**REPUBLIC OF SOUTH AFRICA**

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

**JUDGMENT**

Not Reportable

Case No: **JR1629/2016**

In the matter between:

**SUNSHIELD SOLUTIONS (PTY) LIMITED** **Applicant**

And

**NGWENYA: DUMISANE JOHANESS N.O.** **1st Respondent**

**THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **2nd Respondent**

**STEENKAMP: DESMOND WARREN** **3rd Respondent**

**Date heard: 20 January 2017**

**Date delivered: 7 February 2017**

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**JUDGMENT**

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**NAIDOO AJ**

Background

[1] The third respondent was employed by the applicant as a production manager. The applicant is a company that markets and installs sunshield awnings. During 2015 the third respondent got increasingly discontented about his conditions of service. He explained that he was unhappy about being tasked to do installations.

[2] The applicant averred that the third respondent had resigned on 8 December 2015. He did so by communicating his resignation at a meeting orally to the finance director, Ms Jenny Ellis ("the oral resignation"). Shortly thereafter, on that same day, at lunch time, the third respondent announced in the kitchen that he was leaving and added: "you will be happy after I left". The applicant asserted that several employees had witnessed this pronouncement. The third respondent disputed that he orally resigned and had then made the announcement in the kitchen.

[3] The third respondent averred that he typed a resignation letter ("the resignation letter") in the evening of 8 December 2015. He thereafter took the letter to his workplace. He placed it in an envelope, addressed it to Caron, who was a director, and sealed it. He, however, changed his mind and decided not to hand in the letter of resignation. He left it in his top desk-drawer in his office.

[4] The third respondent averred that, on 11 December 2015, Mr Peter Oupa Ricks, a co-worker, had asked him: "…why are you leaving the company?". The third respondent responded: "…so who is going to take my place?".Mr Ricks replied that it was going to be Trevor, Ms Ellis's husband.

[5] On 23 December 2015 the third respondent took the sealed envelope from his top desk-drawer and placed it, under some papers, in his second desk-drawer. He then went on leave.

[6] The third respondent visited his office on 7 January 2016. He averred that he was still on leave. He only visited his office to collect his tools. On his arrival he observed that Ms Ellis and Trevor were in his office. Trevor was sitting at the third respondent's desk and both he and Ms Ellis were working at his desktop computer.

[7] The third respondent returned to worked, after his leave, on 11 January 2016. On his arrival Ms Ellis told him: "… I have your resignation and I accept it".

[8] The third respondent referred an unfair dismissal dispute with the second respondent. The LRA Form 7.11 was served on the applicant, and filed with second respondent, by email on 3 February 2016. The third respondent stated, in the LRA Form 7.11, that he was unfairly dismissed on 11 January 2016. The dispute was conciliated on 8 March 2016. It remained unresolved. The conciliator recorded, on the LRA Form 7.12, that the unfair dismissal related to "reason unknown". The third respondent referred the dispute for arbitration on 8 March 2016. He stated, on the LRA Form 7.13: "Employer acted on a resignation letter not served on the director and dismissed Mr Steenkamp on returning from leave".

[9] The first respondent arbitrated the dispute and issued an award in the matter under case number GAEK1337-16 dated 31 July 2016. He found that the applicant had *dismissed* the third respondent and that the *dismissal* was unfair, both procedurally and substantively. He awarded the applicant compensation of R180 000 being equivalent to six months of the third respondent's salary ("the award").

[10] The applicant issued the current application to review and set aside the award. It sought the relief that the award be substituted by an order declaring that the applicant was not dismissed. None of the respondents filed a notice to oppose the application. The second respondent filed a notice that it would abide by the decision of this Court. No opposing affidavits were filed. Only the applicant was present and represented in Court during argument.

<u>The review application</u>

[11] The applicant alleged that the third respondent had referred: "…an alleged transgression by the applicant within the meaning of section 191(5)(a)(iii) of the LRA by failing to provide the third respondent with reasons for his dismissal". It argued that the first respondent was therefore: "… precluded from adjudicating a dispute with regards to an alleged unfair dismissal …". I am at a loss to understand the applicant's argument. Clearly the third respondent had referred an unfair dismissal based on reasons unknown; and therefore, the first and second respondents were seized with the duty to conciliate and arbitrate it.

