REPUBLIC OF SOUTH AFRICA

Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: DA10/2012

In the matter between:-

JONSSON UNIFORM SOLUTIONS (PTY) LTD **Appellant**

and

LYNETTE BROWN **First Respondent**

NATIONAL BARGAINING COUNCIL FOR

THE CLOTHING MANUFACTURING

INDUSTRY (KZN) **Second Respondent**

RICHARD LYSTER N.O. **Third Respondent**

Heard: **5 September 2013**

Delivered: **13 February 2014**

Summary: Review of jurisdictional findings- different tests applicable to factual and jurisdictional findings- correctness test applicable to legal and jurisdictional findings- reasonableness test applicable to factual findings. Labour Court misconstruing the test applicable to jurisdictional findings- appeal upheld- Labour Court judgment set aside. Review application dismissed.

CORAM: TLALETSI ADJP, C J MUSI *et* MOKGOATLHENG AJJA

JUDGMENT

C J MUSI AJA

[1] This is an appeal against the judgment of the Labour Court (Cele J) wherein it found that the first respondent was dismissed and that such dismissal was substantively and procedurally unfair. The appellant was ordered to pay the first respondent R616 000,00 which was the equivalent of eight months' salary and outstanding leave pay to the amount of R8 983,33. The appeal is with the leave of the court *a quo*.

[2] The appellant (a clothing manufacturer whose place of business is in Durban) employed the first respondent as its Managing Director. She earned R77 000,00 per month.

[3] The appellant was commissioned to manufacture uniforms for Pick 'n Pay, a national retail store. During the end of September 2008 or the beginning of October 2008, the first respondent was informed about a problem with the Pick 'n Pay stock. They did not manufacture enough uniforms. She requested the Operations Director, Mr Hilton Strauss and the Account Manager, Ms Stephanie Horning, to explain the lack of sufficient stock. She then asked another Account Manager, Karen Oswald, to assist with the Pick 'n Pay account. Ms Oswald acquitted herself well and took all the necessary remedial steps. The first respondent appraised the Chief Executive Director of the appellant, Mr Nick Jonsson about the status of the Pick 'n Pay account.

[4] On 3 October 2008, the first respondent went to Johannesburg to attend a meeting. Whilst there, she was phoned by Oswald who was very upset and told her (first respondent) that they had a very unpleasant meeting with Jonsson in Durban. She (first respondent) telephoned Strauss and requested him to explain to Jonsson what the situation was with the Pick 'n Pay account and to make sure that Oswald was all right. Whilst she was in the meeting, in Johannesburg, Jonsson called her and said:

> 'Lynne, Hilton told me that Karen's upset and you're upset, what's going on?'

She responded by saying words to the following effect:

> 'Nick I think it is out of line that Karen be criticised about the Pick 'n Pay (account) because she is a victim in the whole situation, it was Stephanie as I had told you who hadn't kept a proper control of the Pick 'n Pay (account) and Karen was asked to fix it up.'

According to the first respondent Jonsson became angry and shouted:

> 'Who do you think you are telling me that I'm out of line?'

She responded by saying:

> 'Nick, I didn't say that you were out of line, I said the situation is out of line, it's not right.'

He then told her that she was not at the meeting and that Ms Edwina Watkins was more on the receiving side than Oswald. She told him that Watkins was also a victim, because she does production in accordance with the information given to her by the account manager. They agreed to continue with the conversation on the succeeding Monday.

[5] Jonsson confirmed that he had a meeting with some staff members whilst the first respondent was at another meeting in Johannesburg. He confirmed that he was not happy because things were not going "according to plan". He was not aware that Oswald was upset. Strauss subsequently told him that the first respondent called and told him that Oswald called her. The first respondent told Strauss that she was upset because of the manner in which Jonsson spoke to Oswald. Jonsson called Oswald and apologised. He then called the first respondent who aggressively asked him how he dares deal with her staff in that way and that he was out of line. He told her that she was not even at the meeting and that they should talk on the Monday. He was angry. That, in a nutshell, is the background to this dispute.

[6] The first respondent testified that she went to Jonsson's office on the Monday morning. She greeted him, after entering his office. He angrily said: "I'm not going to be spoken to like I was on Friday'. She kept quiet. He then said: "this isn't working out (pointing his finger to her and him).

So what are you going to do about it." She told him that it is up to him. He responded by saying:

> 'I think you must resign, and you must resign immediately.'

According to first respondent, she understood that to mean that she must leave the premises immediately. She went to her office and requested her professional assistant, Bronwyn Turner to help her to pack her things. She requested Turner to hand in her laptop and to submit her expense claim forms to Jonsson, whereafter she left the premises.

