

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JR57/01

In the matter between:

First Applicant

Second Applicant

and

First Respondent

Second Respondent

THE COMMISSION FOR CONCILIATION,
Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the second respondent (“the commissioner”) on 23 November 2000, acting under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) under case number GA80874.
2. This was after the commissioner had found that the second applicant was not constructively dismissed.

1. 3. The first respondent is opposing the review application.

The second applicant's version

4. The second applicant was employed by the first respondent as a Duty Controller.
On 26 October 1999 the second applicant's manager, a Mr Coetzee, informed her that a Mr Untemachier ("the CEO") of the first respondent wished to meet with them the following day, as he wanted her to resign.
5. The meeting took place on 27 October 1999 with the CEO at around 14h00. The CEO spoke to her harshly indicating that he had received several complaints about her from the clients of the first respondent. The CEO told her that he had received her verbal resignation from Coetzee already. The second applicant told him that she did not wish to resign. The CEO presented her with a letter of agreement of termination. The termination agreement made provision for payment of a salary for a further six-week. However, the second applicant had to leave the premises immediately. The CEO began forcing her to sign the letter. The second applicant insisted that she first wanted to consult with her husband. After much haggling and forcing on the part of the CEO he agreed to grant the second applicant until 16h30 to come back with an answer.
6. The second applicant then consulted with her union representative who advised her to accept the offer should the first respondent agree to pay her until the end of

her fixed term contract which was 1 February 2000. The second applicant returned to the CEO's office at 16h30 where she presented her proposal of payment on termination. The CEO acted arrogantly and refused her counter offer. He told her that she should take the money he was offering or else he would ensure that her life at the first respondent would be unbearable to the point that she would have to resign sooner than at the end of her contract.

7. The second applicant was pregnant at that stage and felt pressurised. Her union representative, in the context of her pregnant condition, then advised her that she should sign the agreement of termination. She then went back to the CEO at 18h00 and signed the agreement of termination.
8. The second applicant testified that up to the meeting of 27 October 1999 her employment with the first respondent was very pleasant. The relationship with her supervisors and other staff was normal. On her previous interaction with the CEO, he had behaved normally. She could therefore not understand his behaviour on the day in question.
9. The second applicant testified that she had no intention to resign prior to or on the day of the termination. The pressure exerted by the CEO on that day forced her to resign. He had placed her in such an intolerable situation that she had no option but to resign. She signed the agreement out of her own accord because she feared

the threats made by the CEO. Had she wanted to resign, she would have done so in the normal procedure. The CEO had told her not to approach human resources in this matter.

1. 10. The second applicant considers her dismissal to be unfair as its effects are that of a constructive dismissal and is seeking compensation.
11. The second applicant's version was corroborated by Coetzee in material respects. He said that whilst the second applicant was away on sick leave, approximately a month before the meeting in question, she had indicated to him that she was going to come in and resign. He had disclosed this to the management meeting at the time. Since then, the CEO constantly asked him for her resignation. The CEO indicated to him that in Switzerland it was normal for a person to resign by stating it verbally. He told the CEO that in South Africa it was different.

The respondent's version

12. The CEO testified that he met with the second applicant and Coetzee on 27 October 1999. He raised the issue of her performance due to having received personal complaints from clients. He tackled the issue with her at the meeting. The clients were extremely important to the company's business. The complaints were treated with seriousness. He said that the names of the clients were not disclosed to avoid personal grudges.

13. The CEO testified that Coetzee had told him that the second applicant had verbally resigned about a month before the meeting. As he was not sure to whether this was sufficient he wanted the second applicant to sign a written termination agreement. He had prepared the letter to confirm the resignation already given. He was persuading her to sign for the same reason. As the second applicant's position was critical, he needed to finalise her resignation immediately. He believed that since the second applicant had decided to resign she had mentally not been involved with the business. This was of major concern to him as the position was critical.
14. The CEO denied that he had threatened the second applicant or had spoken to her in an arrogant and forceful manner. When she came back with a counter offer at the 16h30 meeting, he told her that the contract would then continue as normal till 1 February 2000. He was surprised when she came back at 18h00 to sign the agreement, as he was under the assumption that the matter was finalised. He denied having threatened her not to take the matter to human resources.
15. The CEO testified that beside the day in question, he had met the second applicant only once before. He had taken up the complaints against her with Coetzee. However, Coetzee had failed to do anything about it. He had told Coetzee the day before the meeting that he wished to meet with her to finalise her verbal resignation.

16. The CEO testified that the meeting was centred into confirming her verbal resignation. The resignation, albeit verbal was a “done deal.” He had prepared the letter to confirm the resignation. As she had no resignation letter prepared he had prepared one and wished it to be done in the form of an agreement. Also he did not ask her whether she wished to resign since he considered it to be a done deal. When she rejected his offer, he agreed that the contract would continue. Her failure to sign the agreement and then return with a counter offer showed that she was comfortable with the idea of resignation. He said that he did not contact human resources in this instance, since he was sure that she had resigned and that all that was needed to be done was to confirm it in writing. Since a month had passed since her oral resignation, he wanted to expedite the process. Payments are usually made to staff resigning, to ensure that there is no delay in replacing staff. The sum of money is usually negotiated. He became involved due to Coetzee, who is now an ex-employee of the first respondent failing to take action. Coetzee was confronted with this and it is part of the reason that he is no longer with the first respondent.

