

166336IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

CASE NO: **C39/99**

In the matter between:

CAPWEST MOULDINGS & COMPONENTS CC

Applicant

And

JOHN ELY

First
Respondent

GERARD ROSSOUW

Second
Respondent

ISMAIL DAUDS

Third
Respondent

**COMMISSION FOR CONCILIATION, MEDIATION &
ARBITRATION**

Fourth
Respondent

JUDGMENT

STELZNER AJ

1. This matter came before me by way of an application for review of the decision of the third respondent, under the provisions of section 145 of the Labour Relations Act, No 66 of 1995 (“the Act”).

2. First and second respondents both left their employment with applicant during January 1998. They thereafter claimed that the termination of their employment amounted to a constructive dismissal and jointly declared a dispute with the applicant before the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) on 12 March 1998. The dispute was not resolved at conciliation and proceeded to arbitration before the third respondent over a protracted period of time between May and November 1998. Third respondent gave his award on 14 December 1998 and awarded both first and second respondent compensation equivalent to 5 months’ remuneration.
3. The present review proceedings were initiated by the applicant on 29 January 1999. Subsequent thereto, the applicant and first respondent settled their dispute. Second respondent has not filed any opposing papers and abides the decision of this court on review. Both third and fourth respondent have also indicated their intention to abide the decision of this court.
4. It was submitted by the applicant that the evidence before third respondent did not reasonably justify his finding that there was a constructive dismissal of second respondent and, further, that there was no evidence whatsoever to substantiate the quantum of the compensation awarded by the third respondent. It was

also alleged that the approach to the issue of quantum adopted by the third respondent was fatally flawed.

5. The approach to be followed by this court in determining the matter is that set out in the decision of the Labour Appeal Court in *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 ILJ 1425 (LAC) in particular at pages 1434-1435.
6. Where no opposing papers have been filed there can be no question of any factual dispute arising on the papers. The review therefore has to be decided on applicant's papers and the record of proceedings before the third respondent, which together form the record before me.
7. In dealing with the evidence before him it is clear that the third respondent was obliged to consider which of two conflicting versions he would prefer, namely the version put forward by the second respondent himself or that put forward by one Meyer, who was in essence the owner of the applicant business. It was submitted on behalf of the applicant that when finding that there was conduct on the part of Meyer which objectively justified second respondent's decision to cease employment, third respondent had to be satisfied that second respondent's version was to be preferred over Meyer's and had to provide cogent

reasons in his award for favouring such evidence. (See the *Carephone* decision at p1440, *Standard Bank of SA Ltd v CCMA & others* 1998 (19) ILJ 903 (LC) at 910 para 24 albeit where the court was considering a review in terms of s 158(1)(g) of the Act and *Federated Timbers (Pty) Ltd v Lallie NO & others* (1999) 20 ILJ 348 (LC) at 352 para 24 which quotes the reasoning in the *Standard Bank* case with approval).

8. Other than glossing over the facts with a remark that “*die totaliteit van die getuienis laat my met geen twyfel dat Mnr Meyer wel op sy werkers gevloek en 'n skrik bewind onder hulle gevoer het nie ...*” the arbitrator made no finding that there was any reason to prefer the evidence of second respondent over that of Meyer. In addition, he made no credibility finding against Meyer which would suggest a finding in favour of second respondent. Indeed, on one crucial aspect at least, the third respondent disbelieved second respondent’s evidence regarding the remuneration package offered to him by Meyer. Having accepted that second respondent’s evidence on this score was grossly overstated, it was submitted that it was difficult to understand how the third respondent could ever have regarded second respondent as a reliable witness on other aspects of the case, certainly without giving cogent reasons for doing so. On the face of it Meyer’s evidence was reasonable and no less

probable than that of second respondent. In the face of this and the rejection of second respondent's evidence on the remuneration package issue it is apparent that third respondent misconstrued the evidence before him to an extent that is inappropriate and unreasonable, as contemplated by the dicta in the *Standard Bank* and *Federated Timbers* cases referred to above.

9. Furthermore, there was no evidence before the third respondent to the effect that second respondent indicated that he was offended or aggrieved by the behaviour of Meyer or that he raised his dissatisfaction with Meyer in order that the matter might be addressed. Indeed, on the evidence, it appeared that second respondent's decision to abandon his job was ultimately prompted by Meyer's refusal to pay him an advance on his commission on the strength of an order allegedly secured by him. Second respondent did not rely on the alleged non-payment of salary as the basis for his alleged constructive dismissal but rather relied on the allegation that Meyer's conduct, language and attitude towards him and fellow employees had created an intolerable situation.
10. I was pointed to numerous other incorrect findings on the evidence made by the third respondent by Mr Gamble, who

appeared on behalf of the applicant. It appears from the record that the third respondent, indeed, made a number of incorrect findings on the evidence before him but it is not necessary for the purposes of this award for me to traverse the detail thereof.

11. As indicated above the first main ground of review was that the evidence before the third respondent did not reasonably justify his finding that second respondent had been constructively dismissed.

12. This court has endorsed the so-called two stage approach to dealing with a dispute involving an alleged constructive dismissal. The approach, with specific regard to the scheme of the 1995 Labour Relations Act, is set out in detail by Landman J in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 ILJ 1240 (LC) and in particular at 1250C-F

“In my opinion, having regard to the scheme of the new Act, the two-stage approach is to be followed.

