

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

**CASE NO. D534/08
Not Reportable**

IN THE MATTER BETWEEN:

TERNSPORTSWEAR (PTY) LTD

APPLICANT

AND

**NATIONAL BARGAINING COUNCIL FOR
THE CLOTHING MANUFACTURING INDUSTRY:**

1ST RESPONDENT

COMMISSIONER: RICHARD LYSTER

2ND RESPONDENT

ROBERT MICHAEL WEBBER-HARRIS

3RD RESPONDENT

JUDGMENT

GUSH, AJ

1. The Applicant in this matter applies to review and set aside or correct an award made by the Second Respondent that the Third Respondent had been constructively dismissed by the Applicant and awarding the Third Respondent compensation in the amount of R54 000,00.

2. The background to the matter was that the Third Respondent was employed by the Applicant in May 2007 as the factory administration manager. His immediate superior was a Mr Lu who was the Applicant's production director. The offer of employment accepted by the Third Respondent required the Third Respondent to *inter alia* deal with the "control of labour matters".
3. It is common cause that towards the end of 2007 the Applicant was in the process of curtailing costs and was preparing to embark on a retrenchment exercise and that this had caused tension within the workforce.
4. The Third Respondent in his evidence at the Arbitration before the Second Respondent indicated that his relationship with the Applicant's Mr Lu, prior to the incidents which lead to his resignation was somewhat strained and produced in evidence a number of e-mails to support this. These e-mails were dated the 6th November, 21st November, 23rd November and the 3rd December and deal with various labour relations issues and to some extent record some differences of opinion between the Third Respondent and Lu. They do not indicate anything untoward regarding Lu's treatment of Third respondent and the Third Respondent does not in the e mails complain of his treatment. I will return to these e-mails below.
5. The Third Respondent in his evidence at the Arbitration suggested that his difficulties had arisen as a result of the following;

"the way I saw it I was part of top management, that was the function that needed to be filled in the management capacity, but the steps taken against me were directly affecting that position. I wasn't invited to

meetings. The Directors and Kevin would eat lunch together and discuss business on a daily basis".

What is clear however from the organogram and the offer of employment is that the Third Respondent was not a Director and was on a lower level of management from the directors (together with seven other managers). The assumption by the Third Respondent that he was part of "top Management" was not justified given his letter of appointment and the organogram which forms part of the record.

6. During February 2008 it appears as if the relationship between the Third Respondent and the Applicant's Mr Lu deteriorated to the point where the Applicant addressed an email to Mr Lu on the 14th February 2008 recording his concerns at being shouted at by Lu. This email he copied to the Chief Executive Director, Mr Jarvis, the Executive Chairman Mr Lin and two others.
7. Whilst the gist of the e-mail of the 14th February was that the Third Respondent was unhappy with the fact that Lu had shouted at him in essence it records his concerns regarding a number of work related issues involving his responsibilities as the person dealing with labour matters. The e-mail ends with the Third Respondent's stating;

"I hope that we are able to move forward in a more amicable manner in the future. I lost a very dear friend this week and will be attending his funeral this afternoon. Please feel free to call me to discuss any problems that you have of my performance or the effort that I am putting in to the company".

The email does not in any way suggest that if nothing is done about the matter his employment relationship with the Applicant would become intolerable nor did he give the Applicant an ultimatum.

8. It appears from the evidence of the Third Respondent at the Arbitration hearing, that subsequent to his e-mail of the 14th February 2008 his wife was admitted to hospital and he was accordingly absent from work for a number of days.
9. The Third Respondent initially suggested during his evidence that he had, while his wife was in hospital and he was looking after her before his return to work, received a notice to attend a disciplinary enquiry from Lu regarding his absence. Third Respondent later conceded during his evidence that it was not in fact a notice to attend a disciplinary enquiry but simply a letter "*stating that [he] should please report to [Lu] to let him know what is going on*". This too is an issue to which I will return.
10. The Third Respondent indicated that having returned to work after his wife's hospitalisation he met with the Applicant's Jarvis to discuss his concerns regarding Lu's behaviour. Jarvis had told him that he, Jarvis, did not approve of Lu's actions and that the matter was to be dealt with. Third Respondent further conceded during the Arbitration that, between the his return to work and his letter of resignation, positive steps had been taken to arrange meetings regarding the his concerns and that he was aware of the interventions and the proposed meetings.
11. The Third Respondent's evidence was that after Jarvis had spoken to him when he came back to work after his absence during his wife's hospitalisation, that

afternoon a certain Mr Fan who was a director of an associated company had visited him. His evidence surrounding the Fan visit was that Fan had threatened him that as a result of this threat he had decided to resign as he felt the Applicant had made a continued employment relationship intolerable. The e-mail containing his resignation is dated the 4th March 2008 and is addressed to Lu and copied to Jarvis and Lin, directors of the Applicant.

