



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR1579/11

In the matter between:

ARMAMENTS CORPORATION OF

SOUTH AFRICA LTD

Applicant

and

LAWRENCE NOWOSENETZ N.O.

First Respondent

COMMISSION FOR CONCILIATION,

Second Respondent

MEDIATION AND ARBITRATION

SOLIDARITY obo B.J.E. VAN TONDER

Third Respondent

HEARD: 16 January and 14 February 2014

DELIVERED: 5 August 2015

Constructive dismissal – persistent unfair treatment may give rise to claim for constructive dismissal – probative value of evidence, failing to lodge and exhaust grievance procedure and long delay in lodging grievance may militate against the granting of such relief.

Constructive dismissal – determination whether dismissal constitutes constructive dismissal in terms of section 186(1)(e) of LRA 1995 - comprising of two-stage approach: (1) first-stage, onus on employee who resigns or leaves to prove that continued employment made intolerable by employer's conduct, (2) second-stage, onus on employer to show that dismissal not unfair.

Constructive dismissal – two stages of constructive dismissal not independent stages – facts which are relevant to first-stage may also be relevant to second-stage – there may be cases where facts relating to first-stage are determinative of outcome of second-stage – whether or not this is so is a matter of fact and no general principle can or should be laid down.

Commission for Conciliation Mediation and Arbitration – Test on review of constructive dismissal – (1) review of first-stage of constructive dismissal is whether facts establish jurisdiction, (2) review of second-stage of constructive dismissal is reasonableness.

JUDGMENT

RAM, A J

Introduction

- [1] This is the second time that the applicant seeks to review and set aside the arbitration award of the Commission for Conciliation, Mediation and Arbitration ("the Commission").
- [2] The first time van Niekerk J reviewed and set aside the arbitration award of Commissioner J.C.B. Schoeman N.O. of the Commission and ordered that the matter be referred back to the Commission for a fresh determination of the third respondent's member's constructive dismissal referral, without any rehearing of evidence and on the basis of the transcribed record of

proceedings (“the transcript”).¹

- [3] The rehearing was heard by the first respondent, namely, Lawrence Nowosenetz N.O. (“the commissioner”) who issued an arbitration award dated 26 May 2011 (“award”) finding that the third respondent’s member was dismissed as contemplated in terms of section 186(1)(e) of Labour Relations Act, No. 66 of 1995, as amended (“the Act”) and his dismissal was unfair.
- [4] The applicant seeks to review and set aside the award of the commissioner on the basis that the third respondent’s member failed to prove that he was constructively dismissed in terms of section 186(1)(e) of the Act.

The evidence in the transcript

- [5] The third respondent’s member testified at the arbitration proceedings. He relied on the evidence of a number of employees of the applicant. They are, Mr Pierre Meiring (“Mr Meiring”) who is a Senior Manager in the Acquisition Department, Ms Ingrid Crossley (“Ms Crossley”) who is a Process Assurer, Dr Johann Viljoen (“Dr Viljoen”) who is a Manager in the Quality and IT Department and Mr Mercer Johan Potgieter (“Mr Potgieter”) who is a Manager Technical in the Division Systems Engineering in the Acquisitions Department. The applicant also relied on the evidence of two of its employees, namely, Mr Sipho Johannes Mkwanaazi (“Mr Mkwanaazi”) who acted as Acting General Manager for the year 2005/2006 and its Acting General Manager, Quality and IT, namely, Mr Mike Mathibe (“Mr Mathibe”).
- [6] The third respondent’s member testified in chief that he was 18 years and 11 months in the employment of the applicant when he resigned and claimed constructive dismissal on 5 October 2008. He was well qualified and has a number of qualifications, a doctorate inclusive.² At the time he resigned, he occupied the position of Senior Manager: Quality Engineering

¹ The parties did not address me on the first review application.

Services which is a division of the applicant's Quality and IT Department.

- [7] The primary function of the third respondent's member's department was quality engineering which he described as conducting program baseline audits which "refer to major acquisition programs". This was the core business of the applicant. His main duty was to oversee the integrity and quality of the work performed by the Acquisition Department. His department also had a watchdog function as they had to evaluate the quality of the work performed by the other departments.

- [8] The third respondent's member also testified that in 2004 his department was given the additional responsibility to ensure that all multi-source contracting processes was performed in such a way that it could not be disputed afterwards. This was called process assurance.

- [9] The third respondent's member based his constructive dismissal referral on events that occurred during the years 2004 to 2007. He testified that he started to experience problems in 2004 which he described to be at first fairly minor and thereafter escalated when there were lots of changes in the positions of the applicant's general management and acting managers. Prior to that he was content.

