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

**CASE NO: JR 1078/14**

In the matter between:

**SONJA BAKKER** Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION** **First Respondent**

**MICHAEL BOYCE *N.O.*** **Second Respondent**

**ABSA BANK LIMITED** **Third Respondent**

**Heard:** **21 June 2017**

**Delivered:** **24 January 2018**

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**JUDGMENT**

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**WHITCHER, J:**

Introduction

[1] The Applicant referred a constructive dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on 24 January 2013 following her resignation with effect from 22 January 2013. She sought full retrospective

reinstatement. Commissioner M Boyce found that the Applicant was not constructively dismissed by Absa.[1]

[2] This is an opposed application, first to reinstate the review, which application has, according to the Practice Manual of the Labour Court, lapsed on account of the late filing of the record and subsequent papers and, if this is granted, to review and set aside Commissioner Boyce's award.

[3] On my evaluation, the Applicant has provided a detailed and reasonable explanation for delay. It is evident therefrom that the delay was occasioned by the delay in receiving the complete record from the CCMA and the disorderly fashion it was transcribed as a result of the piecemeal manner it was made available by the CCMA. Even though the delay may appear to be excessive, it was not brought about by inaction on the part of the Applicant or her attorneys. The matter thus falls to be determined on the merits of the review. The parties have essentially reiterated the submissions that they made to the Commissioner, this being a review which the Court must determine on the basis of correctness.[2]

The law on Constructive Dismissal

[4] Counsel provided a comprehensive overview of the law on constructive dismissal.

[5] Section 186(1)(e) of the LRA defines a constructive dismissal in the following terms:

> "(A)n employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

[6] In *Pretoria Society for the Care of the Retarded v Loots*[3] the LAC stated:

[1] Issued on 16 April 2014 under Case number GAJB5570-13

[2] *Solid Doors (Pty) Ltd v Theron NO and Others* (2004) 25 ILJ 2337 (LAC); *Conti Print CC v CCMA and Others* (2015) 36 ILJ 2245 (LAC)

[3] *(1997) 18 ILJ 981 (LAC) at 984E - F*

"Where an employee resigns or terminates the contract as a result of a constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely, to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that the fears were unfounded, then she has not been constructively dismissed and her conduct proves that she has in fact resigned."

[7] In *Strategic Liquor Services v Mvumbi NO & Others*[4] the Constitutional Court held that the test for constructive dismissal does not require that the employee should have no choice but to resign, but only that the employer should have made continued employment intolerable. There is thus a fundamental shift from the test from one in which the employee had no option to resign, to one in which no other option was reasonably available to an employee save for resignation. The shift is thus from a strict test to one that is slightly less strict.[5]

[8] The following was stated by the LAC in *National Health Laboratory Service v Yona and Others:*[6]

"In other words, a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee. Ms Yona terminated her employment relationship with the appellant, by resigning with a month's notice. She alleged that the resignation constituted a constructive dismissal in terms of section 186(1)(e) of the LRA. The appellant denied that Ms Yona was dismissed at all. Ms Yona bore the onus to prove her alleged constructive dismissal. The test for proving a constructive dismissal is an objective one. The conduct of

[4] *(2009) 30 ILJ 1526 (CC) at para [4]*
[5] *Experian Regent Insurance Co Ltd v CCMA & Others (2013) 34 ILJ 410 (LC) at para [47]*
[6] *(2015) 36 ILJ 2259 (LAC) at para [30]*

the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances." (counsel's emphasis)

[9] Whether or not the employer intended to repudiate the employment contract is irrelevant.[7]

[10] Constructive dismissal is not inherently unfair. Once, it has been proven that a constructive dismissal has occurred, the onus shifts to the employer to prove that it did not act unfairly. A two - stage approach is thus envisaged.[8] The central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair.[9] A court will consider the circumstances with a view to establishing whether the employer's conduct was justified.[10] The focus will be on the substantive fairness of the dismissal as procedural fairness plays little or no role in most constructive dismissal cases.

[11] Counsel for Absa added the following law.

