IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN JOHANNESBURG

JR2048/03

2004/10/29

Date of Judgment:

In the matter between

LIBERTY GROUP LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION 1st Respondent

COMMISSIONER M S RAFFEE 2nd Respondent

ITSENG EILEEN MOGOROSI 3rd Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MR JUSTICE NGCAMU

ADVOCATE P A BUIRSKI

THIRD RESPONDENT IN PERSON

TRANSCRIBER
SNELLER RECORDINGS (PTY) LTD - DURBAN

JUDGMENT

NGCAMU AJ

[1] This is a review application brought against the award issued by the second respondent. The application is being opposed by the third respondent.

[2] The third respondent, Ms Mogorosi, was employed by the applicant as Divisional Director, Brand Development. She commenced employment on 22 May 2000. On 29 October 2001 she referred a dispute of unfair constructive dismissal to the CCMA. She alleged the dispute arose about 14 September 2001. The conciliation could not resolve the dispute. The dispute was referred for arbitration, presided over by the second respondent. At the end of the arbitration the commissioner issued an award in terms of which he found that Mogorosi had been constructively dismissed by the applicant and awarded compensation amounting to R432 000.

[3] The review is based on several grounds, namely that:

(a) The commissioner committed a gross irregularity, or did not apply his mind to the relevant issues, or that he made no rational connection between the evidence before him and the conclusions he reached in finding that the third respondent resigned.

(b) The commissioner committed a gross irregularity by failing to find that the third respondent, if she resigned, resigned freely and voluntarily and therefore there was no dismissal in terms of section 186(e) of the Labour Relations Act.

(c) The commissioner committed a gross irregularity, or did not apply his mind in not making a factual finding on what caused the resignation of the applicant which was not voluntary or what caused the employee to be constructively

dismissed and failed to find the nexus between the perceived demotion and the resignation.

(d) The commissioner failed to make an adverse finding against the employee for failure to institute a grievance.

(e) The commissioner committed a gross irregularity by finding that the third respondent had good reason to believe that she was demoted.

(f) The commissioner committed a gross irregularity by awarding compensation in the sum of R432 000, a figure that is arbitrary.

[4] Before dealing with the merits of the review, I need to deal with the preliminary issues raised in this matter.

Third respondent's opposing affidavit

[5] On 20 September 2004 the third respondent filed a document purporting to be an opposing affidavit. This document was signed on 17 September 2004 and was served upon the applicant. This document is not under oath. When this was raised by counsel for the applicant, the third respondent's response was that there is no document which is not under oath. The document and annexures filed by the third respondent have a rubber stamp put on them by an official of the bank as an *ex officio* commissioner of oaths. There is, however, no indication that the affidavit was attested to. I say this because the rubber stamp appears on all the documents filed with the affidavit. There is no reason for placing the rubber stamp on those papers. I am satisfied that the opposing affidavit was not signed under oath. The third respondent, who appeared in person, never submitted that the affidavit was made under oath. I therefore reject the document as constituting a proper affidavit before the Court.

[6] Another unsigned and unattested affidavit appears at page 232 to page 238 of the court papers. This document is also rejected on the same basis.

Rule 11 application

[7] The third respondent filed an application to dismiss the review application. This application was filed with the Registrar on 11 February 2004, having been signed on the same date. The affidavit in support of this application has not been signed before a commissioner of oaths. Accordingly, it does not constitute a proper affidavit and it is not admitted. That disposes of the rule 11 application. I dismissed this application after hearing the submissions made by the parties during the hearing.

Late filing of documents

[8] A rule 7A(8)(a) affidavit was sent to the third respondent by registered mail on 2 July 2004. The unattested opposing affidavit was filed on 20 September 2004. Another document purporting to be an affidavit was filed on 7 October 2004. These documents, even if accepted as correct affidavits, were filed out of time. There is no application for condonation that has been filed so that they could be admitted. In the circumstances, these documents, besides not being properly before the Court, are not proper affidavits. In the circumstances they are not admitted as part of the proceedings. The third respondent addressed the Court and stated that these documents were late because she focused on the dismissal of the review.