- [10] The third respondent's member divided his constructive dismissal claim into three grounds, namely, manipulation of his and his subordinates' performance contracts³ and management abnormalities, measurement of performance contracts and inhibiting or interfering with his role in appointing personnel.

- [11] The third respondent's member claimed that both his and his subordinates' scores were changed for the year 2005/2006 by the then Acting General Manager, namely Mr Mkwanazi. For the year 2006/2007, the Acting General Manager, Quality and IT, namely, Mr Mathibe threatened to change his score and placed targets that both he and his subordinates

² He has a BAC, a BAC Honours, a MSC (Engineering Management), a DSC (Physics).

would not be able to achieve and for the year 2007/2008 no performance contract was agreed on. He also testified that without a performance contract it was impossible for him to manage his department. His other grounds were that his complaints were not answered, a report was changed without his and his subordinate, namely, Ms Crossley's, permission and signed on their behalves, his grievance which he lodged in September 2007 was not attended to and delayed. He was escorted out of the applicant's premises when he resigned.

[12] The third respondent's member contended under cross-examination that he was forced to appoint staff who could not perform the work and prevented from appointing those who could. The recruitment process ran from 2002. The Chief Executive Officer ("the CEO") threatened to discipline him if he did not appoint staff and he could not be blamed if he could not find suitable candidates who had the qualifications or met the requirements. The staff or candidates he referred to were black people ("affirmative action candidate/s" or "affirmative action appointee/s"). To the question that none of his subordinates lodged formal complaints, he contended that they did. He also contended that he did not just resign but made a proposal for an amicable settlement, the confidentiality of which Messrs Mkwanazi and Mathibe breached by discussing it with the Acquisition Department.

[13] Mr Meiring testified that he was one of the architects of the performance management system. It was irregular for Mr Mkwanazi to change the scores of the third respondent's member after the performance contracts were already entered into. He testified that it was "criminal fraud" for Mr Mkwanazi to request that Mr Mathibe change the Pilatus report and that it was highly illegal. He was one of the original employees who designed the tender process. The tender process could not be changed because of the amount of money involved. To the third respondent's member's statement that Mr Mathibe told the third respondent's member and another employee, namely, Ms Nomsa McGina ("Ms McGina") to leave out certain clauses and what effect that would have if it was not communicated by the Board to Mr

³ I understand this to be the balance score card system.

Mathibe in writing, he answered that “the correct process for any change to any practice would be for the [applicant’s] management board (“the Board”)⁴ or the owner of the practice, which would be the general manager of that ... who owns that practice to formally instruct whoever he holds accountable for that practice to review and update the practice.”⁵

[14] Mr Meiring confirmed under cross-examination that Mr Mkwanaazi could change the performance scores by instruction to the Human Resources Administrator. He, however, contended it was irregular to do so without consulting the concerned employee. To the question that he contended that changes were made to the Pilatus report prepared by Ms Crossley in her absence and that it was “criminal”, he answered that he had “no idea of the details.” He stated that the Board had no power to reject the Pilatus report but could send it back. He could not refute that a General of the client gave an instruction to ignore the prescribed criteria (“the criteria”) and that Dr Viljoen got a letter of consent from the General to do so.

[15] Ms Crossley testified that for the year 2005/6 her scores were changed. The Pilatus report was changed without her consent. The Acting Manager, namely, Dr Viljoen signed it without her consent. She also testified that affirmative action appointees were either unqualified or inexperienced which lowered standards with the result the third respondent’s member spent more time monitoring them.

[16] Ms Crossley contended under cross-examination that she holds a BA Ed.⁶ with 19 years experience whereas the qualifications to be appointed as a Process Assurer was a BSC degree or an engineering degree (preferably an Honours degree with 13 years experience which was lowered to 7 years and required a “matured person”⁷ with experience in the defence industry). She did not have the requisite qualifications but contended that the third

⁴ I note that the witnesses of both the third respondent’s member and applicant refer to the applicant’s Board as the Board or Management Board and assume that they are referring to one and the same body of the applicant.

⁵ I quoted this answer as it appear in the transcript..

