

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN

CASE NO: D1405/99 & D1439/99

IN THE MATTER BETWEEN

APPLICANT

AND

THE COMMISSION FOR CONCILIATION,  
FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

NGCAMU AJ

[1] The third respondent obtained an award in his favour made by the second respondent in which the commission found that his dismissal was procedurally and substantively unfair. Third respondent then approached this court to make the award an order of court in terms of section 158 (1) (c) of the Labour Relations Act No 66 of 1995. The application is being made under case no D1405/99.

[2] The applicant has also filed an application to review the award under case no D1439/99. The two cases have been brought together. If I find that the award has to be reviewed and set aside I must then dismiss the application in terms of section 158 (1) (C). If on the other hand, I dismiss the review, I must make the award an order of court.

[3] The review is opposed by the third respondent. Although I am in possession of the CCMA transcript record, it is poor in that it does not have all what was said during the hearing. I will therefore have to rely on the summary of the evidence as recorded by the Commissioner in his award.

[4] The award is being attached on the basis that it is devoid of a rational objective basis and bears no connection to the evidential material before the Commissioner. It is further submitted that the Commissioner failed to apply his mind properly to the matter.

[5] The third respondent was employed by the applicant as a maintenance manager. He was instructed to obtain a quotation for the installation of built in cupboards in the trauma unit of the hospital. He obtained one quotation from a certain Patrick Pillay of R.C. Cupboards. He was requested to obtain two further quotations. Instead of approaching other cupboard makers he approached the same Patrick Pillay for the additional two quotations. Patrick Pillay handed to the third respondent two quotations which were later found to be fictitious and were made up by Patrick Pillay himself.

[6] The third respondent had previously used Patrick Pillay for the installation of built in cupboards in his own house at a cost of R7380-00. The third respondent has only paid a deposit of R2000-00 for the cupboards.

[7] The third respondent was accused of having committed fraud in that the bill for the units in his house was settled by the applicant. He was further accused of having committed fraud in obtaining all three quotations from Patrick Pillay. When the third respondent was first confronted with these allegations he was off-sick. After discussing the matter with the maintenance Director Dr Parsoo, the third respondent tendered a letter of resignation dated 19<sup>th</sup> February 1999. The contents of the letter reads:

“ I, Raj Singh, am hereby placing on record a 24 Notice today, the 19/02/99, terminating any services as maintenance manager at Victoria Hospital. The acceptance of my resignation comes with the proviso that no criminal or civil charges will be instituted against me with

regard to my employment or work carried out at Victoria Hospital. I await your written response within the next 24 hours.”

A response by Dr I Parsoo read:

“ Your letter dated 19<sup>th</sup> February 1999 refers.

Your letter of resignation has been accepted by the board with immediate effect. However, the proviso with regard to criminal or civil charges against you will not be part of the conditions of resignation. However, please be assured that as far as is possible and if the only major offence was in relation to the cupboard saga in the trauma unit, then all possible leniency will be shown to you. We thank you for the period of your employment in this institution.”

[8] Third respondent declared a dispute and referred it to the CCMA on the grounds of constructive dismissal by the applicant. The applicant contended that the third respondent resigned and was not dismissed. The conciliation failed and the matter was referred for arbitration. Both parties were represented by attorneys at the arbitration hearing. Only the third respondent gave evidence and applicant closed its case without leading any evidence. The third respondent denied that he committed fraud. The third respondent denied that he committed fraud.

[9] Sections 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.” In terms of section 191 (1) of the LRA of 1995 this constitutes unfair dismissal. The onus to prove constructive dismissal rests on the employee. See *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC). Where the employer claims that the employee resigned but the employee denies that, the onus rests on the employer. See *Moodley v Seasands Investments* (1989) 10 ILJ 1129 (IC).

[10] The employee must establish that there was no voluntary intention to resign but the employer caused the resignation. The court must look at the employer’s conduct as a whole and then determine whether the cumulative effect of his conduct judged reasonable and

sensible is such that the employee cannot be expected to put up with it. See Pretoria Society For the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC).

[11] After hearing the evidence of the third respondent, the Commissioner came to the conclusion that the third respondent's dismissal was procedurally unfair and awarded the amount of R35840-00 as compensation. There was no evidence by the applicant to challenge that of the third respondent.