[12] The applicant submitted that the first respondent had erred, in his analysis of the evidence, when he made the finding that the third respondent was dismissed in January 1996; whereas he should have found that the third respondent had resigned on 8 December 2015. In this regard the applicant averred that the first respondent erred in not taking into account the testimony of the third respondent when he allegedly admitted that he had told Mr Ricks, a co-worker, on 11 December 2015, that he (the third respondent) was in fact leaving the employ of the applicant. The applicant alleged further that the third respondent had admitted, in his testimony, that he had in fact resigned. I shall deal with the issue relating to the resignation later in this judgement.

[13] The applicant submitted that the first respondent did not have any evidence before him on what the third respondent's monthly salary was. This is not true. The first respondent had established, during the *narrowing down of the issues,* at the inception of the proceedings; that the third respondent's monthly income was R30 000.

The award - resignation

[14] The foremost issue before the first respondent was whether the third respondent was dismissed. The first respondent found that, although the third respondent had in fact typed out the resignation letter on 8 December 2015; he (the third respondent) had changed his mind and decided not to communicate it to the applicant. He found that the applicant had discovered the resignation letter in the third respondent's office, during his absence, when he was on leave between 24 December 2015 until 10 January 2016.

[15] The first respondent reasoned that, if the third respondent had indeed communicated his resignation, whether orally or in writing, on 8 December 2015, as the applicant had averred; then it begs the question: why did he continue tendering his services into January 2016? The first respondent concluded that the only probable reason for this was that the third respondent had not communicated his resignation on 8 December 2015. Hence, his termination in January 2016, when he returned to work, was not due to his resignation on 8 December 2015; but amounted, in fact, to his dismissal.

[16] The applicant had presented no evidence to motivate that such dismissal was procedurally and/or substantively fair. The first respondent found that the dismissal was not procedurally and substantively fair. He granted R180 000 compensation in favour of the third respondent. The third respondent had sought only compensation.

[17] The applicant submitted that the first respondent had exceeded his authority by assisting the third respondent during the re-examination stage of his testimony.

The award – first respondent exceeded his authority during re-examination

[18] During the cross examination of the third respondent, the applicant's representative asked the former:

> "Now Mr Ricks will testify … (T)hat on the 11th of December whilst coming back from Pretoria, you said you were driving in the same vehicle, you then said to him that you are leaving …And he will also testify (that he) … asked Des are you leaving the job just like that and you said just like that. Do you have any comment that you wanted to make if that evidence will be led?"

[19] In response, the third respondent said:

> "And that was my response to him. Because I am not going to say Jenny this and Jenny that and the company this …I said to him I am leaving just like that.

[20] During the re-examination phase of the third respondent's testimony the first respondent asked the former:

> "… you had a discussion with Peter where you actually disclosed that you are leaving and (inaudible) discuss the context under which (inaudible) disclosure was made. Remember you said that to him and then he moved onto other questions, so you were not able to expand on that. That is what I mean by clarifying."

[21] In response, the third respondent stated:

> "… I dispute it totally. …We had a discussion about work that he was unhappy about the environment, we were both unhappy that we were running our butts off and doing installations that we didn't sign up for and it became almost a daily operation …I think I used (inaudible) I am gatvol of doing this, I did not sign up for this. He then raised the question and he said but why are you leave. I never said to him or any of the staff that I was leaving … I said I was unhappy about issues but I never ever said that I was resigning …"

Did the first respondent exceed his authority during re-examination

[22] The broad principal applicable is that commissioners should exercise caution when they intervene in the proceedings over which they preside.[1] Presiding officers have the common law power to clarify aspects of the evidence and to establish the truth. In this sense, the presiding officer is more than referee whose duty is to see to it that the rules of the game are observed by the parties. The presiding officer is an administrator of justice and must see to it that justice is done [2] Moreover, a commissioner conducting arbitration proceedings is, strictly speaking, not obliged to follow the rules of procedure applicable to courts. Section 138(1) of the LRA provides that the commissioner must:

[1] *Innovation Maven (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 465 (LC) at [6]

[2] *Leboho v Commission for CCMA and Others* (JR689/2004) [2005] ZALC 65 (14 April 2005) at [5] ("the *Leboho* case")

> "determine the disputes fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities"

[23] Hence, the LRA gives an arbitrator a wide discretion on how to conduct proceedings; as long as the procedure followed is fair and does not result in prejudice to any of the parties involved.[3]

[24] In the current matter it is clear that the first respondent intervened to clarify the third respondent's earlier testimony in light of the fact that he was unrepresented and the testimony was somewhat unclear. He did not exceed his authority in so doing.