The referral

17. The second applicant thereafter referred an alleged unfair dispute under section 186(e) of the Labour Relations Act 66 of 1995 (“the Act”) to the CCMA. The dispute could not be resolved at conciliation and the matter was referred for

arbitration. The arbitration proceedings were conducted on 16 October and 9 November 2000. The commissioner was required to determine whether the dismissal amounted to a constructive dismissal and if so to make an appropriate award.

18. The second applicant's claim was dismissed. The commissioner found that the second applicant had failed to prove that the first respondent's actions amounted to a constructive dismissal in that the first respondent did not cause such an intolerable situation leaving the second applicant with any option but to resign.
19. It is against this finding that the second applicant has brought her review application.

The commissioner's award

20. The commissioner found that for a constructive dismissal to exist the employer must have created a situation so intolerable that the employee had no option but to resign. The employer's actions must be viewed as a whole and then it must be determined whether the effect of the employer's actions, judged reasonably and sensible, creates a situation that the employee cannot be expected to put up with it.
21. The commissioner found that it was clear from the evidence that the aim of the CEO on that day was to get the second applicant to sign the agreement of

termination. The CEO at no stage denied that he was pressurising the second applicant to sign the resignation agreement. He argued that he was justified to do so since she had already resigned orally. The CEO could not corroborate this point. The commissioner also found that it was undisputed that he had the termination agreement prepared before he met with her. He found that the CEO acting on behalf of the employer was forcing the second applicant to resign.

22. The commissioner found however that this was not sufficient to find the first respondent guilty of constructive dismissal. He dismissed the second applicant's claim on the basis that she had failed to prove that the first respondent's actions caused such an intolerable situation that she had no option but to resign.

The grounds of review

23. The applicants contend that the award is not legally justifiable and is reviewable in terms of section 145 of the Act.

The legal position

24. Under the Act, constructive dismissal is governed by section 186(e). Section 186(e) makes provision for a situation where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

25. The leading case that deals with constructive dismissal is that of *Jooste vs Transnet t/a South African Airways* [1995] 5 BLLR 1 (LAC). In *Pretoria Society for the Care of the Retarded vs Loots* 1997 (18) ILJ 981 (LAC) the test was formulated at 985 A - C as follows:

1. “The enquiry is 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 trust between the employer and the 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 ... its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.”

and at 984 E - F:

“When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become 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 unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

26. It is trite that arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in section 145 of the Act more especially where the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it was not rationally related to the purpose for which the power was given from an objective view or if it was not justifiable as to the reasons given. Such a conclusion must be justifiable as to the reasons given in the sense that the material reasons given must lead logically to his order.
27. The following was said in *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC) at paragraphs 32 - 34:
1. *“In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the ‘merits’ of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.”*
28. A commissioner must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that the material reasons given must be lead logically to

his order. In this regard see *Milady's (A Division of Mr Price Group Ltd) v Naidoo & others*(2002) 23 ILJ 1234 (LAC).

Analysis of the facts and arguments raised

29. The second applicant bears the onus to prove that she terminated her contract of employment with or without notice because the first respondent made continued employment intolerable for her. The onus must be discharged on a balance of probabilities by leading credible evidence.
30. The second applicant testified at the hearing of the matter about the circumstances of her resignation. She was supported by her manager, Coetzee. Prior to the meeting that took place, there was no problem with the second applicant's performance and she had a good relationship with everybody. The parties met on 27 October 1999 at approximately 14h00. The second applicant testified that after she had sat down, the CEO told her that he wanted them to be open with each other. He told her that when she started working for them he had great expectations from her but because of her big mouth, he had received many complaints from various airlines about her attitude, her performance and her dress code. The second applicant told him that due to being pregnant she did not wear a uniform. The CEO refused to give her more information about the alleged complaints that he had received regarding her behaviour. The CEO wanted her to sign a written resignation but she insisted that she needed to consult with her

husband and legal advisor. The CEO challenged her by asking her if she could not take any decision by herself.

31. The second applicant was given until 16h30 to make up her mind. She consulted with her union official who advised her that because she was on a fixed term contract which was going to expire on 1 February 2000 she should inform the CEO that if she was paid for the unexpired portion of the fixed term contract she would resign. She went back to the CEO who asked her if she had decided. She told him that she wanted to be paid out for the duration of her contract and then she would resign. He laughed at her and told her that she was a joke. He asked her if she thought that he was stupid to lose a lot of money. He told her that he would contact his lawyers and she hers and that it would be a lengthy process. He then told her that he was going to be hard on her, he would make her life hell for her and that he would be watching her every day and would get reports on her every hour. He would check on her doctor. He knew that she would not work for a full contract till January 2000 because of her health.
32. The second applicant testified that she left to call her union representative. She was angry and hurt. She was advised that as she was angry, upset and pregnant, and because of the fear that any emotional stress would cause damage to her pregnancy that she should resign. She did so. The second applicant during cross examination said when she was presented with her letter of resignation by the

CEO, she understood what was in the letter. She signed it but not because she agreed or whatever but that she wanted out. She was threatened and she was told what would happen if she did but not resign. She was not prepared to put herself or her baby at risk and to be humiliated more and even to look at the CEO again.