First of all an employee who resigns or leaves her place of employment (or may be said to have deserted) must prove that this was not the case and that the employer dismissed her by making the continued employment intolerable. The onus on this leg is upon the employee. If this is established then the second

stage is arrived at. The second stage concerns an evaluation of whether or not the dismissal was unfair. This is certainly true of substance but clearly the provisions relating to procedure are not relevant.

The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is so is however a matter of fact and no general principle can or should be laid down."

13. In the *Sappi Kraft* case, further, the court found that the enquiry into the second stage commences when dismissal has been proved. At that stage the onus switches to the employer to show that the dismissal was fair for reasons related to the employee's conduct or capacity. On the facts of the *Sappi Kraft* case the court found no indication in the award that the commissioner had properly considered the relevant facts in regard to the second stage. The court was convinced that the commissioner did not apply his mind past the mere fact that constructive dismissal has been proven, in the sense of a

jurisdictional fact, that being a dismissal. It found that that aspect was conclusive as far as the commissioner was concerned, whereas it ought not to have been. He ought to have gone on to consider all the facts to determine whether or not the dismissal was unfair. His failure to do so rendered the award reviewable.

14. That is exactly what appears to have happened in the case before me. There is no indication whatsoever that the third respondent applied his mind to the second stage. He simply concluded on the evidence before him that second respondent had discharged the onus of showing a constructive dismissal in the sense that it was the conduct of Meyer which had caused him to terminate his employment with applicant.

15. In addition, and in any event, it appears doubtful that the evidence before third respondent was sufficient to justify the conclusion which he reached even at the first stage.

16. In the circumstances I am satisfied that on this leg the third respondent's award ought to be reviewed and set aside.

17. The second leg of applicant's case rested on the approach taken by the third respondent to the issue of compensation to be awarded. Having found the dismissal of second respondent to be

unfair the third respondent was bound to award compensation in accordance with the provisions of section 194 of the Act. In terms of section 194(1) read with section 194(2), the minimum amount of compensation payable was the remuneration which second respondent would have been paid from 1 February 1998 (being the date of the constructive dismissal) to 5 November 1998 (being the last day of the arbitration hearing), that is, just over 9 months' remuneration. The maximum amount payable was 12 months' remuneration. Third respondent does not find any unreasonable period of delay caused by the employee in initiating or prosecuting a claim (as envisaged by the provisions of section 194(1)). Indeed, having mentioned that one of the postponements was occasioned at the request of the employer party, third respondent simply states that given that the matter took so long to finalise and because in his view the employer party should not be penalised in this regard, he deems an appropriate compensation award to be the equivalent of five months' remuneration.

18. Furthermore, third respondent awards compensation to second respondent on the basis that he was remunerated at a rate of R6 000-00 per month when the evidence before him did not justify such a finding. Indeed, the finding in this regard accorded with neither the version of Meyer, on behalf of the

applicant, nor with the version put up by second respondent. Second respondent's evidence was that the parties had agreed upon a monthly salary package of R20 000-00 made up of R15 000-00 cash plus R5 000-00 fringe benefits, which evidence was rejected by third respondent. Meyer testified that he and second respondent agreed upon a monthly salary of R6 000-00 only up to and including December 1997, due to the fact that the factory was not yet in production at that stage. From 1 January 1998 the basis for remuneration would be strictly commission with a salary of R6 000-00 per month to be paid only provided that sales of R18 000-00 had been achieved. Thereafter there would be an additional 10% on nett profit above sales of R18 000-00. The evidence was, furthermore, that there were no sales during January 1998 and that second respondent was, accordingly, entitled to no remuneration for that month. What he might have earned in months thereafter had he remained employed is, in the circumstances, purely speculative.

19. It has been settled by the Labour Appeal Court in the matter of *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) that the only discretion under section 194(1) in regard to an award of compensation for procedural unfairness is not to award any compensation whatsoever. In the absence of exercising a discretion not to

award any compensation then the formula set out in section 194(1) must be applied. Section 194(2) gives the arbitrator a discretion in awarding compensation for substantive unfairness but states that the award must not be less than the amount specified in s 194(1), in this case 9 months' remuneration. Not only does third respondent misconstrue his powers in applying the provisions of section 194 but he also determines the monthly rate of remuneration on a basis unsupported by the evidence before him. Accordingly, I am satisfied that on the second leg as well the applicant has made out a case for review.

20. As in the *Sappi Kraft* case referred to above this appears to be the kind of case where it is appropriate to refer the matter back to the CCMA for arbitration *ab initio* before a commissioner other than the third respondent, where both stages of the two-stage approach to constructive dismissal can be applied and in order that, if relevant, the provisions of s 194 of the Act can be properly applied and can be applied in relation to the properly established facts.

21. There was no opposition from any of the respondents in regard to these proceedings and, accordingly, this is the sort of case where it would be appropriate for me to exercise my discretion against making any award of costs.

22. In the circumstances I make the following order:

22.1 The award made by the third respondent in the arbitration held under the auspices of the Commission for Conciliation, Mediation & Arbitration under case number WE9899 is reviewed and set aside.

22.2 The matter is referred back to the CCMA to conduct the arbitration *ab initio* before a commissioner other than the third respondent.

22.3 There is no order as to costs.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 20 August 1999

DATE OF JUDGMENT: 27 August 1999

APPEARANCE FOR Mr P Gamble
APPLICANT:

INSTRUCTED BY:

Cliffe Dekker Fuller Moore
Inc.

APPEARANCE
RESPONDENTS:

FOR

No appearance.