IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. JR 1410/08

In the matter between:

WORKERS PARTY UNION obo ESTHER PRISCILLA GERMISHUYS **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **1ST Respondent**

COMMISSIONER BERNARD VAN ECK, N.O. **2ND Respondent**

E R FABER t/a MILAGROS SPA **3RD Respondent**

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside the arbitration award of the second respondent ("the commissioner") issued under the auspices of the first respondent ("the CCMA") on the 29 June 2008 under case number NC786-08. In his award, the commissioner held that the applicant had failed to establish the existence of a constructive dismissal, and dismissed the referral of an unfair dismissal claim on that basis.

[2] The facts giving rise to this application are briefly the following. The third respondent (Faber) employed the applicant on the 1 February 2006 as a beautician. On 18 March 2008, the applicant applied for leave on 1 April 2008; 4 and 5 April 2008 and 17 to 26 April 2008. The first period of leave sought was family responsibility leave (for the applicant to take her husband to the doctor), the second was for unpaid leave (to allow the applicant to attend the birthday party of her niece and nephew) and the third was unpaid leave to allow the applicant to attend her best friend's wedding. The applicant requested unpaid leave because she had exhausted her annual leave entitlement. On 19 March 2008, Faber declined all three applications for leave. The letter conveying this decision to the applicant suggested that the applicant had no loyalty to her work, and attached an unsolicited application for unpaid leave for the period 31 March 2008 to 4 May 2008, already signed by Faber. The applicant did not sign the leave form, stating that she wished to discus the matter with her husband. The applicant's husband contacted Faber the same afternoon and, after discussion, the husband proposed that if Faber did not wish the applicant to work any longer, he should "discharge" her and pay her the equivalent of three months' remuneration. Faber did not reject the proposal - on the contrary, he regarded it as a reasonable way to terminate the relationship.

[3] On 20 March 2008, the applicant was presented with a document headed "resignation by employee". Faber had signed the document, and it was suggested that the applicant could leave her employment the same afternoon. The applicant signed the form, in the belief that her husband and Faber had concluded an agreement based on the proposal made to Faber the previous day. The applicant testified that Faber had not made her continued employment intolerable, and that she had a good relationship with Faber and his wife. The applicant's husband testified *inter alia* that on 19 March 2008, the applicant stated that she was unhappy about the fact that Faber intended to place her

on unpaid leave. He confirmed that he spoke to Faber about the matter, and that a suggestion was made that the applicant's employment terminate on payment of three months' salary. Faber suggested that he discuss the proposal with his wife and revert to him. The applicant agreed to the proposal, but before he could communicate their agreement to Faber, the applicant informed him that she had signed the resignation form presented to her. The respondent closed its case without leading evidence.

[4] In his award, the arbitrator found that it was common cause that the applicant had not resigned because she was dissatisfied with the fact that she had been refused leave, or placed on unpaid leave. The applicant had signed the resignation form only because she was under the impression that her husband had communicated to Faber her agreement to the proposal made the previous afternoon i.e. that she be paid three months' salary. The commissioner held that this was not an instance where it could be said that the applicant had been compelled to resign. She had resigned voluntarily, and had not sought to withdraw her resignation once she discovered her error. In these circumstances, the respondent could not be held liable for the applicant's actions. With these considerations in mind and after setting out the relevant legal principles, the commissioner concluded that the applicant had failed to establish the existence of a constructive dismissal and ruled that there was no dismissal for the purposes of s 187 of the Act.

[5] The commissioner applied the well-known test for constructive dismissal, which he suggested "requires that the Applicant should have resigned because of the intolerable conditions that existed at the time. In other words, there must be a casual connection between the intolerable conditions that had been created by the Respondent and the Applicant's decision to resign." Applying this test, the commissioner concluded that the applicant had resigned for the sole purpose of bringing into effect the supposed agreement reached between her husband and Faber. She had not been forced or in any other way

compelled to sign the resignation form. The respondent had not misrepresented the situation to her i.e. Faber never held out that she would receive compensation if she were to sign the form. Further, nothing prevented the applicant from withdrawing her resignation once she discovered that it had not been accepted in terms of the agreement. The commissioner concluded:

"In my opinion the Respondent should thus not be held liable for the Applicant's misdirected actions as a result of her having lived under this misconception. She should have confirmed with her husband that he had indeed secured an agreement with Faber before she signed the resignation form. Alternatively, she should have notified the Respondent of her wish to withdraw the resignation as soon as the misdirection became clear."

For these reasons, the commissioner held that the applicant had not been dismissed.