[12] "Intolerable" is not defined in the LRA, but it is a strong word which suggests a high threshold. In this regard, Grogan, in his *Workplace Law*[11] states:

> *"[T]he 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 …"*

[13] The Labour Court has held that if an employee is too impatient to wait the outcome of the employer's attempts to find a solution to the perceived

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[7] *Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at 985A - C*

[8] *Jordaan v CCMA & Others (2010) 31 ILJ 2331 (LAC) at 2335*

[9] *Jonker v Amalgamated Beverages Industries (1993) 14 ILJ 199 (IC) at 211*

[10] *Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC)*

[11] At 109

intolerable situation and resigns, then constructive dismissal is almost always out of the question.[12]

[14] Furthermore, the Court has held that an employee who resigns instead of taking an opportunity to defend herself in terms of a LRA process, such as a disciplinary enquiry or a performance counselling process cannot claim constructive dismissal.[13]

[15] The Constitutional Court in *Strategic Liquor Services v Mvumbi N.O & Others*,[14] held that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.[15]

[16] In *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (MIBC) and Others*,[16] Hulley AJ opined that the above statement in *Strategic Liquor Services* must be understood to mean the absence of reasonable alternatives. He said:[17]

> "It seems to me that this latter statement must be understood to exclude a 'reasonable' choice.[52] If it was intended to mean that an employee was not required to demonstrate that he or she had no 'reasonable' alternatives to resignation it would be in conflict with the language of the section. Quite apart from all the authorities on the question, the ordinary meaning of the word "intolerable" connotes the absence of a (reasonable) choice. I emphasise the meaning of the phrase intolerable and its various synonyms as set out above. If an employee has reasonable alternatives, it implies that the conduct of the employer is not unbearable or not beyond the limits of tolerance.
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> Thus, in *Albany Bakeries*, *supra*, Pillay AJA, with reference to the judgment of Conradie JA in *Old Mutual Group Schemes v Dreyer and Another*[53] held:
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> '[28] Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or

[12] *SmithKline Beechman (Pty) Ltd v CCMA & Others* (2000) 21 ILJ 98 (LC)
[13] *Hickman v Tsatsimpe N.O.* [2012] 5 BLLR 493 (LC)
[14] [2009] 9 BLLR 847 (CC)
[15] At para [4]
[16] [2013] JOL 30442 (LC)
[17] At paras 129 and 130

abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.

[29] ….

[30] In addition, even if an employee was dissatisfied with the manner in which he was dealt with in terms of the grievance procedure, he could have made use of the machinery of the Act. Schedule 7 item 2(1) (b) of the Act provides that an employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the provision of benefits to an employee. A person alleging an unfair labour practice relating to demotion may refer the matter to a council or if no council has jurisdiction to the CCMA for conciliation and arbitration. The first respondent did not make use of any of these procedures.'

If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s. 23 of the Constitution which requires that fairness be viewed from the perspective of both employer and employee."

Background facts

[17] The Applicant commenced her employment with Absa on 11 September 2000. She was employed as a Technical Manager: Specialised

Funding Solutions in Commercial Asset Finance (CAF). Pursuant to a reorganisation in 2011 her role was incorporated into that of Market Development Consultant within CAF. Her role profile read as follows:

> *"To assist all CAF staff to book non - vanilla/specialised finance business and to manage these transactions in the Specialised Funding Solutions (SFS) environment by using in - house systems. To assist clients with the management of the non - vanilla/specialised structures and ensure clients continued use of these products. To complete and control the financial reporting function for CAF: SFS (incl Tax) and ensuring accuracy and integrity of information provided to both internal and external clients."*

[18] The parties referred to this as the booking of clients on the Mentis system and crafting specialised financing solutions, as opposed to ordinary (vanilla) transactions (such as the financing of a vehicle) conducted by CAF marketers.

[19] It is Absa's policy to review its employees' performance twice a year. As such, employees are rated in the middle of the year and again at the end of the year against a Performance Development Plan (*"PD Contract"*) *agreed* upon between the relevant employee and his/her line manager.