[12] The commissioner had to determine whether or not a constructive dismissal occurred or whether the applicant terminated his services on his own free will by resigning. The commissioner found that the third respondent Mr Singh submitted a letter of resignation on 19<sup>th</sup> February 1999. This was common cause. The commissioner also found that Mr Singh did not understand clearly what fraud entailed. He found that at the time Mr Singh was confronted by two policemen he was sick. He was told he had already lost his job at the hospital for this offence. The following day he was told by his immediate senior, Dr Parsoo that he must resign or he would be dismissed. He further found that this coupled with the threat of criminal charges both by the policeman and Dr Parsoo created a state of mind in the applicant that he believed he had no option but to either resign or be dismissed. Commissioner further found that it seemed reasonable that Mr Singh attempted to protect himself by resigning than being dismissed to try and safeguard his future employment opportunities.

[13] The commissioner found in favour of the applicant that it had established that Mr. Singh knew the rules and regulations of the applicant. However the commissioner found that Dr. Parsoo did not present the option of a disciplinary hearing to Mr Singh. He found that Dr Parsoo said the hospital Board had made a decision that he must either resign or be dismissed. The commissioner came to the conclusion that on a balance of probabilities intolerable pressure was placed on Mr Singh by a combination of the SAPS and Dr Parsoo to resign. The conclusion he came to was that the termination was at the initiative and request of the employer.

[14] The applicant did not give evidence to refute the evidence of the third respondent Mr Singh but sought to argue the matter on the merits by placing reliance on the resignation. John Grogan in Rielert's Basic Employment Law-Second edition pg 98 paragraph 7 says: "An employer may be tempted to circumvent the substantive and procedural requirements for a fair dismissal by attempting to persuade an unwanted employee to resign. If the employee does so freely and voluntarily, the contract will end." Where the employer exerts undue pressure on the employee to resign, or where he renders the relationship with the employee so intolerable that the employee has no option but to resign, we have what is known as a case of constructive dismissal which entitles the employee to relief both at common law and under the Labour Relations Act (Grogan p99).

[15] The respondent submitted that Mr Singh elected to resign after making a careful, independent and rational decision, unrelated to any pressure exerted by the employer. This was based on the fact that Mr Singh admitted that his conduct constituted a serious wrong and broke his employer's trust justifying his dismissal. It was further submitted that Mr Singh resigned to avoid a disciplinary hearing and its consequences. I fail to follow this submission in that there was no suggestion of a disciplinary proceeding made to Mr Singh. No evidence was given to show that disciplinary proceedings was put as an option and that Mr Singh decided to resign instead of facing the disciplinary action. In fact Mr Singh said he would not have resigned if the disciplinary hearing was put as an option.

[16] It was further submitted that there was no evidence that Dr Parsoo exerted unbearable pressure on Mr Singh. In my view, it is the cumulative effect of the employer's action which is the determining factor. It was not denied that the police called at Mr Singh's residence with the hospital employee and was told he had lost his job at the hospital as a result of the offence he had committed. Dr Parsoo also told him the board had decided to dismiss him. It was further not disputed that Dr Parsoo told him to resign or be dismissed. He was accused of purchasing cupboards and the bill paid by the hospital and then of committing fraud by obtaining three quotations from one person. These facts stood

unchallenged by the applicant. The question is whether the court can review the award in the light of these undisputed facts. When Mr Singh was first approached about the misconduct a decision to dismiss him had been taken by the board of directors. This was not disputed by the applicant. There was therefore no option open to Mr Singh except to resign as suggested by Dr Parsoo. This conduct was enough to put pressure on Mr Singh.

[17] The court cannot review and set aside the award on factual issues found proved by the Commissioner. The court is obliged to regard the award as valid, binding and final unless an applicant on review can show that there is a defect. Taking into account the evidence presented before the commissioner, I have no reason to interfere with the award with regard to the proof of the dismissal. If the evidence of the third respondent is seen objectively and taking into account the absence of the applicant's version, it is clear that there was implied intention on the part of the applicant to end the employment relationship. The facts found proved which caused the commissioner to come to his conclusion were sufficient for the finding of dismissal.