⁶ I interpret this to mean she holds a Bachelor of Education.

respondent's member took her experience into account. She also contended that she wrote the quality assurance examination once whereas Ms McGina who had the requisite qualifications had written the examination twice and had still not passed. Mr Mkwanazi changed her performance scores and "if [she] think about it, it affected [her] salary increase...[as it] was lower obviously..."⁸ and her performance bonus. She did not lodge a grievance but reported it to the third respondent's member. She could not refute that a General of the client agreed to ignore the criteria in the Pilatus report, but contended that it was irregular as it happened after the fact. Insofar as the tender process was concerned, she contended that she indicated that there were discrepancies, "however [she] probably concluded that the process was transparent and fair."⁹ Further, she did not "think there was any necessity on their part to change the report unilaterally."¹⁰

[17] Dr Viljoen testified that he acted in the third respondent's member's position. Messrs Mkwanazi and Mathibe made changes to the Pilatus report. He signed the report in good faith because his manager asked him to sign it but did not understand it. To the questions whether there was a practice or if he knew of one that stipulated that he could not sign on behalf of Ms Crossley and that the changes made by Messrs Mkwanazi and Mathibe were not authorised and were extremely irregular, he answered that he was not aware of one and would not have signed the Pilatus report if there was such a practice, respectively.

[18] Mr Potgieter testified that the CEO and Messrs Mkwanazi and Mathibe interfered with the third respondent's member's managerial functions. The third respondent's member's grievance was not heard within the time periods. The applicant did not follow its own grievance procedure. The grievance procedure was an employee's last resort and the next step was a referral to the Commission. It was irregular for the third respondent's

⁷ She described a "matured person" to be a person who had not recently left university.

⁸ [My emphasis].

⁹ [My emphasis].

¹⁰ I interpret the word "necessity" to be a typographical error and the words expressed by Ms Crossley to mean that there was no intention on behalf of Messrs Mkwanazi and Mathibe to change the Pilatus report unilaterally.

member to be escorted out of the applicant's premises.

[19] Mr Potgieter conceded under cross-examination that it was not possible to deal with the third respondent's member's grievance whilst Mr Mathibe was overseas. In re-examination, he testified that should the Board make a decision to change a practice, the procedure was to register the decision with the applicant's document management section "ADM" and thereafter the change "goes through the procedure of the committees and comes back to the Board." The failure of Mr Mathibe to follow such procedure placed a question mark on the "sort of services" that the third respondent's division rendered at the applicant especially the Acquisition Department.

[20] Mr Mkwanazi testified that he changed the scores of the third respondent's member and his subordinates because he did not agree with the scores which the third respondent's member allocated to himself and his subordinates. He contended that the third respondent's member used a different criteria to assess himself and his subordinates and in so doing over assessed himself and his subordinates. Had the third respondent's member and his subordinates not been content, they should have followed the grievance procedure. He did not deem the changing of the scores of the employees to be unreasonable.

[21] Mr Mkwanazi also testified that although he was given the instruction to appoint Mr Peeters,¹¹ he did not do so as he still required the approval of the CEO. He instructed the third respondent's member to lower the job requirements because in most cases in the applicant's industry it was very rare to find a candidate who met the job requirements completely, so he asked the third respondent's member to address such gaps by means of training or development programmes which would enable the candidate to meet the job requirements. By doing this, he did not deem it to be a lowering of standards.

[22] Mr Mkwanazi contended under cross-examination that he changed the

¹¹ He appeared to be a highly qualified candidate from a non-designated group.

scores of the third respondent's member and his subordinates on the basis of the evidence that was placed before him. He contended that if there was other information, then the third respondent's member could have stopped the meeting and produced such information. To his statement that the third respondent's member did not comply with the computerised client feedback system, it was put to him that there was no such system, to which he contended that what he meant was that there was a number of ways in doing a client survey. He contended that before he changed the scores, he asked the third respondent's member for evidence.

[23] Mr Mkwanazi denied under cross-examination that Mr Meiring was the architect of the performance management system and went on to contend that he found it strange that the third respondent's member and other senior managers did not complain or lodge grievances about the scores he changed at the time when he did so and the third respondent's member had only done so after three years had passed.

[24] Mr Mkwanazi also contended under cross-examination that it was the targets that were contracted and not the scores. He explained that the third respondent's member allocated to himself and his subordinates scores of over 100% which was above the target. A 100% was an acceptable standard and the disagreement arose in respect of the extent of over performance. Insofar as appointments were concerned, he contended that he argued with the third respondent's member to appoint candidates who had less experience but were qualified and referred to Ms Crossley who was appointed but was not an engineer. Insofar as the Pilatus report being submitted without Ms Crossley agreeing to the changes made thereto and Dr Viljoen signing on her behalf, he contended that she was "off sick" and to the question that it was submitted to the Board as if she was the author thereof, he answered that it was "pp'd".¹² He maintained that a meeting was held in respect of the scores he changed and another with the senior

¹² The abbreviation "pp" is the shortened form of the Latin phrase "per procuracionem" which means "through the agency of" or "by proxy". This abbreviation appears to be now often used when signing a letter or document on someone else's behalf and often taken to mean "on behalf of".

managers to explain the way forward with the new balance scorecard.