[20] The Applicant started reporting to Buitenhuis during January 2011. At the heart of the constructive dismissal dispute was the setting of monthly targets by Buitenhuis in the Applicant's PD plans from July 2011.

[21] The Applicant resigned on 22 January 2013 and referred a constructive dismissal dispute to the CCMA on 24 January 2013, alleging in the pre-arbitration minute that Absa had made continued employment intolerable for the following reasons:

(i) During 2011 Absa unilaterally amended the Applicant's Performance Development Plan by introducing targets. The introduction of such targets was unreasonable and unfair due to the nature of the work she was employed for and/or performed at Absa;

(ii) The Applicant was unable to meet the targets as set out by Absa which resulted in her obtaining very poor ratings. The ratings obtained by her did not reflect her true performance as an employee;

(iii) The Applicant addressed the issue with the relevant structures at Absa and explained that she was unable to meet the targets for reasons beyond her control. Absa failed to address alternatively properly address the grievance in that regard.

(iv) During her grievance process, the Applicant requested reassignment or a separation package. Absa failed to assist her and made no alternatively no proper attempt to resolve the situation;

(v) Due to her C - ratings, the Applicant was also not allowed to apply for alternative positions in Absa as determined by its policy;

(vi) Buitenhuis adopted a hostile management style towards the Applicant and *inter alia* unreasonably refused her requests for leave.

The Applicant's testimony at the arbitration

[22] In July 2011, Buitenhuis unilaterally amended her PD plan by introducing monthly targets. Her performance was prior to reporting to Buitenhuis assessed only on the basis of multi – source feedback obtained from her colleagues. Financial achievements such as PBT (profit before tax) and NI (non- interest income) did appear on her self – assessments prior to reporting to Buitenhuis, but she was never assessed on such basis.

[23] The targets were arbitrary. She repeatedly asked Buitenuis how the targets were arrived at but received no sensible answer from him and history had showed there is no consistency in the performance of her department.

[24] Considering the nature of her job, the targets were not achievable and not within her control. In terms of her role profile she occupied a Middle Office position and was not involved in direct marketing. She only became involved when CAF marketers and business development officers (BDO's) referred to her clients who required specialised financing solutions. The formulation of

special funding solutions was very labour intensive and could take up to 18 to 24 months to finalise as opposed to ordinary vanilla transactions which, although voluminous, mostly involved mere data capturing and mostly took only 24 hours to finalise. She moreover worked on a pipe-line, meaning that some transactions which she had worked on for a long time may only reflect as income in the future.

[25] She never agreed to an assessment based on targets. When she repeatedly failed to submit a draft PD plan for the first half of 2012, she was issued with a written warning on 26 April 2012.

[26] She suggested alternative measurable, based on the annual growth sought by the bank, but Buitenhuis indicated that assessment based on targets was not negotiable. Buitenhuis' response stemmed from a lack of experience in specialised funding and an unaccommodating attitude. This attitude is demonstrated in an e - mail dated 17 September 2012 in which he stated:

> *"Job description and measurement of performance: Sonja can propose alternatives; either purely administrative or sales. Status Quo will remain if no proposal is received and agreed to."*

[27] The imposition of targets degraded her from an exceptional performer[18] to a poor performer and negatively affected her bonuses and career possibilities in Absa. She received a C –rating for the period January to June 2011, a B+ – Good Performance at the end of 2011 and awarded herself a C – rating for the period January to June 2012. She expected to receive a D – rating for the period July to December 2012.

[28] An employee with multiple C – ratings could encounter difficulties in applying for another position within Absa. A D - rating is the lowest form of rating. She would not have received any bonus and her chances of promotion would have slimmed into virtually non-existent. She would also be placed on compulsory coaching. Her employment could be terminated in the near future due to her

[18] In the past she had mostly received A – rating

not meeting expectation descriptors. Absa's Standards on Performance Development states:

> *"Any employee who receives two Does not meet expectations descriptor out of three (mid - year, year - end, mid - year OR year - end, mid - year, year - end) may be dismissed for a failure to maintain a satisfactory standard of performance after an enquiry is held to determine the reasons for the failure to maintain a satisfactory standard of performance."*

[29] She lodged a formal grievance during August 2012, wherein she recorded the following:

> *"In June 2011, my Pd was amended to incorporate targets that is unfair and does not represent what I have been employed to do. This is creating a situation where I cannot meet the targets set in my PD. I have been threatened, humiliated and consistently been victimised by management."*

[30] She suggested the following as a solution:

> *"I do not think I can continue working for such a management team."*

[31] She lodged a similar grievance during September 2012, wherein she requested a separation package or being allocated to another division within Absa as outcome.