The evidence - resignation

[25] The applicant's version was that the third respondent had communicated his resignation orally to Ms Ellis on 8 December 2015. He thereafter walked into the kitchen, during lunch time, and announced to the workers congregated there, that he had in fact decided to leave the applicant's employ. Three of the workers who witnessed this were Mr Ricks, Mr Mabusa and Ms Monica.

[26] The third respondent had again, on 11 December 2015, told Mr Ricks that he was leaving the applicant's employ. The third respondent conceded that he had such a conversation with Mr Ricks; but clarified that Mr Ricks was a co-worker and the discussion was within the context of their mutual frustration relating to their operations.

[27] Someone found the third respondent's letter of resignation in his office after he had left on 23 December 2015. The actual date when the letter was found by the applicant is unknown; but it was before 11 January 2016, when the applicant had returned to work after the festive season.

[28] The third respondent did not dispute that he had drafted the letter of resignation on 8 December 2015. He disputed that he had orally communicated his resignation to Ms Ellis on 8 December 2015 and placed the letter of resignation on his desk under a stapler. He also disputed that he had

[3] The *Leboho* case at [8]

announced, in the kitchen, that he was leaving the applicant's employ. He further disputed that he had told Mr Ricks on 11 December 2015 that he was leaving the company.

[29] The third respondent averred that he had drafted the letter of resignation in the evening of 8 December 2015. On 9 December 2015 he signed the letter of resignation, placed it in a sealed envelope, addressed it to Ms Caron; but had a change of heart. He decided not to bring it to the notice of the applicant. Instead, he placed it in his top desk-drawer, in his office. The letter of resignation remained in this drawer, while the third respondent continued his duties as an employee; until 23 December 2015, when he took the letter of resignation out of the top drawer and concealed it under some papers, in the second drawer of the desk. The third respondent was on leave from 24 December 2015 until 10 January 2016. However, when he visited his office on 7 January 2016 to collect some tools, he observed that Mr Trevor was working at his (third respondent's) desk. When he returned to his office on 11 January 2016 Ms Ellis told him: "I have your resignation and I accept it".

[30] The applicant's representative had vigorously put the applicant's version to the third respondent during cross examination. The third respondent, in turn, vigorously disputed the version saying that it was a fabrication. The applicant's representative persistently stated, during the cross examination, that several witnesses would be called, including Ms Ellis, Mr Ricks, Mr Mabusa and Ms Monica; to attest to the version that the third respondent had indeed orally communicated his resignation to Ms Ellis on 8 December 2015 and had subsequently announced this in the kitchen at lunch time. The applicant, however, did not call any witnesses. Instead it closed its case immediately after the third respondent had testified. The only testimony that the first respondent had before him was that of the third respondent.

The review test

[31] Section 138 of the LRA provides that the Commissioner must expeditiously determine whether a disputed dismissal is fair. The Constitutional Court

("CC"), in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[4] ("the *Sidumo* case"), stated:

> "There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that a commissioner is to determine the dismissal dispute as an impartial adjudicator."

[32] A party aggrieved by a commissioner's award, issued in terms of section 138 of the LRA, may do so under very limited grounds in terms of section 145 of the LRA. The CC rejected, in the *Sidumo* case, the "justifiability of an arbitration award in relation to reasons given for it as a ground of review of CCMA awards"[5].