- [25] Mr Mathibe testified that he changed the criteria of the third respondent's member and his subordinates in that the targets that were previously agreed upon were easily achievable. However, that for the year 2006/7 he gave the third respondent's member the benefit of the doubt. They did not reach agreement on the criteria for the year 2007/8. He was not obliged to accept what the third respondent's member wanted. If an employee was not content with the changes made to his or her performance contract, they could follow the grievance procedure or even embark on "strike" action. To the question that the 2007/8 performance contract was never concluded and whether it was possible for the third respondent's member to execute his duties without it, he answered that it was possible because the performance contract was just a formal mechanism between two parties who knew exactly what needed to be done and who knew "most of the work."
- [26] Mr Mathibe also testified that the third respondent's member had not appointed affirmative action candidates and had delayed in doing so for a number of years. Insofar as such candidates had not met the requirements, he testified that in the applicant's industry it was difficult to find a suitable candidate because it was unique and an external candidate would have to be developed in order to meet the requirements.
- [27] To the changes that were made to the Pilatus report, Mr Mathibe testified that the Board was not content with the report and a meeting was held with all concerned and everyone agreed to change the report. They got approval from the Board to change the report. They did not force anyone to sign the report after the changes were made. They were all under pressure. Insofar as not attending to the third respondent's member's grievance timeously, he testified that he was about to leave for official business overseas and needed the grievance to be translated from Afrikaans to English.¹³ When he returned he addressed the third respondent's

¹³ He testified that he did not understand Afrikaans.

member's grievance. He expected the third respondent's member to exhaust the grievance procedure instead of resigning. He briefed the CEO about the grievance meeting held with the third respondent's member and because the third respondent's member was aggrieved coupled with the nature of the projects embarked on by the applicant, the third respondent's member became a security risk and he advised the CEO to accept the third respondent's member's resignation and that he serve his notice at home.

[28] Mr Mathibe contended under cross-examination that the final decision in respect of the performance contracts rested with him. Insofar as the third respondent's member's testimony that the terms and conditions of the 2007/8 performance contract were not achievable, he contended that the third respondent's member should not have refused the task from the outset but waited until the end of the period or during the review stage show why it was not possible to achieve. He disputed that Mr Meiring was an authority on performance management. To the question that the third respondent's member requested early retirement, he contended that he did not see the urgency thereof and everyone have "issues" but it did "not mean that the person must resign" or retire. To the question that he had not answered the third respondent's member's grievance, he contended that the third respondent's member was part of his management team who knew he was going away. He admitted that the day after the grievance meeting, the third respondent's member resigned. He did not agree that the third respondent's member was escorted out the applicant's premises like a criminal and contended that the third respondent's member was a security risk who was exposed to top secrets and confidential information.

[29] Mr Mathibe also contended under cross-examination that the third respondent's member and his subordinates could still do their work without performance contracts as they still had their job descriptions and the third respondent's member did the same work daily. He contended that the practice that the third respondent's member did not want to change was approved by the Board and the third respondent's member's successor recommended the change. At this stage of his testimony, it is noteworthy to

mention that the third respondent's member's representative placed on record that it was not disputed that the Board may accept a change in practice but that certain procedures had to be followed to do so.

[30] Mr Mathibe maintained under cross-examination that the timeframe that the third respondent's member took in not making appointments was unacceptable. To the question that it could not be expected of the third respondent's member to lower the requirements of candidates who came to work in his division as that would mean that the quality of work would be downgraded, he answered that everybody in the employment of the applicant knew that the applicant was unique in that it was difficult to find an external candidate who would meet the requirements a 100%, so those candidates with potential should be employed and trained to meet the requirements. To the question that the third respondent's member could not be faulted in that he was an expert in his field who tried to find candidates whom he found did not have potential, he answered that the new senior manager (who I understand to be the third respondent's member's successor) had already made the necessary appointments with candidates who had the right qualifications and experience.

[31] Insofar as the Pilatus report was concerned, Mr Mathibe contended under cross-examination that as a General Manager he was the accounting officer of the department and could make changes to it. Insofar as Dr Viljoen did not have the authority to sign on behalf of the third respondent's member and Ms Crossley, he contended it could be done under delegations of authority. To the question that the changes to the report made the third respondent's member's employment intolerable, he answered that such deduction could not be made as the third respondent's member was not at work but overseas when the changes were made to the report.

Evaluation of the evidence and applicant's grounds of review

[32] The commissioner found that the applicant dismissed third respondent's

member as contemplated in terms of section 186(1)(e) of the Act.

- [33] The Act codified constructive dismissal in terms of section 186(1)(e) thereof and defined it as follows:

‘an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee’.

