IN THE LA BOUR APPEAL COURT
OF SOUTH AFRICA.

Appeal Court Case No. JA65/05

In the matter between

LE MONDE LUGGAGE CC T/A
PAKWELLS PETJE **Appellant**

and

COMMISSIONER G DUNN **First Respondent**

COMMISSI ON FOR CONCILIATION,
MEDIATION AND ARBITRATION **Second Respondent**

SANDRA GAIL SMITH **Third Respondent**

JUDGMENT:

DAVIS AJA

Introduction.

[1] **Appellant conducts a business of selling travel luggage and leather-ware. On 1 April 2002 Ms Nonzamo Petje and her husband acquired ownership of appellant, having purchased it as a going concern from its previous owners.**

[2] **Third Respondent, who had initially been hired by the previous owners, continued to be employed by appellant. At the time of her resignation, she**

was in charge of a team of employees and earned R7,000 per month. On 14 February 2003 third respondent resigned on the basis of an allegation that her employment relationship had become intolerable. In particular, she alleged that she had been assaulted by Mrs Petje on 13 February 2003. Appellant denied this allegation and contended that third respondent had resigned when she had been charged with disciplinary offences and then notified to attend a disciplinary hearing.

[3] Third respondent referred the dispute to second respondent for conciliation. After conciliation failed, the matter proceeded to arbitration. The main issue for determination at the arbitration hearing was whether third respondent had been constructively dismissed on 13 February 2003. First respondent found in favour of third respondent and ordered appellant to pay twelve months compensation in the amount of eighty four thousand rand (R84,000).

[4] Appellant then brought an application to review the arbitration award before Francis J who dismissed the application with costs on 13 September 2005. The matter now comes to this Court with leave of the court a quo.

The Essential Dispute .

[5] In his judgment, Francis J determined that the crucial issue for resolution

was whether the third respondent had been assaulted by Mrs Petje. As he stated: 'If she were assaulted in the manner that she says she was it cannot be expected of her or any other employee as such to endure an assault and continue to work' (at para 14) In this assessment he was clearly correct. S185(e) of the Labour Relations Act 66 of 1995 ('the Act') provides that an unfair dismissal exists where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee. If the evidence justified the finding of an assault, on the probabilities, then it follows that respondent would have been unfairly dismissed.

[6] Ms Anderson, who appeared on behalf of appellant, contended that, in addition to the issue as to whether an assault had taken place, there was a further question as to whether third respondent had resigned on 14 February 2003. I shall deal with these two disputes in turn.

The Alleged Assault.

[7] Third respondent testified that on the morning of 13 February she had an acrimonious telephone conversation with Mrs Petje. It appeared that third respondent had telephoned the Department of Labour and, as a result of a long conversation, Mrs Petje, who was en route to a funeral, was unable to

contact third respondent. An acrimonious telephone conversation then ensued once Mrs Petje was able to locate third respondent. It then appears that there was a similar exchange between Mr Petje and third respondent.

[8] Later that day Mrs Petje returned to the store and informed third respondent that she was no longer the manager. Mrs Petje called a meeting of staff to apologise for the rowdy arguments between herself and third respondent. According to third respondent, Mrs Peje told the meeting: 'I would just like you all to understand that you will not be referring to Mrs Smith anymore. She does not belong to the shop. What ever she is going to do is up to her but she is not the manager in the store anymore.' Notwithstanding this announcement , third respondent returned to her work station. A further angry exchange took place between the two women which according to third respondent culminated in Mrs Petje slapping her on the left side of her face while she was sitting on a chair. She claimed that she fell off the chair, felt dizzy and immediately left without her bag. She went to consult a medical doctor who referred her to a specialist so that he could conduct a hearing test.

[9] Third respondent testified that she then spoke with her mother-in-law who, on the former's instructions, compiled a letter of resignation which was faxed

to respondent on 14 February 2003. It was shortly thereafter that third respondent received a notice to attend a disciplinary hearing.

[10] Third respondent's version was supported by the evidence of Mr John Malati, a self employed signwriter who was present at the store on 13 February 2003 where he was hired to complete a sign writing assignment. . He heard an argument between third respondent and Mrs Petje and 'when the voices raised up I just turned to look what was going on then I just see Mrs Petje just clapping Sandy, on the face on the left hand side'. Notwithstanding a lengthy cross examination, Mr Malati insisted that he had personally witnessed the assault.

[11] Third respondent's version was also supported by medical documentation. A medical certificate from Dr Ben Viljoen of 13 February 2003 confirmed that he had examined third respondent. There was apparent damage to the left ear as a result of which he had referred her to an ear, nose and throat specialist. A further certificate from Dr Mike McDonogh dated 14 February 2003 was produced. Dr McDonogh described the nature of the illness thus: 'Injury left ear severe deafness and dizziness'.