[9] The applicant also filed the rule 7A(8) out of time. An application for condonation has been made. I was satisfied during the hearing with the reasons set out for the delay. I accordingly granted the application condoning the late filing of rule 7A(8).

Application to strike out

[10] The applicant submitted that some of the documents filed by the third respondent cannot be part of the review application and that new matters had been raised in the opposing affidavit. The third respondent submitted that there are no new facts. Counsel for the applicant requested that I reserve judgment in respect of the striking out until I have heard submissions. I accepted this.

[11] Having found that the documents filed by the third respondent are late and no application for condonation has been filed and that the affidavits are not under oath, there are therefore no documents filed by the third respondent to be considered. The reason for this is that these documents are not properly before the Court. In the circumstances I do not have to make any ruling on the application to strike out because there is nothing to strike out.

[12] I should add that because the third respondent has filed a notice to oppose I allowed her to address the Court. Her address to the Court focused on the position she was appointed to and the reporting structure. She pointed out that Mr Came, to whom she had to report, was on her level when she came to work for the respondent but not at the time when she left. She agreed to three months' pay to leave the company. After she had left, the bonus had not been included,

and that is where the dispute arose. The third respondent's address raised issues not on record.

The background of the review

[13] On 22 May 2000, the employee, Ms Mogorosi, was employed by the applicant as Divisional Director, Brand Development. The employment contract was concluded on 26 May 2000. The grievance procedures formed part of the employment contract. At the time the employee reported to Mike Jackson, the Head of the Financial Services Department.

[14] During March 2001, the relationship between the employee's superiors, colleagues and subordinates began to deteriorate. The employees in her division were not satisfied with her management style and reported to her superiors without informing her. Mr Jackson contacted the employee regarding this problem. A meeting was held with Jackson, the employee and two of her subordinates to discuss the problem. It was felt at that stage that the complaints were unfounded. The employee undertook to take this matter up and to resolve the problem with the staff. An agreement was reached that contemplated her exit should the problem not be resolved by the following month.

[15] Mr Jackson advised the employee that the rumours of the employees not being satisfied persisted. Mr Jackson took a decision to transfer the employee to Mr Gavin Came, who would then manage the employee's department. The employee was not satisfied with this and considered reporting to Mr Gavin Came as demotion. She told Mr Jackson that it was not acceptable to her because this was changing her job. She believed that Mr Gavin Came was her equal as he had previously occupied her position. This incident took place on 14 September 2001. Mr Jackson suggested she became a consultant without overall responsibility for brand development. In her response to Mr Jackson, she sent an e-mail and stated: "My request is to be given a chance to find the solutions to the problems with the team. To do this I need to fully grasp the issues and implement corrective action. Should I fail to resolve the issues as agreed, then we will discuss my exit from Liberty. The consultant option will pass it is not my competency. While I agree to this, it needs to be understood that the solution lies not with me only but in conjunction with the team. I can try till I am purple in the face but if there is no commitment from the team to resolve the issues there is nothing I can do."

[16] Mr Jackson also asked her how they could part ways as a result of her perceived demotion. The employee suggested that a fair settlement would be three months' pay. Mr Jackson accepted the proposal. A draft settlement agreement was written. The employee refused to sign it because the agreement did not include the incentive bonus. She then went back and had a discussion with Mr Jackson. There is a dispute as to whether Jackson agreed to have the bonus included. There is, however, no figure that was agreed for the incentive bonus. The subsequent agreement sent to the employee again did not have the incentive bonus. She did not sign the agreement.