[32] The panel found that she had provided insufficient evidence to justify the amendment of her PD ratings and indicated that a separation agreement can only be motivated by the Head of the department and *that an alternate position can be applied for in terms* of the normal recruitment process. In her view, the panel, like Buitenhus, had no experience in specialised funding solutions and thus failed to appreciate the nature of her job and grievance.

[33] After her last grievance hearing (in which she had asked to be transferred), Buitenhuis offered to transfer her to the office of Hendrik Slabbert but later told her that Absa's policies required her to apply for an alternative positon through the normal recruitment process. By that time, applications for vacant posts in Slabbert's department had closed.

[34] Buitenhuis' claim that the offer had not been unconditional is belied by two emails. In an e-mail dated 23 October 2012 the Applicant informed Sue Morar of Employee Relations that she has decided to accept the position with Slabbert. In an e-mail dated 24 October 2012 Morar stated the following in response:

> *"Please be advised that the position you were offered is not as a result of the grievance, but because of a business requirement."*

[35] Both emails were copied to Buitenhus and he never disagreed with the exchange between her and Morar.

[36] She did not look for other positions during that period because Absa's later turn - about on this aspect did nothing to inspire her confidence in senior management. Moreover, her applications would have been blocked by the system because of her C ratings.

[37] In December 2012, Baloyi, the Head of CAF offered to assist her in compiling a draft PD plan for 2013, but she did not revert to Baloyi. During cross - examination of Baloyi it became clear that the only assistance that would have been forthcoming was the formulation of targets, under circumstances where the introduction of targets was at the core of the problem. She can thus not be blamed for not taking up the invitation.

[38] Her target for 2013 was increased to R700 million per annum.[19] This was the straw that broke the camel's back. She was given a sales target of double that of a normal marketer who had direct access to clients. The target was also double the amount paid out during 2012.

[39] It thus became clear to her that no assistance would be forthcoming and that all her complaints fell on deaf ears. Moreover, she expected to receive a D – rating at the end of 2012, with all the adverse consequences that came with it (as explained earlier on). She was thus set up for failure.

[19] In a meeting on 31 January 2013 she said it had increased to R650M.

[40] The fact that she had to work under extreme pressure was exacerbated by the fact that Buitenhuis refused her leave over an extended period of time.

[41] She also landed up in hospital during *May/April 2011* due to exhaustion and stress.

[42] She was left with no reasonable alternative than to resign, which she eventually did with effect from 22 January 2013. The test confirmed in *Strategic Liquor Services* does not require her to show that she had no other alternative but to resign.

[43] The circumstances under which she had to perform her duties however became unbearable. She would have continued working for Absa had her work circumstances been changed. She liked her job and is the sole breadwinner with her parents living with her and depending on her for financial support. Her father is blind and her mother is in a wheelchair. She had no other job to walk into and remained unemployed for more than a year after her resignation.

[44] The following was stated in *Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & Others*[20]:

> "Where it appears from the circumstances of a particular case that an employee could or should reasonably have channelled the dispute or cause of unhappiness through the grievance channels available in the workplace one would generally expect an employee to do so. Where however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudiced against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in the circumstances."

[45] She no longer trusted Buitenhuis or Baloyi to address the situation. She had escalated her complaints to seniors in the persons of Govindasamy and Wessel Steffens, but also without success.

[20] *(2008) 29 ILJ 356 (LC) at para [12]*

[46] Following her notice of resignation on 22 January 2013, Wessels met with her on 23 January and asked if he could assist in any way. She did not take up this offer because he had only taken the time to talk to her and offer assistance after she had submitted her resignation.