[12] On 25 February 2003 an audiologist, Petro Groenewald, prepared a

certificate in which the following appears: 'Pure tone audiometry indicates peripheral bilateral normal hearing abilities. In the left ear is a mild condutive component. These results might indicate a possible hit on the left ear.'

[13] By contrast, Mrs Petje, supported by two other witnesses, Mr Boy Mandla Silundi and Mr Nceba Beauchamp, denied that any assault had taken place as alleged by third respondent. According to Mrs Petje an argument had indeed taken place and at some point ,on 13 February 2003, respondent had simply left the store without her bag. The following passage captures Mrs Petje's version: 'Well I said Sandra I am asking you to work. She said "ag your game is over" you know and she was shouting "your game is over" and then I must say Madam Commissioner I was very upset and in that anger I just went past he quickly. I ran into the office and just sort of to cool down you know because I was extremely, extremely annoyed and thee were people in the shop you know… I think it was early afternoon or so you know. Yah around there. Okay fine. Some few minutes later I came down again after I had cooled down and she was not there in the shop. When I asked where she had been to they told me that she took her purse and she said "I will be back" you know.

[14] After evaluating this evidence, first respondent concluded: 'The assault on the applicant is the event which set this day apart from other incidents with the respondent. This is supported by the extensive medical evidence which forms part of this case. The applicant left the store to consult a medical doctor where she had received treatment on more than one visit. It is my view that the applicant had no intention to resign and wanted to work for the respondent.'

[15] Ms Anderson submitted that first respondent had erred in using the medical certificates as justification for her finding in that no doctor had been called to give evidence at the arbitration hearing. Absent the medical evidence, Ms Anderson submitted that the two versions were effectively in equipoise. There was no basis to prefer the version of third respondent over that of Mrs Petje.

Evaluation

[16] This submission overlooks the evidence provided by Mr Malati who was consistent in his contention that Mrs Petje had slapped third respondent. By contrast the balance of the evidence tendered on behalf of appellant was of a very poor quality. Mrs Petje testified that third respondent left in the early afternoon; Mr Beauchalp said that third respondent left at approximately

11.00 a.m. where Mr Silundi estimated the time between 16h00 – 17h00.

[17] While it may have been preferable for first respondent to have heard medical evidence, in the very nature of the process undertaken by a member of second respondent, some measure of informality is surely indicated. The arbitration process before a member of second respondent should not be reduced to the evidentiary formalism which applies in an ordinary court of law.

In this connection the instructive judgment of Wallis AJ in Naraindath v The Commission for Conciliation, Mediation and Arbitration and others (2000) 21 ILJ 1151 (LC) illuminates the role of second respondent. After a careful analysis of the role of arbitration in labour disputes Wallis AJ said: 'It would stultify the entire purpose of the legislation if this Court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by CCMA to resolve unfair dismissal disputes conducting those disputes in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts'. (para 26)

[18] In my view, Wallis AJ was correct to point arbitrators, seeking to conduct an arbitration in a manner which is fair to both parties and which

expeditiously resolves a dispute, in the direction of section 26(1) of the Small Claims Court Act 61 of 1984 which provides inter alia, 'subject to the provisions of this Chapter the rules of the law of evidence should not apply in respect of the proceedings in a court and a court may ascertain any relevant fact in such a manner that it may deem fit. See also Paul Benjamin. 'The impact of judicial decisions on the operation of the CCMA' 2007(28) ILJ 1 who cautions that a nuanced approach to arbitration, that is one that moves beyond a traditional adversarial legal culture, may be a bridge too far for second respondent as 'it will call for expertise that we do not possess at present' (at 19). In the present case, first respondent revealed an appropriate degree of legal flexibility of the kind required to enhance the mandated performance of second respondent.

[19] I accept that the present dispute is one of those rare cases where the true issue concerns the resolution of the clear dispute of fact which is best determined by listening to evidence and ascertaining the credibility of the witnesses. However, even within this context, the demands upon an arbitrator for accuracy, expedition and fairness should counsel against an adherence to the nature of the technical legal form which predominates in a court of law.

[20] Viewed accordingly, first respondent was manifestly justified in testing the accuracy of the competing narratives presented by the disputing parties against the objective evidence which might have been available to her. The medical certificates supported third respondent's version that she consulted medical advice on the 13th of February 2003 about an injury to her left ear. The medical evidence therefore supports the version that she sustained an injury as a result of an assault, in this case from Mrs Petje. The medical evidence, coupled with the independent testimony of Mr Malati, therefore provides a far more objectively verifiable account of the events of 13 February 2002 than the bare denials from appellant's witnesses.

[21] Bearing in mind that the arbitrator had only to find on the probabilities that an assault had occurred, I can find no fault with her reasoning or the conclusion to which she arrived in this regard.