[7] She met with her partner at La Lucia Mall and realised that she could no longer send or receive e-mails on her phone. Her phone was connected to the company's server and was disconnected. Whilst at the Mall, at approximately 13H00 Jonsson's executive assistant called her and informed her that Jonsson requested her to call the first respondent and ask her to fax her resignation letter because he wants to make a company announcement. She said to the executive assistant:

> 'Sarah, I haven't resigned, please will you tell Nick that I'm not sending in a letter of resignation as, in fact, I am seeking legal assistance and advice on my position.'

She consulted Mr Ebbie Jamieson, an attorney.

[8] In the evening she received an e-mail dated 6 October 2008 that was sent at 01:47PM to the personnel by Jonsson, which reads:

> 'Dear All,
>
> As some of you already know, Lynn Brown has resigned from the company with immediate effect and has already left. I am contemplating our next move, but I can assure you that it is "business as usual" until then. I am sure that you will all cope extremely well, as you always did before the appointment of a managing director. We are facing some wonderful challenges with the imminent role out of the new Pick 'n Pay G3 range followed by new Spur uniforms early in 2009, so it is going to be an

exciting period, and we will need everyone to be at the top of their game to ensure the success we are expecting.

Please feel free to discuss with me any issues that may arise following Lynn's departure."

[9] On 6 October 2008 at 18H58, she wrote the following e-mail to Jonsson:

'Reference is made to the events which transpired at work today and your Executive Assistants (sic) telephone call to me requesting a resignation letter so that you could make an announcement to the company.

I am deeply shocked, upset, humiliated and traumatised by your actions today. I have not resigned, and am (sic) presently seeking legal advice as to which course of action I should follow.

All my rights are reserved."

[10] On 7 October 2008, Jonsson replied as follows:

'Your sudden departure yesterday after our discussion was surprising to say the least. We had a brief conversation regarding your insubordination and seemed to agree that your continued employment here would be stressful. Seeing as you have not been dismissed and have not resigned you are officially still an employee of Jonsson Uniform Solutions (Pty) Ltd. Therefore I would like you to please come and see met at 10:00 am on Thursday 9th October so we can resolve this matter in an amicable way.

I did call you on your mobile at 5:00 pm to discuss this but there was no reply and I left a message …'

[11] The first respondent admitted that Jonsson called her twice on her mobile on 6 October 2008 and that she did not answer. She testified that she was in a meeting with Mr Jamieson at the time.

[12] In 9 October 2008, Mr Irvin Lawrence, the first respondent's erstwhile attorney wrote a letter on her behalf to Jonsson wherein he set out the background facts from his client's perspective and ended it as follows:

> 'Our client construes your actions as having constituted her effective dismissal from the company alternatively as having made her continued employment with the company intolerable.'
>
> In these circumstances, please indicate what the objective is of our client meeting with you on Thursday, 9th October 2008 at 10h00. Our client's understanding is that the employment relationship has been effectively severed. That aside, it is, with respect interesting to note, that while you contend that our client has not been "dismissed" there is no indication in your correspondence that our client should return to work. This, with respect, seems to accord with our client's version was (sic) that her employment has effectively come to an end.
>
> In these circumstances we are instructed, to refer a dispute on behalf of our client relating to the unfair termination of her employment. We will in due course be despatching the necessary documents referring the dispute to your offices'.

[13] On 13 October 2008, she submitted a leave form requesting leave from 14 October 2008 to 24 October 2008 in order to go overseas.

[14] Jonsson testified that first respondent threatened to resign on a previous occasion because she did not get along well with Mr Fortman, the Chief Financial Officer of the appellant.

[15] He confirmed the telephonic conversation, which occurred between him and the first respondent, on the Friday.

[16] He confirmed that he and the first respondent had a meeting on 6 October 2008 in his office whereat, he told her that, it would be very difficult for them to work together if she was going to talk to, or behave towards, him in that manner. She then said: "Well I wouldn't like to let the company down or you down, shall I stay a month or longer?" He then responded by saying: "No, there's no need. If you want to resign you can go now." He further suggested to her that she should go and think about it and come back to see him after it had settled in. The first respondent left.

[17] He confirmed that he requested his executive assistant to call the first respondent and that the latter told her that she did not resign. He was surprised to hear that and called the first respondent but she did not answer and he left a voice message on her answering service. He testified that her email account was not disconnected but her emails were re-routed because they wanted to avoid customers sending emails to her and not receiving a response or receiving one late.

[18] He confirmed that he sent the email informing the staff about the first respondent's resignation followed by a meeting where he informed them that they should see him to discuss any issues and that it is business as usual.