[6] The first ground for review is that in finding that the applicant had resigned voluntarily, the commissioner failed to have regard to the circumstances which led up to the applicant's signature of the agreement. In support of this submission, the applicant attacks Faber's version, as articulated in the answering affidavit, and to the effect that the applicant's signature of the resignation letter simply amounted to the implementation of the settlement reached the previous evening, as disingenuous. This may well be so, given that the agreement made no provision for the payment of three months' salary, which had been discussed as part of the settlement. But the court is confined in these proceedings to the record of the arbitration, in which, it will be recalled, Faber elected not to testify. The function of this court is not to reflect on the veracity of versions not articulated during the arbitration proceedings under review - rather, this court, bound by the record of the arbitration proceedings, is required to determine whether the result

of those proceedings, in the form of the commissioner's award, represents a decision to which no reasonable decision maker could come. To the extent that the applicant avers that the commissioner committed a reviewable irregularity by failing to enquire into the circumstances surrounding the applicant's resignation and to bring into account what Faber should have done in the same circumstances, this misconstrues the function of the commissioner. The commissioner is required under the Act to reach a decision on the evidence presented at the arbitration hearing. In the present instance, that is precisely what the commissioner did, guided as he was by the provisions of the Act relevant to the onus to establish the existence of a dismissal.

[7] Secondly, the applicant submits that the commissioner misconstrued the evidence and misinterpreted the law in finding as he did and that instead, the commissioner should have concluded that despite a relatively good relationship between the applicant and her employers initially, what transpired on the 18 March 2008 going forward changed that relationship to one of hostility, harshness and antagonism between the parties which cumulatively rendered continued employment intolerable for the applicant. Both these grounds assume that the commissioner was required to go behind the evidence led (and in particular, the evidence of the applicant who, despite the best efforts by her representative at the arbitration hearing gave no evidence to the effect that the working relationship between her and her employer was acrimonious) and to discern the deception for which the applicant contends. In essence, the applicant's case is that Faber snatched at a bargain that deprived her of three months' remuneration. Her evidence was that she was "baie onkundig met sulke goed" and signed the letter of resignation in ignorance. But it is a big jump from a conclusion that the applicant acted in ignorance to a conclusion that continued employment was intolerable. The applicant recognised as much in her evidence - she was pertinently asked by the representative whether it had been made impossible for her to work for her employer, and replied in the negative. In short, an objective assessment of the

relevant factual circumstances aside, the commissioner cannot be faulted for finding that the applicant failed to establish the necessary subjective element of the test for constructive dismissal.

[8] Further, the applicant's submissions overlook the policy underlying the Act, which is to afford an aggrieved party a limited right of review, the nature of which poses a significant hurdle to any applicant in review proceedings. This court has often drawn attention to the difference between a review and an appeal, and emphasised the limited nature of the right to review a commissioner's award. In the matter of *Bafokeng Rasimone Platinum Mine v CCMA and others* [2006] 7 BLLR 647 (LC) the court observed as follows in respect of how an arbitrator's award ought to be judged:

> "At the end of the day the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of section 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings *as a whole rather than knit-picking through every shrapnel of evidence that was considered or not considered as stated in Coin Security Group (Pty) Ltd v Machago [2000] 5 BLLR 283 (LC)."*

[9] The limitations to the right to review of an arbitrator's decision have been further explained by the Labour Appeal Court as follows:

> *"A critical element of fair administrative action is that the person performing the task applied his mind to the matter before him and took account of relevant considerations and evidence placed before him. Whilst it might be possible that based on the same facts, someone else would come to a different conclusion, that however, is not the test."*

See: *Softex Mattress (Pty) Ltd v PPWAWU and others* [2000] 12

[10] More recently, in *Sidumo v Rustenburg Platinum* Mines [2007] 12 BLLR 1097 (CC) the hurdle set for an applicant in review proceedings was ratcheted up a notch or two. In that matter, the Constitutional Court held that this court is entitled to interfere with arbitration awards only if the commissioner, in reaching the decision under review, came to a conclusion to which no reasonable decision maker could come. When conducting an assessment of the facts in a particular case, commissioners are required to use their own judgement. So long as the conclusion reached is a reasonable one in light of the facts and circumstances of the case, the commissioner may not be faulted. In this instance, the commissioner found that on the facts before him, the employer's conduct had not rendered continued employment intolerable. In the commissioner's opinion therefore, the applicant was not entitled to any relief. While a more reasonable employer may well have acted differently in the circumstances, that was not the standard by which the commissioner was obliged to measure Faber's conduct for the purposes of determining whether objectively, Faber had made the applicant's continued employment intolerable. In short, the commissioner's decision is not one that falls outside of the band of reasonableness established by the *Sidumo* judgment, and there is therefore no basis for this court to review and set aside the commissioner's award. Finally, there is no reason why costs should not follow the result.

I accordingly make the following order

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of Hearing: 30 January 2009

Date of judgment: 21 May 2009

Appearances:

For the applicant: Adv A P Landman

Instructed by: Jose Nascimento Attorneys

For the Respondent: Mr D J Coetzee from Dirk Coetzee Attorneys