[18] It was upon the applicant to show that the dismissal was fair for reasons related to the employee's conduct or capacity. The applicant has not admitted or conceded the dismissal and therefore did not submit that the dismissal was for a fair reason. What was however argued was that Mr Singh had on his own admission committed a serious offence and was guilty of dishonesty. It was submitted by Mr Omar for the applicant that the commissioner should have looked at the substance of the misconduct and ask what the employer could have done and whether the dismissal was a reasonable response in the circumstances. I accept this submission but wish to add that no evidence was produced before the commissioner to justify the dismissal. No fraud was proved to have been committed by Mr Singh except the misconduct in failing to obtain the required quotations. There was no evidence to show that Mr Singh benefited from this conduct. I am not suggesting that receipt of benefit is required for a misconduct.

[19] It was submitted quite correctly by Mr Omar that in the constructive dismissal there is no procedural aspect involved only the substantive aspect comes to play. In view of the

finding on procedural unfairness, can I sitting as a court of review interfere with the wrong conclusion of the arbitrator when his conclusion is logical? Was the applicant prejudiced in any way by this conclusion taking into account the commissioner's remarks on substantive fairness?

[20] I am of the view that the court cannot interfere with the award on the basis that the conclusion is wrong. I am satisfied that conclusion reached was logical and based on the material before the commissioner whether I agree with it is irrelevant. I am also of the view that the conclusion reached by the commissioner did not lead to the failure of justice. A bona fide mistake by the commissioner does not lead to the review of the award unless it amounts to the failure of justice. I therefore find that the conclusion reached did not prejudice the applicant and therefore immaterial.

[21] It was submitted that the commissioner substituted his decision with that of the applicant and that the dismissal was a reasonable response. The dismissal was a reasonable response. There was no evidence before the commissioner on this. The commissioner only relied on the undisputed evidence of the third respondent.

[22] Any breach of trust committed by the third respondent is an issue which should have been dealt with before the commissioner. The circumstances of the resignation were not challenged. I therefore find that there is no evidence for coming to the conclusion that the commissioner misdirected himself or that there was no evidential material on which the award was based.

[23] It was submitted that the commissioner misconceived his powers, when on the question of substantive fairness, he perceived his function as having to determine a fair sanction and therefore acted ultra vires. This it was argued would make the award unjustifiable and has to be set aside. Reliance was placed on the following paragraphs of the award:

“ In terms of an appropriate sanction for such misconduct it is debatable whether this would warrant a serious (and possibly final) disciplinary warning or whether it would warrant

dismissal, particularly taking into account the role that Mr Singh held in the hospital and the responsibilities required of him.

Thus I find that the dismissal was not necessarily warranted in this matter but that it was probable that if an appropriate disciplinary hearing had been conducted that in all likelihood Mr Singh would have been placed on a final written warning-taking into account the seriousness of this matter.”

[24] I do not understand the commissioner to have substituted what he considered to be fair. He mentions that it is debatable if Mr Singh’s misconduct would have warranted a serious disciplinary warning or a dismissal. A decision to dismiss or to issue a final warning would have been determined during the hearing if there was any. The award cannot be set aside on this ground.

[25] The employer is not expected to run a business with untrustworthy employees. When faced with serious breach of trust, the employer is entitled to dismiss. The law still stands which requires him to act fairly towards the employee. The employer must be able to prove the fairness of the dismissal and prove the misconduct committed by the employee. It is not sufficient only to prove that a serious wrong doing was committed without proving that such wrong doing results in the dismissal of the employee. When the commissioner is faced with one side of the story and there is no reason to reject such version he has to act upon it. The factual findings are not disputed by the applicant.

[26] Where the employer relied on the resignation of the employee to dispute the dismissal, it is not open to him to say the dismissal was justified when no evidence was given to prove the fairness. I am satisfied that the commissioner properly applied his mind in coming to the conclusion he reached. I find that the award is rational and justifiable and cannot be set aside for any defect. I find that the applicant failed to prove the fairness of the dismissal.

[27] In the circumstances the following order is made:

(a) The application to review the reward in case no D1439/99 is dismissed.

(b) The award in case no D1405/99 is hereby made an order of court.

(c) The applicant in the review application to pay the costs in respect of case no's D1405/99 and D1439/99.

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NGCAMU AJ

FOR THE APPLICANT: M.S. OMAR

FOR THE RESPONDENT: A.M.C. HUNTER