Maepa v CCMA and Another* [2008] 8 BLLR 723 (LAC) at paragraph 8.

concerned, was not the cause of any intolerable employment environment. She correctly found that as illegal as this might have been, the Respondent did not engage in this conduct in order to coerce or exert undue influence on the Applicant in order to force him to resign. In other words, it was not a conduct deliberately directed at the Applicant in order to create an intolerable environment for him. I find that this factor, though significant and relevant, does not go to the core of the first enquiry – i.e. whether it was conduct by the employer aimed at forcing the Applicant out.

59. Regarding whether the Applicant was not afforded a fair procedure in the form of *audi alterem partem* by virtue of the commissioner not having had his heads of argument when considering her decision, I find that it is clear from the award that the commissioner had captured the evidence fully and that she answered the essential factors for the enquiry on constructive dismissal despite not having had the benefit of the assistance of the Applicant's heads of argument. The Applicant was not prejudiced thereby.
60. Even if I am wrong in finding that the commissioner had taken these material and relevant factors into account, I have taken them into account in this ruling which will amount to a correction of the award. It is common cause between the parties that this Court may correct a commissioner's award instead of referring it back to the Second Respondent.
61. The commissioner agreed with the Respondent that the Applicant's case is frivolous and vexatious. There is no reason to have come to this conclusion. In his subjective mind, the Applicant believed he had a case for constructive dismissal. This perception was based on some facts such as the two irregularities that prevailed and the fact that instead of being assured at the strategy meeting that these would be attended to, he was confronted with an allegation that he was a poor performer and subsequently advised of an intention to suspend him and institute disciplinary proceedings against him. Although the application was ill-founded, it was not outlandish. I do not agree that it was frivolous and vexatious. However, this finding will have no effect on the costs order to be made and the costs will follow the result.

62. After the award was delivered on 16 July 2010, the Applicant served this review application on 16 September 2010. After the Applicant had failed to file the record of the arbitration proceedings in terms of Rule 7(A)(b) by 21 January 2011, the Third Respondent gave notice of its intention to bring an application in terms of Rule 11, seeking an order to dismiss the review application on account of the excessive delay in proceeding with the review.
63. The Rule 11 application was abandoned after the Applicant complied with Rule 7A (6) on 25 February 2011. The costs of the Rule 11 proceedings shall be costs in this application.
64. In the circumstances, the following order is made:
 1. The review application is dismissed.
 2. The Applicant is ordered to pay the costs of the application on a party and party scale.
 3. The costs of the Rule 11 application are costs in this application to be paid on a party and party scale.

APPEARANCES:

Adv Booysen

Mr Du Randt