[19] After receiving the email from the first respondent on 7 October 2008, he solicited legal advice as a result of which he responded to her email on 7 October 2008 and invited her to a meeting. He confirmed that he received the letter from Mr Lawrence on 9 October 2008.

[20] A clinical psychologist, Mr Jean-Francois Deveaux Marigny was called by the first respondent. He testified that he assessed her and concluded that she suffered from Post-Traumatic Stress Disorder as a result of the manner in which she was treated and dismissed by Jonsson.

[21] The appellant also called Strauss and Fortmann to testify. Strauss mainly testified about the telephone conversation between him and the first respondent on 3 October 2008 while Fortmann testified about his relationship with the first respondent and her previous threat to resign.

[22] On 4 November 2008, the first respondent referred the dispute to the Second respondent. Conciliation could not yield a positive result and a certificate of non-resolution was issued. The first respondent then referred the dispute to arbitration.

[23] The arbitrator found that the meeting of 6 October 2008 caused a misunderstanding. The first respondent believed that she was being dismissed whilst Jonsson believed that she was resigning voluntarily. He

concluded that a request by an employer to an employee that she must resign cannot constitute a dismissal and that the appropriate response by the first respondent, a Senior Executive of many years' standing, should have been to tell Jonsson that she refuses to resign. He considered the probabilities and concluded that they favour Jonsson's version. He concluded that the first respondent was not dismissed and that she must be regarded as having resigned. With regard to the claim for unpaid leave he found that the first respondent's claim for 12.5 days' leave pay should be set off against the undue salary that she received for October 2008. She was paid her full salary whilst she worked until 6 October 2008. He therefore dismissed the first respondent's claim.

[24] Dissatisfied with the arbitrator's decision, the first respondent launched a review application against the award of the arbitrator. She contended that the arbitrator committed gross irregularities in the conduct of the arbitration proceedings, because he did not apply his mind properly to the evidence presented. With regard to the finding that the probabilities favoured Jonnson's version, it was contended that the arbitrator overlooked important evidence and that his failure to consider relevant evidence constituted a misdirection. The first respondent therefore contended that the arbitrator's decision is a decision that a reasonable decision-maker could not have reached.

[25] The court *a quo* applied the reasonable decision-maker test as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[1] The court *a quo* stated that:

> 'It is noteworthy that the rightfulness or wrongfulness of the decision reached by a commissioner is not part of the probe as to whether such a decision is one that a reasonable decision-maker could reach…'

[26] The court *a quo* correctly stated that the first respondent bore the *onus* to prove the alleged dismissal and that where the probabilities were evenly balanced, the application had to be dismissed.

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[1] [2007] 28 ILJ 2405 (CC).

[27] The court *a quo* found that the basis on which the arbitrator accepted Jonsson's version leaves much to be desired. The court *a quo* was of the view that the arbitrator did not give any reason for his finding that the probabilities favour the appellant's case.

[28] The court *a quo* analysed the evidence and made the following findings:

- If Jonsson was truly expecting a resignation letter from the applicant, he ought not to have cut the special means of communication by which such letter would probably have been sent to him. This fact alone, so the court a *quo* reasoned, disturbed the veracity of his version.

- Jonsson testified that he gave the first respondent time to think but yet he cut her email. This conduct went contrary to his version that he gave her time to think about the matter and come back to him.

- His conduct after the encounter in his office by telling Fortmann that the first respondent had resigned clearly evinced that, at the time, he believed that she was no longer an employee.

- The words: "I think you must resign and you must resign immediately" can only be construed as a dismissal.

- Once she was dismissed, she sought legal advice and thereafter accepted the repudiation of her employment contract; the issue of the leave she took could not resuscitate a contract which had already ended.

- The appellant paid her salary for October 2008 for which she did not work. She was entitled to 12.5 leave days' pay but took the overseas trip as leave. That period of leave "she took after her dismissal has to be set off against her leave credit leaving her with 3.5 leave days".

- She was dismissed and that such dismissal was substantively and procedurally unfair.

[30] Strangely, the arbitrator's award, which was the subject of review, was not set aside by the court *a quo.* There is therefore, currently, a valid arbitration award dismissing the first respondent's claim and a court order, ordering the appellant to pay the first respondent compensation, emanating from the same set of facts.