Resignation by Third Respondent.

[22] Ms Anderson sought to make much of the fact that the letter of resignation had been prepared by third respondent's mother-in-law and that the mother-in-law had no locus standi to resign on her behalf. Furthermore, Ms Anderson submitted that the notification to attend the disciplinary enquiry

was sent to third respondent by appellant before appellant received third respondent's resignation letter. Furthermore Ms Anderson also referred to passages from the evidence of third respondent that she was willing to return to work at the time that she received the notice to attend the disciplinary hearing.

[23] Whatever the ambiguity in parts of third respondent's testimony both her explanation of the production of the resignation letter and its contents are clear.

The background to the resignation letter was set out by third respondent in her evidence as follows :

'My mother-in-law, I told her that I am going through to the doctor. I explained to her everything that had happened. She had contacted her lawyer.

Are you saying she resigned on your behalf? – Yes. She faxed the letter for me. I was told, I told her what to say and what was happening. That morning had she said to me she was going to fax it. That is on page 6. I had then resigned. Mrs Petje then came and…So in between when my mom-in-law was faxing this for me Mrs Petje's driver, probably at the same time, had come to give me the discipline hearing. I did not have money in my phone at home. About ten minutes later my mother-in-law phoned me. I said to her look I do not know if I have done this right or if I have done it wrong but I

have signed now for a discipline hearing form that has come through She said to me do not worry about that because you have already resigned, so ignore that, you have already resigned, whether you signed for it or not it does not matter anymore.'

[24] First respondent found that third respondent had asked her mother-in-law to fax her letter of resignation on 14 February 2003. That she was given notice to appear at a disciplinary enquiry on the same day does not alter the fact that third respondent had given her mother-in-law clear instructions to draft and then dispatch a resignation letter to appellant, the contents of which make her resignation perfectly clear:

'Following your irrational and unruly behaviour yesterday afternoon in which you assaulted me, in consequence of which I have sustained certain injuries, I find that a continued working relationship is intolerable.

As you are aware I have, since you acquired this operation, applied myself diligently to my duties under very difficult circumstances, where you have repeatedly sought to undermine me, belittle me and, to put it bluntly, sought any excuse to terminate my employment.
Under these circumstances I hereby tender my resignation without notice and reserve my rights in their entirety.'

[25] In my view, first respondent was correct in her finding that third respondent had resigned on the basis of a working relationship which she found to be 'intolerable'. For these reasons, the third respondent had discharged the onus of proving that she had been constructively dismissed in terms of

section 186(1)(e) of the Act.

Damages.

[26] Ms A nderson submitted that first respondent had given no reasons as to why she ordered appellant to pay third respondent in the amount of twelve months compensation. In his judgment Francis J found that this omission did not necessarily render the award reviewable. He concluded that it was just and equitable under the circumstances of the case that compensation of twelve salary should be awarded.

[27] Ms A nderson sought to argue that it was not just and equitable to make an award of twelve months compensation, in that the circumstances leading up to the assault revealed that both parties had been to blame and that third respondent, in particular, had been provocative in the manner in which she sought to engage with Mrs Petje.

[28] It appears from the evidence that there is some merit in this submission. The relationship between the two women had clearly deteriorated over a period of time. On 13 February 2003 Mrs Petje who was en route to a funeral was unable to make contact with her manageress, owing to the latter's lengthy telephone conversation to the Department of Labour. Mrs Petje was

clearly in a tense and distraught frame of mind when she returned to work. The conduct of third respondent may well have exacerbated her mood and given rise to the anger which ultimately resulted in the assault.

[29] This court, however. cannot be sympathetic to employers assaulting employees. The history of South African labour relations reveals all too often the contempt with which employers treated employees whose dignity was all too often sacrificed upon the alter of an avaricious desire to extract the maximum profit from the workforce and powered by a racist disregard for the interests of employees. Employers must not only treat employees with respect but must comport themselves with the knowledge that there exists an obligation upon them to exercise power in the most responsible possible manner, provocation from an employee notwithstanding.

[30] The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employees loss and not to punish the employer. See MSM Brassey Commentary on the Labour

Relations Act A8-155; also Ferodo (Pty) Ltd. v De Ruiter (1993) 14 ILJ 974 (LAC).

[31] In my view, an award of compensation of twelve months is not punitive but is clearly justifiable on the basis of the nature of the wrongful act committed by Mrs Petje which was the key event which gave rise to the unfair dismissal. As noted, an assault upon an employee is an egregiously wrongful act.

For these reasons, the appeal is dismissed with costs.

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DAVIS AJA

Jappie & Leeuw AJJA concurred

Date of Judgment: 29 June 2007
For the Appellant: Ms Riki Anderson
instructed by Riki Anderson Attorneys
For the Respondent: Adv. W. Hutchinson
instructed by Fluxmans inc.