- [34] This Court has followed a two-stage approach in determining whether there has been a constructive dismissal. In *Pretoria Society For The Care Of Retarded v Loots*¹⁴ the Labour Appeal Court set out the two-stage approach as follows:

‘In this matter the respondent in her letter accepts the constructive dismissal of the appellant and seeks compensation. Where the employee seeks compensation the court looks at whether the employee was constructively dismissed. A part of that enquiry may well be whether the employee’s evidence should be believed or whether the employer’s evidence, which is to the effect that she actually resigned, should carry the day.

The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and the trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. I am also of the view that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed’.

- [35] In *Murray v Minister of Defence*,¹⁵ the Supreme Court of Appeal with reference to previous decisions of this Court confirmed the two-stage approach which applied to a constructive dismissal referral as follows:

¹⁴ [1997] 6 BLLR 721 (LAC) at page 724I to 725D.

¹⁵ [2008] 6 BLLR 513 (SCA) at para12.

‘...These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal; in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer’s conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it’.

[36] I interpret the two-stage approach of a constructive dismissal referral to mean that the employee must present evidence to the commissioner to establish that her or his employer made her or his employment intolerable (that is, she or he has not resigned). Should it be established that the employee resigned, the inquiry is at an end. However, once it is established that she or he has not resigned, then the Commission has jurisdiction to entertain her or his constructive dismissal referral. This is sometimes referred to as a jurisdictional issue. This does not mean that the matter is at an end once this first-stage of a constructive dismissal referral is established, the second-stage thereof is for the employer to show that the dismissal was not unfair. In *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others*,¹⁶ it was held with regard the two stages of a constructive dismissal referral that:

‘The two stages ... 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’.

¹⁶ (1998) 19 ILJ 1240 (LC) at para 38.

- [37] Mr Hulley who appeared on behalf of the applicant during argument handed up three judgments of this Court which he requested that I consider when giving my judgment. The first was *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) and Others*¹⁷ in which case he acted as an acting judge of this court, the second is *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others*¹⁸ and the third is *Majatladi v Metropolitan Health Risk Management and Others*.¹⁹
- [38] In the *Distinctive Choice* judgment Hulley AJ as he then was found that the test on review of a constructive dismissal referral was not one of reasonableness but of jurisdiction. In the *Conti Print* judgment, Naidoo AJ found that the test on review of a constructive dismissal referral was not one of jurisdiction but whether the employee established a claim or not. In the *Majatladi* judgment, Steenkamp J found that the test on review of a constructive dismissal referral was not one of reasonableness but whether the commissioner was right or wrong in finding there was no dismissal.
- [39] Mr Hulley as such contends that the test on review of a constructive dismissal referral is whether the Commission has jurisdiction. Mr Hulley's judgment has recognised an issue that needs consideration by this Court insofar as what test or tests on review apply in assessing each of the two stages of a constructive dismissal referral. Mr Hulley's judgment as well the other two judgments are incorrect in that they failed to take into account the two-stage approach of a constructive dismissal referral in deciding what test of review apply to each of those stages in a review application of an award of such referral. My view is that the jurisdictional test only apply to the review of the first-stage of a constructive dismissal referral but not the second-stage thereof. The second-stage thereof requires the employer to show that the dismissal was not unfair. The test for jurisdiction cannot apply to the second-stage as well. Insofar as the *Conti Print* judgment is concerned, this judgment held that the Commission's jurisdiction is derived

¹⁷ (2013) 34 ILJ 3184 (LC).

¹⁸ (2013) 34 ILJ 3169 (LC).

from section 186(1)(e) of the Act. This view is correct only insofar as the Commission has the power to hear a constructive dismissal referral, but is incorrect in assuming that the Commission has jurisdiction for this reason alone as the employee still bears the onus of proving that she or he has made out a case for constructive dismissal in terms of section 186(1)(e) of the Act which means that the employee must present evidence to the commissioner to establish the jurisdiction of the Commission to hear her or his constructive dismissal referral. In the *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd; SA Rugby Pty Ltd v SARPU and Another* ²⁰ the Labour Appeal Court held that the test on review of a jurisdictional issue is whether the facts establish jurisdiction, not whether the commissioner's ruling was rational ("the jurisdictional test" or "jurisdictional ground of review"). Insofar as the *Majatladi* judgment is concerned, this judgment also did not take into account the two-stage approach of a constructive dismissal referral and is incorrect in finding that the test for jurisdiction only applied. I deal with the test which apply to the second-stage of a constructive dismissal referral below. I am of the view for reasons aforementioned, the judgments handed to me by Mr Hulley obfuscate the appropriate tests on review of an award involving a constructive dismissal referral.