[47] She contacted Absa after her resignation and met with Buitenhuis, Baloyi and HR on 31 January 2013. She requested the opportunity to be allowed to her notice period, alternatively be employed on a fixed term contract to train the person taking over her position. Her request was not incompatible with a constructive dismissal claim. She made the request because she did not want to be "black - listed" in the financial or banking sector for not working her notice period. The definition of constructive dismissal in section 186(1)(e) of the LRA also refers to termination *"with or without notice"*, which is a clear indication that the working of a notice period is not *per se* incompatible with constructive dismissal. She would not have reported to Buitenhuis had she been engaged as an independent contractor.

[48] Absa disputed each one of these allegations and its version was accepted by the Commissioner.

<u>The award</u>

[49] The Commissioner found that the Applicant had failed to establish that Absa had made continued employment intolerable for her. In particular the Commissioner found the following.

[50] With regards to the Applicant's PD plan, all that changed was the fact that she would no longer be assessed based on subjective criteria (multi-source comments from peers) but on more objective and measurable criteria (production targets). This was not peculiar to the Applicant but applied to all income generating employees in the CAF division.

[51] Insofar as the Applicant was called upon by Buitenhuis to promote the Mentis System, the limited change in functionality did not require the Applicant to undergo a metamorphisis.

[52] There was no reason why the Applicant could not reasonably have put up with the imposition of targets or negotiation of a target.

[53] It is clear that from the beginning the Applicant resented the imposition of a production target and was simply not prepared to cooperate and her attitude to her superior was condescending. Buitenhuis' actions were practical and reasonable.

[54] The fact that the Applicant was only required to submit a draft PD plan is indicative and supportive of Absa's version that the contents of the plan were not cast in stone and were subject to negotiation.

[55] Regarding the Applicant's allegation that there had been a selective imposition of a production target more than twice that of individual marketers, Absa had a good reason for this decision which included:

(i) The Applicant had the benefit of two assistants to generate income as opposed to a single CAF marketer.

(ii) She would receive the benefit of the CAF marketers' groundwork after she had made the effort of promoting the Mentis system to the CAF marketers.

(iii) She only became involved in large transactions exceeding R3million, whereas the CAF marketers attended to the "rats and mice" contracts of high volume but less value.

[56] The Applicant did not even attempt to resort to the measure of first resort, namely to comply.

[57] Absa took all reasonable steps to address the Applicant's cause of complaints despite the fact that there was no substance to the complaints.

[58] There was no evidence that Absa deliberately and unfairly placed pressure on the Applicant to resign. In fact, she was regarded as a valuable employee and Absa sought to retain her undoubted skills and abilities.

[59] The Applicant acted impulsively and precipitously in tendering her resignation.

[60] The Applicant contended that she found the situation to be so intolerable that she had no option but to resign, yet she was willing to return to Absa's employ – even on a fixed term contract.

[61] The fact that the Applicant secretly taped her discussions with management even after her resignation belies her explanation as to why she found it necessary to record the discussions in the first instance.

My findings

[62] On my evaluation Absa has demonstrated with reference to the record of evidence that there are no grounds to interfere with the findings of the Commissioner.

The implementation of a target system was not unfair

[63] As submitted by Absa's counsel, one has to distinguish between changes to work practices as opposed to changes to terms and conditions of employment and between dramatic or fundamental changes to terms and conditions of employment and changes which are not dramatic or fundamental. The reasons for this are that changes to work practices that do not constitute terms and conditions of employment fall within the discretion of management,[21] and employees are expected to accept non-fundamental changes which have a commercial rational.[22] Furthermore, it stands to reason that if actual agreement was in fact reached that would be the end of this point. It is also a trite principle of labour law that management has the prerogative to decide how to assess the performance of its employees, as long as the method of assessment is reasonable and rationally connected to the job of the employee.