33. When the CEO testified, although he denied that he was being arrogant, he did not deny that he had uttered the words that the second applicant said he did. He was asked this on two occasions and he said that he did not have any comments. He avoided saying that the second applicant has fabricated the allegations that he had threatened her in the manner she had testified to.
34. The commissioner found that the aim of the CEO on that day was to get the second applicant to sign the agreement of termination. The CEO at no stage denied that he was pressuring the second applicant to sign the resignation agreement. The commissioner found that the CEO could not corroborate the fact that the second applicant had tendered her resignation orally on an earlier occasion. He did not dispute that he had prepared the termination agreement.
35. The commissioner however then went to hold despite these findings that the second applicant was not constructively dismissed. He found that although at the first meeting the CEO was forcing her to sign the agreement, the pressure was alleviated by the fact that he gave her until 16h30 to come back to him. He found

that she probably resigned because of her union's advice and that she probably had other reasonable options including the lodging of the grievance against the CEO.

36. I am of the view that in coming to his decision, the commissioner ignored the issues pertaining to performance and pregnancy of the second applicant as he said that they were not directly linked to the issue in dispute. The commissioner ignored the fact that the CEO had made unsubstantiated allegations against the second applicant regarding her performance which was not supported by the manager and her motivation for resigning namely that she feared that if she were to stay and that the CEO was to carry out his threats of regularly checking on her including her doctors and making her life hell, it would affect her pregnancy.
37. The commissioner's decision more particularly to ignore these factors and the circumstances is not rationally justifiable. The fact of the matter is that the CEO threatened the second applicant. He demeaned her by calling her a joke, accused her unjustifiably of poor performance and made no bones about the fact that if she did not resign he would make her life hell. The CEO did not challenge that he said this and indeed no evidence was led that his threat was not serious. The second applicant was in the circumstances justified in believing that the threats of the CEO were serious. This was the only reasonable inference in the circumstances to draw.

38. The second applicant had no alternative but to resign having regard to the unequivocal threats of the CEO. No evidence was led about a possible grievance procedure that could have been lodged by the second applicant against the CEO and nor was evidence led by the CEO that his threats were not serious. It was clear from the evidence that was led that the CEO wanted the second applicant out.
39. The second applicant had given clear evidence that she was forced to sign the letter as is evident from the commissioner's own findings and of abuse, rudeness and conduct of an overbearing nature. The CEO's conduct was unjustified and improper. He told the second applicant in unequivocal terms what he would do if she did not resign. She was faced with a stark choice: either resign or stay in employment and face the threats of her CEO. In her situation and the fact that she previously had been recommended by her doctor to take light duties for fear of a miscarriage, she had no other reasonable option but to resign. Any reasonable person would have resigned in the face of the threats of the CEO and the CEO's conduct could not justify it.
40. The CEO's conduct demonstrates that the first respondent had embarked on a course of action calculated to render the employment relationship intolerable. If one examines the CEO's conduct as a whole, it cannot be said that it was conduct

which the second applicant could be expected to tolerate.

41. The commissioner's award is therefore irrational. The commissioner ignored material evidence, namely of the second applicant's pregnancy and furthermore ignored the direct evidence of the second applicant which was unchallenged that the threats of the CEO were serious. The commissioner had also ignored the objective state of affairs. Had he applied his mind to the objective unfairness of the first respondent's conduct, he would have found that the second applicant had no alternative but to resign.
42. The commissioner's finding that there was no constructive dismissal is not rationally justifiable in relation to the reasons given for it. His award was so flawed that I am left with no alternative but to conclude that there was no fair trial of the issues. The award must be reviewed and set aside.
43. Section 145(3)(a) empowers this Court when it sets aside an award to 'determine the dispute in the manner it considers appropriate'. This is an appropriate case to deal with the matter on review as all the facts are before me.
44. It is common cause that second applicant, if it is found that she was constructively dismissed, would be entitled to six weeks compensation which is for the balance of her fixed term contract. I agree.

45. There is no reason why costs should not follow the result.

46. In the circumstances I make the following order:

1. The commissioner's arbitration award dated 23 November 2000 made under case number GA 80874 is reviewed and set aside and substituted with the following:

"The second applicant was constructively dismissed.

The second applicant is awarded 6 weeks compensation".

2. The first respondent to pay the costs of the application.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

TS : F A BODA INSTRUCTED BY GEO ISSEROW & T L
FRIEDMAN INC

PONDENT : W HUTCHINSON INSTRUCTED BY FLUXMANS INC

: 13 NOVEMBER 2002

T : 12 DECEMBER 2002