- [40] Insofar as the first-stage of a constructive dismissal referral requires the employee to prove that her or his employment was made intolerable and not a voluntary resignation, it is my view that the applicable test for review of this stage is the jurisdictional tests as enunciated in the *SARPA* judgment which I have already mentioned above.²¹ This case involved the question whether there was a reasonable expectation to renew the fixed-term contracts of employment of rugby players. The distinguishing factor of a referral involving a reasonable expectation to renew a fixed-term contract of employment and that of a constructive dismissal referral is that it does not involve the second-stage of a constructive dismissal referral. Having regard to the *Sappi Kraft* judgment which held that the two stages of a

¹⁹ (2013) 34 *ILJ* 3282 (LC).

²⁰ [2008] 9 *BLLR* 845 (LAC).

constructive dismissal referral are not independent stages,²² it is still necessary for me to mention that should it be decided that an employee has not made out a case in respect of the first-stage of a constructive dismissal referral, she or he will be able to launch a review application on the jurisdictional ground of review (subject to her or him making out a case for such relief) as such finding is final and definitive against her or him at that stage.

- [41] Should the commissioner not find against the employee in respect of the first-stage of a constructive dismissal referral which means the employee had been successful in proving that the Commission has jurisdiction, the commissioner must consider the second-stage thereof. The employer bears the onus of proving the second-stage thereof and must show that the dismissal was not unfair. It should also be noted that the employee may also be unsuccessful at the second-stage of the constructive dismissal referral (though successful at the first-stage thereof) or that the employer may be successful at second-stage thereof. It is my view that the second-stage of a constructive dismissal referral which deals with the fairness or unfairness of the dismissal can only be assessed on review by this Court in terms of the test of reasonableness as enunciated in *Sidumo and Another v Rustenburg Platinum Mines (Pty) Ltd and Others*.²³ This means that should the second-stage of a constructive dismissal referral become the subject of a review application then the test on review for both the parties is reasonableness with the jurisdictional ground of review also available to the employer in respect of the first-stage of a constructive dismissal referral as it is only once both the stages of a constructive dismissal referral is determined against the employer is the constructive dismissal referral finally determined against the employer.

- [42] Insofar as the test of reasonableness being the appropriate test for the review of the second-stage of a constructive dismissal referral, authority

²¹ Paragraph 39 above.

²² Paragraph 36 above.

²³ [2007] 12 BLLR 1097 (CC).

can be found in decisions of the Labour Appeal Court. The Labour Appeal Court in the decision of *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*,²⁴ offer assistance as to the appropriate test of review for the second-stage of a constructive dismissal referral. In this case, the Labour Appeal Court referred to the *SARPA* judgment only insofar as the onus rest on the employee to establish the existence of the dismissal and held that in respect of the two-stage approach of a constructive dismissal referral that the employee bore the onus to prove that the employer effectively dismissed her or him by making her or his continued employment intolerable and after evaluating the evidence that was before the commissioner went on to find that:

‘Having considered all the circumstances, ... the Labour Court has not erred in any way. The commissioner in his award demonstrated a clear understanding of the two-stage approach to constructive dismissal cases and correctly found that the appellant had established his dismissal. The Labour Court was correct in finding that, objectively speaking, the facts before the commissioner established [the employee’s] dismissal and that the commissioner’s decision pertaining to fairness was one that a reasonable decision-maker could reach. The Labour Court correctly dismissed the application for review...’.²⁵ [My emphasis.]

The Labour Appeal Court as such recognised that the appropriate test for review in determining whether a commissioner correctly applied the two-stage approach was the reasonable decision-maker test as enunciated in the *Sidumo* judgment. This also appears to be the approach that was applied in the Labour Appeal Court in *Miladys, A Division Of Mr Price Group Ltd v Naidoo and Others*²⁶ in respect of the rational and justifiability test which was replaced by the test of reasonableness as enunciated in the *Sidumo* judgment. However, in my view both decisions of the Labour Appeal Court are still incorrect insofar as failing to distinguish between the appropriate tests of review which applied to each of the two stages of a

²⁴ [2014] 10 BLLR 987 (LAC) at para 35.

²⁵ See also *Eastern Cape Tourism Board v CCMA* [2010] 11 BLLR 1161 (LC).

²⁶ [2002] 9 BLLR 808 (LAC).

constructive dismissal referral which I have set out above.

[43] I proceed to determine whether the third respondent's member had succeeded in proving that the applicant has made his employment intolerable. In doing so, I do not consider myself bound by the findings of fact of the commissioner as he had before him only the record of proceedings. I am as such in the same position as he was in making a factual finding.