12. In this e-mail of the 4th March the Third Respondent records;

"I can no longer continue to be treated in this manner. You have left me little option by forcing me out of the company by making my employment unbearable. I have no choice but to file for constructive dismissal."

13. Conspicuous by its absence in this e-mail is any reference whatsoever to the incident concerning Mr Fan. This is significant in the light of the Third Respondent's evidence that it was the meeting with Fan that lead him to conclude that he had to resign.

14. The record of the Arbitration however reveals that on 3rd March 2008, the day before the letter of resignation was sent to Lu and Jarvis et al the Third Respondent sent an e-mail to the Applicant's Human Resources consultants attaching the letter of resignation and copying to them the email of the 14th February 2008.

15. In this email Third Respondent says;

"here is a letter I sent to Bob, Allan and Michael [the e-mail of the 14th February 2008]."

"attached is an e-mail I am waiting to send as soon as you give me the go ahead to inform the company of my constructive dismissal. Once you have completed the case according to legislation I will send the other e-mail and then file with the BC. Thanks for all your help. I know that it places you in an awkward position however it is god (sic) to know that I have you on my side and that Allan understands what is going on."

The following day the Third Respondent sent his letter of resignation to the Applicants' Lu and Jarvis. The reference to "*Allan [Jarvis] understands what is going on*" is not born out by the evidence adduced at the arbitration.

16. At the Arbitration the evidence was that towards the end of February 2009 and arising from the e-mail of the 14th February 2008 the Applicant's Human Resource Consultants and Jarvis had discussed the concerns of the Third Respondent with him and were in the process of dealing with the matter. The Third Respondent conceded during his cross examination that he was aware of the fact that his concerns were to be considered by Jarvis; that Jarvis was sympathetic to his concerns; and that a meeting was to take place on the 4th March 2008 to find a solution to his problem.
17. It is abundantly clear from the evidence at the Arbitration and the contents of his e-mails that the Third respondent had deliberately set about orchestrating what he believed would be constructive dismissal. That he maintained that the Human Resource consultants were advising him does not alter the fact that his actions were premeditated and planned.
18. It is common cause that the Third Respondent did not invoke the Applicant's formal grievance procedure in dealing with the matter (save for his e-mail of the

14th February 2008 in so far as it constituted a grievance). In his evidence during the Arbitration Third Respondent was insistent that the threat by Fan was the final straw that had caused him to resign.

17. This however does not appear to be borne out by the evidence adduced at the Arbitration. In the letter of resignation there is no reference made to the visit by Fan and in fact on the day that the visit by Fan took place the Third Respondent was already apparently planning his resignation and referral of the dispute regarding an unfair dismissal. In fact the Third Respondent had already prepared his letter of resignation. Despite the above this incident appears to have been persuasive in the mind of the Second Respondent in coming to the conclusion that the Third Respondent had been constructively dismissed.
18. The record of the Arbitration is replete with references by the Third Respondent to the planning of his constructive dismissal and the procedures that he believed he required to follow in order to establish a constructive dismissal.
19. During his evidence at the Arbitration the Respondent repeatedly referred to the treatment that he had received from Lu during his employment and in support thereof he referred to the e-mails which he had sent during November and December 2007. A careful reading of these e-mails does not give the impression that the concerns the Third Respondent was expressing therein were concerns regarding his treatment by Lu. These e-mails appear to be confined to work related matters in a situation where there might have been differences of opinion as to the procedures to be followed in dealing with the cost cutting measures and matters relating to discipline and the like. They do not in any way object to treatment metered out to the Third Respondent by the Applicant's Lu but simply

record the Third Respondent's point of view regarding procedures being followed by the Applicant Company in dealing with various Industrial Relations issues.

20. Prior to the e-mail of the 14th February 2008 there is nothing to suggest that the Third Respondent had recorded his concerns regarding his treatment or that he was being excluded from what he believed to be his rightful top management position to the extent that it was rendering his continued employment relationship intolerable.
21. An employee alleging that the employer has made a continued employment relationship intolerable bears the onus of proving the constructive dismissal. The evidence given by the Third Respondent at the Arbitration that he had been constructively dismissed is not supported by the facts. For example his evidence that he had been summoned to a disciplinary enquiry as a result of his absence during his wife's illness, appears to have been a disingenuous attempt to gild the lily. His subsequent concession during cross examination that the letter had merely been a letter from Lu requesting him to report to him regarding his absence seems to have been a deliberate misrepresentation of the circumstances and a somewhat misguided attempt to justify his contention that he had been constructively dismissed in that Lu's treatment of him had made a continued employment relationship intolerable.
22. Careful consideration of the evidence and in particular the e-mails sent during 2007 and the Applicant's evidence regarding his perception of his seniority suggests that his unhappiness at work was due to a number of reasons.