[64] In setting targets as a way to measure the Applicant' performance, Absa did not subject the Applicant to any unfair changes. In this respect:

[21] *Apollo Tyres South Africa v NUMSA* [2012] 6 BLLR 544 (LC)
[22] *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others* (1995) 16 ILJ 349 (LAC); *Motor Industry Staff Association v Silverton Spray Painters & Panelbeaters* (LAC) Case No JA5/2011

(i) The Applicant conceded that she was responsible for generating income on the Mentis System and facilitating loans to clients. The bank earns its income by extending loans. In the bank, parties use the term "production" to refer to what the bank pays out to clients, i.e. the finance provided to clients.

(ii) Even before she started reporting to Buitenhuis, the Applicant herself appreciated that her job entailed financial achievements and thus listed financial achievements (profit before tax and non-interest income) in her self- assessments.

(iii) Baloyi testified that employees are evaluated on the "what" and the "how". Objective targets are the way of measuring the "what" and the multi-source feedback is the way to measure the "how". Baloyi testified that it was not permissible for the Applicant to have been measured solely on subjective criteria such as the multi-source feedback.

(iv) It was common cause that the Applicant was not measured solely on production. She was also measured on business management, risk and compliance and people management.

[65] The Commissioner correctly pointed out that if there was any change in the manner of assessing the Applicant's performance, all that changed was the fact that she would no longer be assessed based on subjective criteria (multi-source comments from peers) but on more objective and measurable criteria (production targets). The Applicant was thus not subjected to any changes which could be regarded as fundamental or unfair. The method of assessment did not apply solely to the Applicant, but to her entire team and all employees in CAF.

[66] The evidence indicates that the Applicant initially had no problems with a target system. When Buitenhuis first told her about it, she did not indicate that she had a problem with same. This is supported by the fact that she signed with no problem her June 2011 PD contract which included a target of R50million per month. The Applicant also stated in her November 2011 year-end review that "production targets for the year has been met and

exceeded…" At the end of 2011, she exceeded her target by 167% and received a 7.5% increase together with a performance bonus. It was only in 2012, after she received a subjectively poor rating (B+ and no A) that she began resisting an assessment based on targets. For 2012, Buitenhuis asked the Applicant on numerous occasions to submit a draft PD plan – basically her input on her PD plan and what she wanted to be measured on. She only submitted same after she was given a written warning for failing to follow an instruction.

[67] The probabilities favour Buitenhuis' version that he explained to the Applicant how the targets were arrived at. It is improbable that Buitenhis did not do so, considering, on the Applicant's own version, they discussed the matter on a number of occasions, and, at the arbitration both Buitenhuis and Baloyi tendered simple and similar explanations on how the targets were arrived at. In essence an attempt was made to project the size of the book by having regard to what had been achieved in the past, the markets and the growth figures determined by the group. Year on year one would expect improvement on the previous years.

[68] Absa's version that the targets were not set in stone and were open to negotiation with the employee is supported by a number of factors:

(i) The employees had to submit a draft PD plan and then engage with their line manager regarding same.

(ii) That Buitenhuis was prepared to negotiate is evidenced by the fact that following objections from the Applicant, he reduced the proposed 2012 targets from R55M to R50M.

(iii) In December 2012, the Head of CAF, Baloyi offered to assist the Applicant in *formulating* her 2013 PD contract (which offer the Applicant spurned). Baloyi testified that the meeting would have addressed the negotiation of monthly targets in light of any submissions made by the Applicant regarding special departmental circumstances.

The record of the meeting held on 31 January 2013 further illustrates that the targets were open to discussion and negotiation. In the meeting Baloyi asked the Applicant why she had resigned when Baloyi had offered to assist her with drafting a budget and PD plan with reference to, among other things, “role clarification” and “regional interaction”. The Applicant answered that her 2013 budget was already done by Buitenhuis and that the Mentis team would have to reach a production level of R650M (the applicant originally claimed in her evidence that it was increased to R700M). Buitenhuis, however, pointed out to her that the Mentis team (the Applicant’s team) had met and drafted the 2013 budget themselves. A meeting with him to discuss and finalise the Mentis budget had been set for 22 January 2013. The Applicant did not pitch for any of the meetings, and instead submitted her resignation on 22 January 2013.