[44] Insofar as the first-stage of a constructive dismissal referral is concerned, I proceed to determine whether the third respondent's member had resigned. This, I do by examining the conduct of the parties as a whole and its cumulative impact. An important consideration is the applicant's contention that the third respondent's member was not constructively dismissed. Of equal importance is the third respondent's member's reliance on conduct that occurred during the years 2004 to 2007 to justify his constructive dismissal referral.

[45] In my view, the third respondent's member's reliance on the conduct that occurred during 2004 to 2007, does not give rise to a claim for constructive dismissal. One of the reasons being that he only instituted his grievance in September 2007. In respect of Mr Mkwanaazi changing his scores for the year 2005/6, he also relied on his subordinates complaints to justify his claim yet they also did not lodge grievances. Ms Crossley's testimony needs special mention in particular it appeared from my perusal of the transcript that when Mr Mkwanaazi changed her performance scores that it did not cause much concern to her. I draw this inference from the manner in which she expressed herself at the arbitration hearing.²⁷ Also had that really affected her, she would have lodged a grievance which she did not do. I also infer with reference to all his other subordinates that had it affected them, they would have challenged their changed scores by following the applicant's grievance procedure which they also did not do. In coming to this finding, I take into account that Mr Meiring confirmed

²⁷ I has highlighted this part of her evidence in paragraph 16 above.

under cross-examination that Mr Mkwanaazi could change the performance scores through the Human Resources Administrator by using his instruction and Mr Mkwanaazi contended that before he did so he consulted with senior management in respect thereof. I deal with the other reasons why third respondent's constructive dismissal referral cannot succeed below.

[46] Insofar as Mr Mathibe wanted to change the scores of third respondent's member and his subordinates for the year 2006/7, this did not happen. In my view Mr Mathibe could have done so had there been a reason for him to do so. Had this been of concern to them then they should have also lodged grievances which they did not again do. In coming to this finding, I take into account that both Messrs Mkwanaazi and Mathibe disputed that Mr Meiring was one of the architects of the performance management system and an authority on the performance contracts, respectively and maintained that they could change the scores. This was also confirmed by Mr Meiring although only in respect of Mr Mkwanaazi.

[47] Insofar as the third respondent's member and his subordinates did not have performance contracts for the year 2007/8, this appears from my perusal of the transcript to be as a result of the third respondent's member and Mr Mathibe not being able to reach agreement on the terms and conditions thereof. I find that Mr Mathibe was not obliged to accept the terms and conditions of the Third Respondent's member and his subordinates. I also find that if there was no agreement or as contended by the third respondent's member that Mr Mathibe wanted to include terms that he would not have been able to meet then he and his subordinates should before claiming that to be the position have at least attempted to meet the target set instead of questioning it from the outset. In not doing so, the Third Respondent's member only lodged his grievance shortly before he resigned and his subordinates did not do so at all.

[48] Insofar as the Pilatus report being changed. I find that it was not done

unilaterally or with the intention to commit fraud. At least Ms Crossley was informed of the changes that were required. She should have objected from the outset to the changes made. When Dr Viljoen signed on her and the third respondent's member's behalves, neither did he nor did Messrs Mkwanazi and Mathibe commit fraud as both she and the third respondent's member were on sick leave and leave, respectively. I base my finding on the following evidence:

[48.1] Mr Meiring admitted that he did not know what changes were made to the Pilatus report yet he stated it was "criminal." He also could not refute that a General of the client gave instructions to ignore the criteria and Dr Viljoen got a letter of consent from the General to do so. I find it unacceptable that he would testify on matters he has no knowledge of.

[48.2] Ms Crossley could also not refute that when changes were made to the Pilatus report, it was made with the consent of the client (a General in *casu*) and that it was made in writing. On the contrary, she in fact conceded that the process was fair and transparent and that Messrs Mkwanazi and Mathibe did not change the Pilatus report unilaterally. I find that her testimony does not support the third respondent's member's constructive dismissal referral.

[48.3] Dr Viljoen by reason of his insight and ability could have judged for himself whether he was committing fraud. The fact that he signed the report in my view was indicative that he felt he was not doing anything wrong. I as such find it unacceptable for a person in the position of Dr Viljoen to sign the Pilatus report and later say that if he knew there was a practice of not signing on behalf of others, he would have not done so.

[48.4] The third respondent's member's representative herself placed it on record during the cross-examination of Mr Mathibe that the Board may accept a change in practice but that certain procedures had to

be followed to do so.

