

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No: JR 1963/01

In the matter between

IBM SOUTH AFRICA (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

1st Respondent

ELIAS H HLONGWANE NO

2nd Respondent

SERGIO CARLOS

3rd Respondent

JUDGMENT

TOKOTA AJ:

[1] In this matter the third respondent (Carlos) was employed by the applicant (employer) as a Senior Sales Specialist from 01 June 1999 and placed on commission plan from the beginning of the year 2000.

[2] On 30 October 2000 one Iqbal Hassim, an employee of the applicant who was in charge of the division where Carlos was working, wrote an e-mail to Carlos in which he expressed his concern about his (Carlos) claims for commission. He expressed himself as follows:

“Sergio,

I have a concern on the competitive winback claims you have submitted to the SIP office. In order for us to verify your claims can you please complete the following template for every customer situation where revenue is claimed against the competitive SSM template. The whole idea of the Competitive SSM template is to be actively involved in closing business (new and existing) in Competitive situations.”

[3] It is not in dispute that the two held several meetings in this regard. Suffice it to mention

two of those. One of them was on the 7th of November 2000 in Hassim's office. Another meeting was held in the presence of one Akhter Dukanda on 13 December 2000. Hassim's main concern about the payment of the commission to Carlos was that such commissions were not justifiable in relation to the comparative gains made by the division. This resulted in Carlos's commission for October/November 2000 being withheld pending investigation. Hassim then required certain information from Carlos before any further payment could be made. At the meeting of the 13 December 2000 the following transpired, inter alia, that:

- a) Carlos would furnish all the information on all accounts that have been paid to him and in particular in those that he has participated. He (Carlos) expressed his concern that giving this information would prejudice him.
- (b) Hassim furnished two reasons for requiring this information, namely, that:
 - i) He wanted to verify the validity of Carlos's claims.
 - ii) He wanted to see what the problem was with the sale plan in order to avoid it in future
- b) Carlos undertook to give the information on all accounts in which he actively participated within two weeks from that date.

[4] It is the applicant's contention that payment of the outstanding commission was to be effected upon Carlos furnishing the required information. It is Carlos's contention that he was under the impression that payment would be effected immediately after 13 December 2000 meeting. Barely two days after the meeting Carlos's Attorneys by a letter dated 15 December 2000 tendered resignation on behalf of Carlos stating, as a reason thereof, that the applicant's conduct has placed their client "in an invidious predicament and amount to a repudiation of our client's employment contract." It is expedient to mention, at this stage, that Carlos's Attorneys regarded the request of information from Carlos as being "nonsense". Carlos was owed only for payment of two months. Carlos did not furnish the required information as undertaken. His attorneys were informed of the investigation against him and possible disciplinary action depending on the outcome of investigation. According to employer the amount owed to him, as commission was R703.26 in respect of October month and no commission was earned during November and December 2000.

[5] It was the abovementioned resignation that culminated in the dispute of constructive dismissal. Carlos, contending that he had been constructively dismissed, referred the dispute to CCMA for conciliation and arbitration. The arbitrator found that "the reason that prompted the applicant to resign were (sic) unfair. A constructive dismissal has been established by the applicant." He then made the award in the following terms:

- " 1. Both parties are ordered to convene a meeting within 14 days of receiving this award in order to reconcile their calculations of the commission, the applicant claims R51 808.00 while the respondent alleges (sic) that the applicant is owed R703.26.
- 2. The respondent is ordered to pay the applicant an amount equal to R480 333.00 in respect of compensation within 14 days of receiving this award." It was this order that triggered this

review.

[6] The review application was brought late by almost one week. The degree of lateness is, in my view, negligible. Even if the explanation was not satisfactory this has been saved by the reasonable prospects of success and the interests of justice and fairness. In the circumstances I have decided to grant the application for condonation.

SEE: UITENHAGE TRANSITIONAL LOCAL COUNCIL 2004(1) SA 292 (SCA)

[7] It was not the case of Carlos that the employer was unreasonable in demanding the information, which he undertook to supply within two weeks, before payment of the said commission could be effected.