[69] The Commissioner correctly found that, although the targets were open to discussion, the Applicant was simply not prepared to cooperate – that is sit down and negotiate her targets – because she resented the imposition of targets. The evidence was that she often did not respond to Buitenhuis’’s emails on the subject and when Buitenhuis asked her to come up with draft PD plans, and hence suggested targets, she did not respond.

[70] Buitenhuis explained why the Applicant’s targets were higher than the CAF marketers’ targets. The Applicant worked with a team – she had the benefit of two assistants to generate income as opposed to a single marketer – and her team only became involved in large transactions exceeding R3million.

[71] The Applicant conceded that the other members of her team signed their PD plans and had lodged no complaints about the targets that had been set for the team. Baloyi testified that since the Applicant’s departure, the annual targets set for the Mentis team were met and exceeded.

[72] Buitenhuis’s credentials demonstrated that, contrary to the Applicant’s claims, he was an experienced banker.

[73] Buitenhuis was aware that some transactions on the Mentis system may take long to conclude and only reflect as income in the future. He explained that is why the Applicant was not assessed on a monthly, but on a 6-month and

yearly basis. The focus was on the final assessment at the end of the year. Applicant was not expected to make R50m per month. He expected monthly fluctuations. The Applicant received a C – rating in July 2011, but a good rating (B +) at the end of 2011 *for the year 2011.* She exceeded the yearly target by 167% but explained that her department worked on a pipeline, meaning that some transactions which they had worked on for a long time may only reflect as income in the future.

[74] The Applicant agreed that Buitenhuis had discussed with her ways to achieve targets. He advised her to go out and actively market the capabilities of the Mentis System to CAF marketers, business development officers and other business divisions of the bank, through roadshows. He also advised her to review the time she spent on transactions. In his view, an experienced employee like the Applicant and one who worked smartly would not take 18 to 24 months to complete even complicated transactions and should be able to assess in a reasonable time period the viability of a client.

[75] There is no evidence to the effect that the Applicant seriously followed Buitenhuis' advice, and despite same, she was not able to meet her targets or a reasonable proportion thereof.

[76] Buitenhuis indicated that if the Applicant had shown that she had followed his advice, he would have taken that into account in his ratings and the negotiation of targets.

[77] The Applicant's rating at the end of 2011 indicated that the targets were reasonably within reach. The Applicant got a C – rating in July 2011, but redeemed this with a good rating (B +) at the end of 2011 *for the year 2011.* At the end of 2011, the Applicant exceeded the yearly target by 167%.

<u>Absa dealt reasonably with the Applicant's grievance</u>

[78] The Commissioner correctly found that Absa took all reasonable steps to address the Applicant's cause of complaint, despite the fact that there was no substance to the complaint.

[79] In this respect Absa appointed a panel, which included an accredited decision-maker at Absa with more than 10 years' experience in the bank, to entertain the Applicant's grievance, and in light of my findings above, it is not correct that the panel failed to appreciate her grievance.

[80] Furthermore, the Applicant spurned an offer of assistance made by Baloyi in December 2012 to assist her in formulating her 2013 PD contract. Baloyi testified that the meeting would have addressed the negotiation of monthly targets in light of any submissions made by the Applicant regarding special departmental circumstances. Baloyi further testified that she was shocked when the Applicant submitted her resignation in light of the fact that she had offered to assist the Applicant in negotiating her targets.

[81] Although it makes no difference to my ultimate finding, I find for the sake of completeness that I reject Absa's submission that if the Applicant was dissatisfied with the outcome of the grievance hearing, she ought to have launched an unfair labour practice dispute in the CCMA before resorting to a constructive dismissal dispute. The Applicant's grievance did not concern unfair conduct relating to a promotion, demotion or provision of benefits and there is no requirement in law that a dispute should first be referred to an external body such as the CCMA before a claim for constructive dismissal can succeed.