[49] On the whole, I am of the view that it is apparent from the third respondent's member's evidence as well as that of his witnesses that they were not content with the new management style and changes that were effected and/or to be effected in the work place. In particular, he was not comfortable with changes that needed to be made in respect of addressing employment equity in the applicant's workplace. Insofar as being pressurised into making affirmative action appointments, I find that in line with the evidence in the transcript that the third respondent's member was duty bound to find such candidates, employ and train them which he did not want to do. I base my finding on the testimony of Ms Crossley who testified that the affirmative action appointees were inexperienced or unqualified and the third respondent's member had to spend time mentoring or redoing their work, yet she also appeared not to have met the requirements of a Process Assurer. My finding is further based on her justification that she wrote the quality assurance examination once and Ms McGina who had the requisite qualifications had to write the examination twice and had still not passed and that the third respondent's member took her long years into account, all of which are indicative that the third respondent's member was not willing to accept change in the workplace.

[50] I accept that the third respondent's member's grievance was not finalised within the time periods to do so. I, however, take into account that Mr Potgieter conceded under cross-examination that it was not possible to deal with the third respondent's member's grievance whilst Mr Mathibe was overseas. This supports Mr Mathibe's contention that the third respondent's member knew that he was going overseas. I find that the third respondent's member had not once before that lodged a grievance yet he did so when Mr Mathibe was about to leave for overseas, all of which militates against a finding that the third respondent's member was constructively dismissed.

[51] I find Mr Mkwanazi's testimony unsatisfactory insofar as the third respondent's member did not comply with the computerised client feedback system when there was no such system and when cross-examined on it, he stated that what he meant was that there was a number of ways in doing a client survey. This notwithstanding, he maintained that before he changed the scores, he asked the third respondent's member about the scores. Although this was placed in dispute by the third respondent's member's representative, I find of significance, his testimony that the third respondent's member and other senior managers did not complain or lodge grievances about the scores he changed at the time when he did so and the third respondent's member only did so after three years had passed.

[52] It may be that Mr Mathibe could have been incorrect in his testimony that it was the third respondent's member who walked out of the grievance meeting and that it was Mr Mathibe who had ended the meeting as Mr Mathibe testified that the meeting started at 14h00 and it was 17h00 and it was his obligation to pick up his children. I also accept that he at first contended that Dr Viljoen made the changes to the Pilatus report and when challenged under cross-examination that Dr Viljoen disputed that he did so, he contended that it did not matter and that it was he in consultation with Mr Mkwanazi who authorised the changes. I, however do not deem these factors as decisive on whether the third respondent's member had made out a case for constructive dismissal. Of significance to me is the fact that Mr Mathibe did not change the scores for the year 2006/2007 and when there was an impasse reached in respect of the performance contract for the year 2007/2008, he was not obliged to accept the third respondent's member terms and conditions. Insofar as the third respondent's member being escorted out of the premises, I find that it is highly unlikely that the third respondent's member would have caused harm to the applicant while serving his notice at the applicant, however, there was nothing untoward in doing so as the third respondent's member had already resigned and the applicant was at liberty to have the third respondent's member serve his notice at home or

even pay him his salary in *lieu* thereof.

[53] Insofar as the CEO had not testified at the arbitration hearing and the commissioner finding that reference to him constitute hearsay evidence, my finding is that it was the third respondent's member who contended that the CEO threatened to discipline him if appointments were not made and the third respondent's member and Ms Crossley's own testimonies serve as conclusive proof that the third respondent's member did not make the necessary appointments and that he did not want to do so.²⁸ Insofar as the commissioner finding that members of the Board did not testify and reference to them as also constituting hearsay evidence, my finding as already mentioned above is that Messrs Mkwana and Mathibe could not have committed fraud in that Mr Meiring could not testify on the changes made to the Pilatus report and Ms Crossley herself confirmed that it was not so.²⁹ I find that the testimonies of the third respondent's member and his witnesses made it unnecessary for the applicant to call the CEO and members of the Board as witnesses even if the applicant had not called them to testify as witnesses or intended not to call them at all.

[54] The objective facts do not support the third respondent's member's constructive dismissal referral.

[55] In the circumstances, I make the following order:

[55.1] The arbitration award issued by the the commissioner under case number GAPT 9155-07 dated 26 May 2011 is reviewed and set aside.

[55.2] The arbitration award is substituted with the following order:

[55.2.1] the third respondent's member was not constructively dismissed.

²⁸ Paragraph 49 above.

²⁹ Paragraph 48 above.

[55.2.2] the third respondent's member resigned from the employment of the applicant.

[55.2.3] the commission lacked jurisdiction to entertain the third respondent's member's constructive dismissal referral.

[55.3] there is no order as to costs.

Ram AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the applicant:	Advocate G.I. Hulley SC
Instructed by:	Maserumule Inc.
For the third respondent's member:	Advocate P.H.Kirstein
Instructed by:	Serfontein Viljoen & Swart