[17] On 28 September 2001 the employee left the company before the agreement was signed. In her e-mail to Jackson dated 27 September 2001 she stated that she was not resigning nor terminating, but leaving in view of what she deemed to be a demotion as a result of the alteration of reporting structures, which translated into constructive dismissal. After the applicant had left, she filed a dispute with the CCMA.

The review application

[18] The resignation of the employee only gives rise to a cause of action if the employer makes the continued employment intolerable. Section 186(e) of the Labour Relations Act defines dismissal as meaning:

"An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

[19] The *onus* is on the employee to establish that there was a constructive dismissal. (See *Jooste v Transnet Ltd trading as SA Airways* (1995) 16 ILJ 629 (LAC) at 638A-639B.) The action of the employer must be such that, if judged reasonably and sensibly, the employee cannot be expected to put up with it. (See *Pretoria Society for the Care of the Retarded v Loots* (1997) 6 BLLR 671 (LAC).) The conduct of both parties should be looked at as a whole in order to come to the conclusion that the employee could not put up with the employer's actions. The test on whether there was constructive dismissal is objective. (*SmithKline Beecham (Pty) Ltd v CCMA and Others* (2000) 21 ILJ 988 (LC).)

[20] There are three requirements for constructive dismissal to be established,

namely:

(a) The employee must have terminated the contract of employment.

(b) The reason for the termination of the contract of employment must be that continued employment has become intolerable for the employee.

(c) It must be the employee's employer who had made continued employment intolerable.

All these requirements must be present. If one is absent, that is the end of the matter. (*Solid Doors (Pty) Ltd v CCMA and Others*, case No CA4/03, paragraph 28, an unreported judgment.)

[21] In the present case I am not satisfied that the first requirement has been met. When the employee had discussions with Mike Jackson, to whom she was reporting, she told Jackson to give her a chance to resolve the issues with her staff and that if she failed she would come and say she had failed. She would then resign. Her evidence appears at page 455 of the papers, lines 13 to 15, where she stated:

"That was just (unclear) of the discussion at the time but it wasn't I am going to resign or I am threatened to resign or anything like that."

When the employee was asked if she resigned, she responded that she did not resign and did not write a letter of resignation. The employee denied terminating the employment relationship. She denied having cancelled the contract of employment. When she was asked who cancelled the contract, she responded by saying that:

"I would say we both cancelled it."

[22] The first requirement for constructive dismissal is that the employee must have resigned. The commissioner found that the employee did not resign voluntarily. To come to such conclusion, the commissioner must have first found that the employee did resign. In the light of the denial by the employee that she resigned, there can be no finding that the resignation was not voluntary. The commissioner found the involuntariness in the resignation on the findings that Mr Mike Jackson explained to the employee that, as the rumour persisted, he did not want the employee to manage her division any longer.

[23] The commissioner misdirected himself on this and misconstrued the evidence of the employee. The evidence given by the employee at page 13 of the transcript is that:

"When I voiced my discontent about what was happening and my unbearableness of the situation basically was when he said to me 'Look, I don't want to manage your division any more and you are now going to report to Mr Gavin Came'."

The above is repeated at page 91 of the transcript where the employee stated that Mr Mike Jackson said:

"The rumours are persisting and I don't want to manage your division any more, you know, and I want you to become a consultant, a black market consultant."

It is factually incorrect that Mr Mike Jackson said he did not want the employee to manage her division.

[24] The employee wrote a letter confirming her last day at work to be 28 September 2001. She wanted a response by 2 October 2001. In her evidence she stated that she wrote the letter so that, if she simply left, it would not be

construed as absconding. At page 450 of the papers, lines 22 to 25, she testified that:

"I wrote this just to make sure that when I don't come to work the following day it is understood that it is based on that verbal agreement that I had with them, which is why I am saying if you don't respond you know then I will probably come in and continue working."