23. The Second Respondent in finding that the Third Respondent had been constructively dismissed placed considerable weight on the incident involving Mr Fan. This conclusion was not justified. It is relevant that at the time that the Applicant resigned the Fan incident had already taken place but the Applicant made no reference to it at all in his resignation. This suggests that despite Third Respondent's reliance on this as one of the proximate causes of his constructive dismissal during the arbitration it was at the time not. In addition the record of the Arbitration reveals that during his cross examination the Third Respondent conceded that his interpretation of the Fan incident might well have been overstated in his evidence in chief. The Second Respondent also seems to have disregarded the absence of any indication that the Third Respondent had raised his concerns prior to the 14th February 2008, two and a half weeks before he resigned and that at the time of the resignation the Applicant was endeavouring to deal with the problem.
24. A constructive dismissal is defined in the Labour Relations Act as occurring when an employee terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee – Section 186 (1) (e) of the Labour Relations Act No 66 of 1995.
25. A constructive dismissal has been said to have taken place where;
- "an employer has behaved in a deliberately oppressive manner and left the employee with no option but to resign in order to protect his or interest".*
- Workplace Law – Grogan at page 115; and
- "mere unhappiness at work is not enough. Managers, particularly, are expected to put up with ambiguity, conflict in relationships, power*

struggles, office politics and the demand for performance if not delivered and no payment is made"

"Workplace Law – Grogan page 116; see also

Moyo and Moyo and Standard Bank of South Africa Limited 2005
26ILJ563 (CCMA)

26. In the matter of Albany Bakeries v Van Wyk and Others (2005) 26ILJ2142 (LAC) it was held that where the employee had at his disposal a *"perfectly legitimate avenue open to alleviate his stress and solve his problems the circumstances suggest opportunism"*. This matter there is abundance evidence to suggest that the procedure followed by the Third Respondent was designed to establish a constructive dismissal and that in so doing he did not avail himself of the formal resolution procedures or processes set up by the Applicant immediately prior to his resignation.
27. What is abundantly clear from the evidence and the evidence of the Third Respondent of the Arbitration was that he had set about a carefully planned process of endeavouring to establish a constructive dismissal on his resignation.
28. In the matter of Old Mutual Group Schemes v Dreyer and Another 1999 20ILJ 203A (LAC) it was held by Conradie J that;

"billikheid sal normaal weg ook vereis dat 'n werknemer wat met sy werkgewer die opdragte en prosedures ontevrede is, aan die werkgewer 'n geleentheid bied om sake waaroor daar onmin bestaan reg te stel. 'n werknemer kan, afgesien van ekstreme situasies, dus nie maar net uit die bloute bedank en dan aanvoer dat die diensverhouding onuithoutbaar geword het nie"...Dit is dan ook een van die funksies van 'n grieweprosedure wat die meeste vooruitstrewende wergewers tot

beskiking van hulle werknemers het. In casu, het die respondente nie daarvan gebruik gemaak nie. Die Appellant het derhalwe geen gelentheid gehad om op 'n gestruktureerde wyse aan die Respondente se klagtes aandag te gee nie".

29. In *Murray vs Minister of Defence* 2008 29ILJ 1369 (SCA) it was said by Cameron AJ

"it deserves emphasis that the mere fact that an employee resigned because work has become intolerable does not by itself make for a constructive dismissal. For one thing an employer may not have control over what makes conditions intolerable. So the critical circumstances "must have been of the employers" making". But even if the employer is responsible it may not be to blame. There are many things that the employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: They must be culpably responsible for the intolerable conditions: The conduct must (in the formulation the Courts have adopted) have lacked reasonable and proper cause. Culpability does not mean the employer must have wanted or intended to get rid of the employee although in many cases of constructive dismissal that is the case".

30. Taking the above into account and as the record in this matter reveals that the first time the Third Respondent raised his concern regarding his treatment by Mr Lu in writing with the Applicant was on the 4th February, in the face of clear evidence that the Third Respondent's issue was in the process of being dealt with; the Third Respondent's resignation can only be described as deliberate and premeditated and his resignation does not constitute a constructive dismissal.

31. It is common cause that the applicable test on review is as set out in the matter of Sidumo and Another vs Rustenburg Platinum Mines Ltd and Others (2007) (28) ILJ2405, to which both parties referred to extensively in their Heads of Argument. I am of the view that the decision reached by the Second Respondent is reviewable and that the award made by the Second Respondent should be set aside.

32. I accordingly make the following order:

1. The Second Respondent's award that the Applicant was constructively dismissed and that the company pay the Third Respondent an amount of R54 000 is reviewed and set aside and substituted with an award that the Third Respondent was not constructively dismissed.
2. The Third Respondent to pay the Applicant's costs.

GUSH AJ

Date of Hearing: 2 December 2009

Date of Judgment: 27 January 2010

Appearances:

For the Applicant: Adv PJ Wallis instructed by Deneys Reitz

For the Respondent: J Forster-Forster Attorneys