[33] The court reasoned that such awards may be reviewed, in terms of section 145, on the ground of unreasonableness. The test is whether the commissioner's decision is one that a reasonable decision maker could not have reached. If it is, then such decision is reasonable. If it is not, then such a decision is unreasonable and stand to be set aside on review on that ground. In applying this test parties are assured of their constitutional right to fair labour practices and their right to lawful, reasonable and procedurally fair administrative action.[6]

Resignation – legal principles

[34] Van Niekerk J correctly held, in *Sihlali v South African Broadcasting Corporation Ltd*[7] ("the *SABC* case"), that a resignation is a unilateral act by an employee to terminate his/her contract of employment. The learned judge pointed out that an employee, in so resigning, must demonstrate:



[4] 2008 (2) BCLR 158 at [61]

[5] *Maepe v Commission for Conciliation, Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC) at [40] ("the *Maepe* case")

[6] The *Maepe* case at [40]

[7] [2010] 5 BLLR 542 (LC) at [11]

> "… a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention."[8]

[35] Once the employee delivers the resignation to the employer it cannot be withdrawn. The employer may consent to such a withdrawal. In the absence of such consent, it is a final and unilateral act by the employee.[9] Van Niekerk J stressed that:

> "… it is not necessary for an employer to accept a resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T)). If a resignation to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour."[10]

[36] However, an employee need not communicate his/her resignation to the employer for it to be effective.[11] As Van Niekerk J pointed out, a resignation may be:

> "… established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention."[12]



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[8] See also *Council for Scientific & Industrial Research (CSIR) v Fijen* (1996) 17 *ILJ* 18 (AD), and *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LAC) – as referred to by Van Niekerk J in the *SABC* case at [11]

[9] See the *SABC* case at [11]; *Rustenburg Town Council v Minister of Labour & others* 1942 TPD 220; *Potgietersrus Hospital Board v Simons* 1943 TPD 269*, Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC) and *African National Congress v Municipal Manager, George & others* (550/08) [2009] ZASCA 139 (17 November 2009) at [11]

[10] The *SABC* case at [11]

[11] The *SABC* case at [12]

[12] The *SABC* case at [13]

[37] The LAC held in *Fijen v Council for Scientific & Industrial Research*[13] that, for a resignation to be effective, an employee must:

> "… either by words or conduct, evidence a clear and unambiguous intention not to go on with his contract of employment. … (The employee must) act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract"

Resignation - application of the principles

[38] The issue in the current matter is whether the third respondent had orally resigned on 8 December 2015. The applicant asserted that he communicated this to Ms Ellis in a meeting. The third respondent disputed this. The applicant did not call Ms Ellis to rebut the third respondent's testimony in this regard.

[39] The applicant admitted that he had, on that very evening of 8 December 2015, written out the letter of resignation which stated that he will resign with effect from the end of December 2015. He was adamant, throughout the arbitration, that he had changed his mind and had not communicated this intention to the applicant by his subsequent conduct when he had announced this to the staff in the kitchen. The third respondent disputed this. The applicant did not call any of the staff members to attest to this allegation. The applicant also failed to call Mr Ricks to testify about his conversation with the third respondent on 11 December 2015.

[40] The third respondent's version was clear, unambiguous and in direct contrast to that of the applicant. All the applicant needed to do to prove its version was to call, as witnesses, the various people who had witnessed the applicant's conduct evincing his resignation. It failed to do so. This left the first respondent with just the third respondent's testimony. It also left open, the risk, that the first respondent would draw a negative inference on the conspicuous absence of the various witnesses implicated in the applicant's version. If the third respondent had indeed told Ms Ellis of his resignation on 8 December 2015, it begs the question: why did Ms Ellis or some other person

[13] (1994) 15 ILJ 759 (LAC) at [772C-D]

in authority, not confirm the resignation in writing to the third respondent? Moreover, why did Ms Ellis tell the third respondent on 11 January 2016 that his resignation was accepted, if this was already done orally on 8 December 2015?

[41] In the light of evidence before the first respondent it is apparent that he had acted reasonably in making the finding that the applicant's termination, when he returned to work, amounted to a dismissal. The applicant had not provided any evidence to demonstrate that the dismissal was fair. His finding that the dismissal was unfair was a reasonable one. There was no challenge on the amount of the compensation awarded other than whether evidence was led about the third respondent's monthly salary. I have dealt with this issue above.

[42] In light of the above analyses, I am satisfied that the first respondent's award should stand.

The order

[43] The application is dismissed.

[44] No order is made as to costs

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Naidoo AJ

Acting Judge of the Labour Court

Appearances:

For the applicant: Mr E Ungerer

Instructed by: Klopper Jonker Inc