IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: JR1630/07

In the matter between

ADVANCENET (PTY) LTD	**Applicant**
And	
KROPF J	**1st Respondent**
MOLETSANE N.O.	**2nd Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**3rd Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the award issued by the second respondent (the commissioner) under case number

JAJB 11426/07 and dated 18 June 2007. The review application was opposed by the first respondent.

Background facts

[2] It is common cause that the first respondent (the employee) who was employed as a sales manager by the applicant became increasingly unhappy with his employment after the applicant declined to offer him equity within the business of the applicant, resulting in the relationship between the employee and Mr Hemsley, the managing director of the applicant deteriorated drastically.

[3] On the 18th January 2007, the employee informed Mrs Hemsley, the operational manager and wife of the managing director that he intended leaving his employ with the applicant, without indicating the specific date of termination.

[4] At the end of January 2007, Mrs Hemsley sent an email to the sales team advising them of the intended departure the employee. The employee replied to this email stating inter alia that:

"Transparency is probably the best thing; of course, I will never say any bad thing about the company!"

[5] During the middle of March 2007, there being no movement on the part of the employee with regard to his departure, Mrs Hemsley approached him and enquired as to whether he was still intending to leave. The employee confirmed his plans of leaving.

[6] The issue of when exactly the employee would be leaving still remained a vexed question towards the end of March 2007, and consequently Mr Hemsley addressed an email to him seeking clarity in this regard. The email reads as follows:

"It is now many months since you decided and stated you were going to move on from the company. We have been waiting patiently for you to finalize this but the various deadlines that you committed to have all come and gone. Kindly advise me of when exactly you are planning to resign and leave so that we can plan accordingly. You have already been given a whole lot of latitude in this matter so you are not in a possession to keep dragging

this on. We have investigated this matter and we are legally entitled to ask for your resignation. We are reluctant to do this but we will go this route if necessary. We expect this to be resolved by the end of today".

[7] In response to the above email, the employee addressed his response to Mrs Hemsley in the following terms:

"Dear Danny

I received this email from Phil this morning. Contrary to what is stated below, I have not made any commitments with respect to time lines. I am in the process of resolving the situation and will notify the company in due course. I have also done some investigation of my own and should this matter be pushed any further by the company, I will be forced to seek legal advice of my own. I sincerely hope it does not come to this".

[8] On the 27th March 2007, Mrs Hemsley sent an email to the employee expressing her frustration about the problem arising from the uncertainty as to the exact date of his departure and indicated that at that stage it was already 9 (nine) months since he

had expressed his plans to leave. The employee replied and stated:

> *"You are well aware that the reason for me being forced to seek employment is due to the fact that the relationship between Phil and myself has deteriorated to such a degree that I was not sure whether I still have a future with the company… I cannot resign until I have alternative employment … I feel that the Company is now forcing me to resign"*

[9] On the 2nd April 2007, Mr Hemsley addressed a letter to the employee in which the employee was given 1 (one) month notice of termination of his employment. The letter sought to confirm that the applicant accepted the employee's resignation which he was alleged to have tendered on 18 January 2007.

Grounds of review

[10] The applicant contended that the commissioner failed to apply his mind to the factual evidence that was presented to him in that he

failed to appreciate that an agreement had been reached to terminate the employ of the employee.

[11] According to the applicant, the agreement which it referred to as *"the exit agreement"* was concluded on the 18th January 2007. This is with reference to the meeting or discussions that the employee had with the operational manager, Mrs Hemsley.

[12] The contention of the applicant is that once the existence of the exit agreement was established, the only issue that remained for consideration by the commissioner was whether the period of two and half months was sufficient to allow the employee the opportunity to find alternative employment.

[13] The other related issue which the applicant contended the commissioner ought to have determined was whether the applicant was entitled to insist that the employee should comply with the provisions of the *the exit agreement.* Failure to take into account the *the exit agreement* meant that the commissioner misconceived and misconstrued the nature of the evidence and the dispute he

was called upon to resolve. The applicant argued that this failure resulted in the denial of a fair trial.

[14] The applicant further submitted that the commissioner committed gross irregularity in that he upheld the objection of the employee's attorney when it sought to submit the emails which it contended were relevant in the determination of the issue before the commissioner.

[15] The other complaint of the applicant was that it was not given the opportunity to respond to this objection.

[16] In relation to the effective date of the *"the exit agreement"* the applicant argued that because there was no time specified in the agreement, the effective date had to be within a reasonable time.

[17] The applicant finally contended that the compensation of more than R250 000.00 was excessive and unreasonable.

The award

[18] The commissioner accepted the version of the employee that he did not resign. The commissioner upheld the version of the employee as being plausible because it was not challenged by the applicant. The applicant did not cross examine the employee regarding his version that he did not resign.

[19] The commissioner further found that there was no record that the third respondent resigned on the 18th January 2007. The fact that the applicant did not respond to the email of the employee dated the 28th of March 2007, wherein he indicated that he had not resigned was taken into account by the commissioner in his evaluation as to whether or not the employee had resigned.

[20] The applicant contended that the commissioner ought to have concluded that the existence of the exit agreement concluded between the employee and Mrs Hemsley was enforceable and that the applicant had afforded the employee a reasonable time to make arrangement for his departure.

Evaluation of the arbitration award.