[25] The above excerpt from the evidence brings me to the second requirement of constructive dismissal. That is that the reason for the termination of the contract of employment must be that continued employment has become intolerable for the employee. Without going further, clearly the employee was willing to come back and work for she says if there was no response she would come back and continue working. That is not consistent with the behaviour of a person who finds continued employment intolerable. This demonstrates that the situation was not intolerable but the employee wanted to exit the company. If the employee intended to exit the company there can be no constructive dismissal.

[26] A further indication that she wanted to exit is that she negotiated the package which was agreed. This package amounted to three months' pay. Her evidence was that the dispute arose when the company refused to include the bonus in the package. I must indicate also that at the time when the package of three months was discussed with Mr Mike Jackson, there was no suggestion by the employee that the bonus should be included. The question of the bonus only arose at the time when she was presented with an agreement to sign. It's then that she thought that the bonus had to be included.

[27] However, the willingness of the employee to return if the employer did not confirm the date on which she had to leave, in my view, destroys the employee's case. Accordingly, she failed to satisfy the second requirement.

[28] The third requirement is that it must be the employer who made continued employment intolerable. To decide on this requirement, the Court has to look at the entire matter and, in particular, the behaviour of the parties. The commissioner found that eleven staff members were transferred without consultation with the employee. Mr du Toit was unable to comment on the transfer as he was not aware of it. He also found that staff members requested meetings with human resources without following the grievance procedures. The finding that this was the cause of resignation is not rational for the reason that Mr du Toit testified that the company had an open-door policy. The staff members did not lodge any grievance but sought to meet human resources for a discussion on their dissatisfaction. The employee was advised about this.

[29] The commissioner further cited the proposal of climate survey when two had been held within a year. However, the employee consented to this climate survey. In any event, the insistence by Mr Jackson on the climate survey cannot be a situation that may cause continued employment intolerable. If such a survey was intended to correct the situation it cannot be the cause of the breakdown in the employment relationship unless the employee suggests that her superior, Mr Jackson, was not entitled to get the feeling of the employees.

[30] I need to add that the climate survey was suggested as a result of the persistent rumours about the dissatisfaction of the staff in the employee's division.

There is no evidence that the rumours were unfounded. It is not disputed that Mr Jackson met with the staff or employees in the employee's absence. In the light of the undisputed evidence of an open-door policy of the company, I find that it would be unreasonable for Mr Jackson to refuse to speak to the employees.

[31] The employee's testimony suggests that Mr Jackson and human resources should have refused to speak to the employees. There is no merit in that suggestion. Such a refusal would not only be against the company policy of open-door but would not be in the interests of the company. It is also not disputed by the employer that Mr Jackson offered the employee a job as a consultant as a result of the rumours. It is not the employee's case that this caused the termination of employment. Her case is that it was his instruction to report to Gavin Came that she did not accept and felt she could not remain in the company.

[32] The commissioner made a finding that:

"There is sufficient evidence to uphold what the applicant contends to be having to resign in circumstances where such resignation was not voluntary. There was no single point mentioned by this witness that could rebut the contention made by the applicant concerning the involuntariness of her resignation. The applicant consulted with human resources at every turn and the latter was fully aware of the extent of the applicant's frustration and being unabled. I therefore find that the resignation of the applicant was not voluntary."

[33] The commissioner failed to consider that the test for constructive dismissal is not subjective but objective. He failed to consider objectively if the employer had made continued employment intolerable.

[34] The consultation with the human resources by the employee related to the rumours and the fact that Mr Jackson consulted the employees of her division in her absence. There is, however, no evidence that Mr Jackson went out to source the rumours or that such rumours were created by the employer. In fact, the rumours seem to have come from the employees in the department of Mogorosi, the employee. If there was any wrongdoing by Mr Jackson or the human resources, the employee was aware of the grievance procedures. She could have followed these procedures to resolve the problem. The employee conceded that she could not know what the outcome would have been had she followed the internal procedures.