<u>No unfair disciplinary action</u>

[82] The disciplinary action taken against the Applicant was not unfair. It is common cause that at the beginning of 2012, Buitenhuis requested all of the members of his team to provide him with draft PD plans, and that despite numerous requests from Buitenhus in this regard, the Applicant failed to deliver her PD plan. She only delivered it after she received written warning.

[83] As indicted above, the plan was open to negotiation and discussion so there was no good reason to refuse to deliver one.

[84] The written warning also related to a charge that the Applicant failed to properly capture leave. The evidence demonstrated that the finding of the panel in this regard was consistent with the bank's leave policy.

No unfair refusal of leave

[85] Absa demonstrated that at all material times Buitenhuis had acted in terms of Absa's leave policy and on a number of occasions had accommodated the Applicant's leave requests despite her giving him short notice. Buitenhuis explained in one instance Absa had given an undertaking to a client that they will have the client's facility up and running by a particular date. He told the Applicant, who had given him short notice, that she must get the facility in place and after that she can take leave.

Position with Slabbert

[86] The Applicant alleged that after her last grievance in which she requested an alternative position, Buitenhuis offered her a position with Slabbert but later told her (in a meeting on 22 November 2012) that she had to follow the standard recruitment process. By that time, the applications for vacant positons in Slabbert's department had closed.

[87] Buitenhuis testified that this was not an unconditional offer. It was subject to the approval of Baloyi. Baloyi testified that HR informed them that they were not permitted to create a position which did not exist and if the Applicant wanted to apply for a new position she had to follow the normal application process. This is in line with Absa's internal mobility policy. This policy specifically states that all positions should be formally applied for to be considered.

[88] The emails the Applicant referred to suggest that Buitenhuis did advance an unconditional offer to transfer the Applicant to Slabbert's department. However, he thereafter found out that Absa's recruitment policy did not permit such an offer.

[89] This finding, however, does not assist the Applicant.

[90] Buitenhuis could not be held to something he was not permitted to do and the application which had purportedly closed did not relate to the position Buitenhuis had offered her.

[91] Slabbert's team were also measured in terms of production targets. Thus, the primary factor which allegedly gave rise to the Applicant's constructive dismissal would not have vanished by virtue of her being deployed into Slabbert's team.

<u>Reasonable alternatives to resignation</u>

[92] In light of the Head of CAF's (Baloyi's) offer to assist the Applicant (discussed earlier on), it is not certain that the Applicant's situation, which she perceived as "intolerable", would have remained "intolerable".

[93] On the Applicant's own version, she wanted an alternative positon within Absa. Baloyi testified that Absa is a huge organisation and internally advertises vacancies on its intranet. The record of the November 2012 meeting reflects that the Applicant was advised that if she wished to apply for an alternative position, her management would s*upport her in the process.*

[94] The Applicant however responded that she intended to stay in her positon and refer a dispute to the CCMA.

[95] The Applicant stated that she did not apply for any other positons because she would have been blocked by the system because of her two C-ratings and she expected a D-rating at the end of December 2012. She, however, failed to substantiate this claim.

[96] The Applicant redeemed her first C – rating at the end of 2011 with a good rating for which she received an increase and bonus. Baloyi testified that there is no policy which provides that an employee could not be appointed to a position because of a C or D rating. Vlok testified that although poor ratings could impact on an individual's prospects of success, the system did not block an individual from applying for a post. In my view, it also stands to reason that an employee with many years of experience and positive support from her line

management could also impact on the employee's prospects of success. In this case, the Applicant's management categorically offered to provide this support, but she chose to spurn same and lodge a constructive dismissal dispute.

[97] There was no evidence that the Applicant's job was in jeopardy. The Applicant's fear in this respect was irrational. Even if she did not perform she would have had to be placed on performance counselling and sessions to improve in terms of Absa's policies. Baloyi testified that the Applicant was a valued and good employee and was requested to change her mind when she submitted her resignation.

[98] In all the circumstances above, resignation was manifestly unreasonable.

<u>Order</u>

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

1. The review application is dismissed with no order as to costs.

**Benita Whitcher**

Judge of the Labour Court of South Africa

APPEARANCES:

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|---|---|
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