[8] The test for determining whether or not resignation prior to the termination of employment constitutes a constructive dismissal is objective. The question is whether the conduct of the employer has rendered the continued employment objectively intolerable. This involves a value judgment. The question is whether or not the employer's conduct is of such a nature that the employee cannot be reasonably expected to put up with it.

SEE: SMITHKLINE BEECHAM (PTY) LTD v. CCMA & OTHERS (2000) 21 ILJ 988 (LC).

PRETORIA SOCIETY FOR THE CARE OF THE RETARDED v. LOOTS (1997) 18 ILJ 981 (LAC).

[9] In my view the employee must show that, regard being had to the prevailing circumstances prior to the decision to resign being taken, the conduct of the employer involved a unilateral change of the conditions of employment and such changes were not commercially rational and therefore unfair. However, if there was proper consultation and a commercial rationale for the changes, the court will not interfere even though the result may be unfair.

SEE: W L OCHSE WEBB & PRETORIUS (PTY) LTD v. VERMEULEN [1997] 18 ILJ 361 [LAC].

[10] It was argued on behalf the third respondent that failure to pay remuneration by the employer to the employee constitutes a ground for constructive dismissal. The argument advanced was that after numerous attempts, including those of his attorneys to resolve the issue the only avenue which was open to the respondent, being the last resort, was to tender a resignation.

[11] I agree that failure to pay the salary of an employee, depending on the circumstances of each case, may constitute a ground for constructive dismissal, in any event this may be a breach of a contract of employment. However, resignation is not the only remedy open to the employee. It is open to the employee to declare a labour dispute and follow the normal

procedure through appropriate fora as prescribed by the Labour Relations Act 66 of 1995. He may sue the employer for damages on the grounds of breach of contract or even apply for a mandatory interdict.

[12] In casu Carlos could have lodged a grievance if he was unhappy about the instruction to supply the required information. It was open to him to show that the supply thereof would be prejudicial to him as he stated in the meeting and in what way he would be prejudiced. There is no evidence that the suspicions of undue claims by Hassim were not true and/or unfounded. He admitted in papers that he had undertaken to supply such information within two weeks. He could not explain, however, why he decided to renege on this agreement. He stated that the sole reason for the resignation was the failure to pay the commission.

[13] In my view the applicant was entitled to demand the information from Carlos and he was unreasonable to expect payment before such information was furnished as agreed. To the knowledge of Carlos this was the source of concern, which was subject of investigation. In other words the information required was directly linked to amounts of commission claimed. Consequently it is highly improbable that he would have expected immediate payment when the information was still outstanding.

[14] The finding by the arbitrator that the reason that prompted the resignation was unfair does not make sense, especially if regard is being had to the circumstances of this case. There was an agreement to supply the information at the meeting of the 13th December 2000. Carlos advanced no reason why he failed to do so. The reasoning of the arbitrator demonstrates clearly that he did not apply his mind to the facts placed before him. The third respondent was paid his normal basic monthly salary. It was not as if the situation was such that he could not tolerate the employment conditions. There was no change in the conditions as such. The investigations were necessary before any decision could be taken regarding the continuation of payments. If anything out of that decision became intolerable it was self-induced and the third respondent is not entitled to benefit therefrom.

[15] The arbitrator's award was made an order of this court. An application to rescind that order has not been finalized. The parties agreed that if this application were successful such order would be abandoned. This is a sensible solution.

[16] In the light of what I have stated above the award cannot stand and falls to be set aside. In the result I make the following order;

1. The CCMA award date 26 October 2001 in favour of the third respondent is hereby reviewed and set aside.
2. It is declared that the third respondent voluntarily resigned from the services of the applicant.

3. The third respondent is ordered to pay costs of this application.

TOKOTA A J

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING : 26 MARCH 2004

DATE OF JUDGMENT:

APPEARANCES: FOR THE APPLICANT : ATTORNEY MR TODD

FOR THE 3RD RESPONDENT: ADV.ESCAR