[35] The commissioner further found support for the resignation on demotion. The employee felt subjectively that reporting to Gavin Came was unacceptable as she was on the same level as Mr Came. On the other hand, the employee agreed that Mr Came was the Managing Director, reporting to Mr Anderson, the Chief Executive Officer. Mr Came previously headed the employee's department. The employee further accepted that Mr Came was on level one, while she was on level two as a Divisional Director. Mr du Toit testified that there is no Divisional Director on level one but that Divisional Directors are on level two. This was never disputed. Mr Jackson and Mr Came were both on level one, reporting to Mr Anderson. Accordingly, reporting to Mr Came cannot be a demotion.

[36] The evidence of Mr du Toit, which has not been rebutted, is that there was no change in the employee's salary. There was no change in the job level, being level two. The employee did the same job. The reporting structure also did not

change. The change was in respect of the person to whom the employee had to report. Prior to the change and after the change there was one person between the employee and Mr Anderson.

[37] The commissioner relied on the salary schedule to find that the employee was on the same level as Mr Came. Clearly, the Managing Director cannot be on the same level as a Divisional Director. The Divisional Director reports to the Managing Director. The document that the commissioner relied upon was produced during the cross-examination of Mr du Toit. This document had not been discovered by the employee. The employee never gave evidence on this document when she gave evidence-in-chief. Furthermore, the authenticity of this document was contested but it was never proved by the employee.

[38] The commissioner committed an irregularity in relying on this document to find that there was a demotion, for the reasons that follow. The demotion was not the cause of the alleged resignation or the termination of the employment. The package schedule was not produced during the evidence-in-chief. The employee failed to give evidence as to when the demotion occurred. The evidence relating to the demotion was only raised during cross-examination when the employee's case had been closed. The employer was not given an opportunity to cross-examine the employee on this document. It was accordingly irregular for the commissioner to rely on this document in finding that the employee's position was changed from level one to level two in the absence of evidence of the person who prepared the document and in the absence of cross-examination of the employee. The commissioner accordingly failed to apply his mind to the evidence before him.

[39] In my view, the findings of demotion cannot be sustained on the evidence, in that the status of the employee was never altered. She did the same job. She conceded that Mr Came was the Managing Director on level one and she was on level two.

[40] I find that the employee failed to establish the third requirement of constructive dismissal as well. On the evidence presented by the employee there is no rational basis for finding that the employee resigned, in the face of the denial by the employee that she resigned or that she terminated the contract of employment. If the employee did, in fact, resign in my view it was not as a result of the actions of the employer. The employees in her department seem to have had a problem with her. As a result of this, they sought to consult with Mr Jackson and the human resources. The rumours of dissatisfaction were not created by the employer, as I have indicated.

[41] The commissioner did not apply his mind in assessing the evidence and make a factual finding on the cause of the alleged constructive dismissal. The perceived demotion was unfounded in the light of the available evidence. The award cannot be sustained for reasons I have set out.

[42] Another important issue that needs to be considered relates to the amount of compensation. The employee was earning a total of R57 350 per month. The commissioner awarded the employee compensation amounting to R432 000. The commissioner failed to explain how this figure is made up. One has to take into account that the employee was willing to leave the company on payment of salary equal to three months plus bonus. If the bonus was paid the matter would have

been settled, it would not have come to court. There was no reliable figure for the bonus before the arbitrator. There is no rational objective basis for the award as the commissioner has failed to motivate it.

[43] In the result, I find that the award is arbitrary and the award therefore cannot be sustained.

[44] I have indicated that the employee failed to establish the three requirements for the constructive dismissal action. There is therefore no point in referring the matter back to the CCMA.

[45] I have already ruled that the respondent's papers were not properly before Court. I have accordingly decided not to make any order as to the costs.

[46] The following order is made:

(a) The award is reviewed and set aside and substituted with the order that:
"The applicant has failed to establish the dismissal and the application is dismissed."

(b) There is no order as to costs.

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Ngcamu AJ