[21] In terms of *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC)* the Labour Court is not entitled to interfere with the commissioner's award unless it has been shown that the conclusion reached by the commissioner is unreasonable. The enquiry in applying the *Sidumo* test is to determine whether the conclusion reached by the commissioner is one which a reasonable decision-maker could not reach.

[22] Thus the issue for determination in this matter is whether the decision of the commissioner, that the employee did not resign, is one which a reasonable decision-maker could not have reached, taking into account the facts which were before the commissioner during the arbitration proceedings. The issue is therefore not whether the decision of the commissioner is correct but rather whether it is reasonable.

[23] I cannot find fault with the approach adopted by the commissioner in relation to his conclusion that the employee did not resign. The

evidence of Mrs Hemsley during cross examination clearly indicated that the applicant never received a resignation letter from the employee. On this evidence alone the commissioner was correct in reaching the conclusion that the dismissal of the employee's dismissal was unfair.

[24] The case of the applicant would still not be sustainable even if it was to be accepted that the discussions between Mrs Hemsley and the employee resulted in an exit agreement. The commissioner in arriving at his conclusion correctly relied on the authority of *Transport Allied Workers Union v Natal Co-Operatives (1992) ILJ 13 1154 (LAC)*, where the Court held that resignation must be clear and unequivocal. The same approach was adopted in the recent unpublished judgment of the Labour Appeal Court in the case of *Amazwi Power Products (PTY) Ltd v Shelly Turnbull* (case number JA14/07) where Davis JA said:

> "*To be legally effective, notice of intention to resign from employment and therefore to terminate the contract must be clear and unequivocal."*

[25] It is clear from the evidence of Mrs Hemsley that but for the fact that the employee had contact with the applicant's competitor there would have been no attempt on the part of the applicant to enforce the exit agreement. As concerning the alleged retraction from the exit agreement, Mrs Hemsley testified that the reason for this was that the employee was not able to find alternative employment. The second last paragraph of the email of the 28th March 2007, from the employee to Mrs Hemsley is instructive in this regard. The employee stated

> "*I cannot resign until I have alternative employment and I only informed you that I am considering this so as not to leave the Company in the dark."*

[26] What is even more telling is the contents of the email dated 30 January 2007, from Mrs Hemsley to other managers indicating that the employee was *"**…** currently planning his career change, but has not yet tendered his notice."* The only logical conclusion from analyzing this email is that Mrs Hemsley informed others that the employee was intending to leave the applicant but had not yet tendered his resignation.

[27] The complaint that the commissioner upheld the objection of the employee's attorney when it sought to submit certain emails during the arbitration hearing is also unsustainable in that these emails related to communication with third parties who had nothing to do with the relationship between the employee and the applicant. In refusing to allow the response of the applicant to the objection the commissioner exercised powers vested in him in terms of section 138 of the Labour Relations Act 66 of 1995 (the Act). In terms of section 138(1) of the Act the commissioner has the power to conduct the arbitration hearing in a manner he or she considers appropriate in order to determine the dispute fairly and quickly. The applicant has not made out a case showing in which way can it be said that the exercise of these powers was unreasonable or resulted in an unfair arbitration hearing.

[28] The last complaint of the applicant relates to the compensation the commissioner awarded to the employee. After taking into account the fact that the employee had obtained alternative employment which was paying him R100 000,000 less per annum than what he

used to receive whilst in the employ of the applicant, the commissioner concluded that the appropriate compensation to award for the dismissal of the employee which was both procedurally and substantively unfair, was R256 955.82, an equivalent of three months' salary as at the date of dismissal.

[29] In terms of section 194 of the Act, the commissioner has the power to award compensation which is just and equitable in the circumstances but not exceeding an equivalent of 12 (twelve) months' compensation. It is clear from the award that the commissioner in arriving at the conclusion that the applicant should compensate the employee for a period equivalent to three months' salary, applied his mind and took into account the fact the employee had obtained alternative employment and further that his earnings had significantly dropped, compared to what he used to earn before the unfair dismissal. To this extend I have not been able to find a basis for the argument that the compensation was so unreasonable that it attracted intervention by the court.

[30] In summary, my view is that the mere fact that an employee expresses an intention to resign does fall within the concept of resignation and therefore cannot be equated to a notice of intention to terminate the employment relationship. In the present instance it cannot be disputed that the employee did express an intention to resign but never submitted a resignation nor did he, in any other manner unequivocally serve the applicant with a notice indicating as to when he would be leaving the employ of the applicant. His email of the 28 March 2007, to Mrs Hemsley, indicates very clearly that he had not resigned neither was he ready to resign until such time that he had an alternative employment.

[31] In the light of the above I am of the opinion that the applicant has failed to make out a case justifying interference with the decision of the commissioner. I see no reason why costs should not follow the results.

[32] In the premises the applicant's application is dismissed with costs.

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MOLAHLEHI J

DATE OF HEARING: **18 JUNE 2008**

DATE OF JUDGMENT: **05 SEPTEMBER 2008**

APPEARANCES:

FOR THE APPLICANT: **ADV HALGRYN**

INSTRUCTED BY: **SIM AND BOTSI ATTORNEYS INC**

FOR THE RESPONDENT: **A HINDS (ANTHONY HINDS ATTORNEYS)**