[31] Ms Naidoo, for the appellant, argued that the court *a quo* applied the incorrect test. The test set out in *Sidumo supra*, so she argued, was not applicable because the true question in this matter was whether there was in fact a dismissal. If there was no dismissal then the second respondent would not have jurisdiction to adjudicate the dispute. She submitted that the dispute is therefore a jurisdictional one and as such the correctness of the arbitrator's decision had to be determined from the objective facts. That being the case, the court *a quo* analysed and approached the matter incorrectly. She contended that the court *a quo* assessed the objective facts incorrectly because the probabilities in fact favoured the appellant's version. She submitted that the words you must resign immediately cannot be construed to be a dismissal.

[32] Mr Van Niekerk, on behalf of the first respondent, was constrained to accept that the court *a quo* applied the incorrect test. He however argued that the court *a quo* approached and analysed the facts as if it were an appeal and not a review. He submitted that even though the court *a quo* applied the wrong test it inadvertently used the right approach and therefore reached the right conclusion. He further submitted that the court *a quo*'s analysis of the probabilities and its conclusions were correct.

[33] The generally accepted view is that we have a bifurcated review standard *viz* reasonableness and correctness.[2] The test for the reasonableness of a decision was stated in *Sidumo and Another v Rustenburg Platinum*

[2] I say generally because of the debate relating to the gross irregularity standard as enunciated in *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 76. See Myburgh: The test for review of CCMA arbitration awards :an update. Contemporary Labour Law Vol 23 No. 4 November 2013 at page 31. That controversy, if it is one, is beyond the scope of this judgment.

Mines Ltd and Others as follows: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”[3]

[34] In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute. See *SARPA v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU*.[4]

[35] The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied. [5]

[36] It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court *a quo*, as both parties agreed, applied the wrong standard.

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[3] Supra at para 110

[4] (2008) 9 BLLR 845 (LAC) at para 40 and 41

[5] In many matters the admissibility of evidence, which is a legal question, could be inextricably linked to the facts and the decision of the arbitrator will be guided by the facts. The determination of the admissibility of hearsay evidence is an example of a legal question that is inextricably linked to the facts.

[37] The court *a quo* relied heavily on the fact that the first respondent's email account was cut for its conclusion in relation to the probabilities. The court *a quo* concluded that the first respondent's access to emails was cut. This is incorrect. The evidence of Jonsson is that the emails were re-routed because she left and there was a possibility that they had to respond to clients who sent emails to her. This was in my view a completely acceptable and rational explanation for his conduct.

[38] According to the court *a quo,* the only reasonable construction to place on the words "I think you must resign and you must resign immediately" is that she was dismissed. I disagree. She was requested to resign and that such resignation should be effective immediately. She had an option to refuse to resign. I agree with the arbitrator that it was always open to her to say "I am certainly not resigning". The first respondent was a senior manager. She has operated on managerial level for many years. According to her, she has hired and fired employees in the past. She could not reasonably have thought that she was being dismissed when she was asked to resign. In fact in her evidence-in-chief she clearly stated that "I didn't resign. I was asked to resign."

[39] According to the first respondent she was dismissed, there was no misunderstanding or grey area. Her actions subsequent to the incident in Jonsson's office however points in the opposite direction. When she spoke to Sarah she said she did not resign. Likewise when she wrote the email on the 6 October 2008 she stated that she did not resign. It must be remembered that she wrote that email after consulting a lawyer. What is strange is that she stated what she did not do instead of stating what happened. If she was dismissed one would have expected her to say to Sarah "I am not going to submit a letter of resignation because I was dismissed." So too would one have expected her to state in her email to Jonsson, on 6 October 2008, that he dismissed her.

[40] The first respondent submitted a leave form, on 13 October 2008, requesting leave from 14 October 2008 to 24 October 2008. This is contrary to her evidence that there were no grey areas and that she was

certain that she was dismissed. One does not request leave from one's ex-employer.

[41] In the letter that her erstwhile attorney wrote to Jonsson it was stated that "Our client construes your actions as having constituted her effective dismissal from the company alternatively as having made her continued employment with the company intolerable." This also shows that there was uncertainty.

[42] When Jonsson wrote her a letter requesting her to meet with him so that they could address the problem amicably, she refused to go. In the said letter Jonsson categorically stated that she was still an employee of the appellant because she was not dismissed.

[43] I agree with the arbitrator that the probabilities favour the appellant's version. In my view the court a *quo*'s conclusion is wrong.

[44] The first respondent bore the burden of proving that she was dismissed. She did not relieve herself of that burden. She did not prove that she was dismissed.

[45] The first respondent was also awarded an amount of R8 983.33 as outstanding leave pay. I agree with the arbitrator that the 12.5 days leave pay should be set off against the salary that she received for October 2008 whilst she only worked for 6 (six) days in October 2008. The court a *quo*'s conclusion that she was officially on leave from 14 October 2008 to 24 October 2008 is, based on my conclusion that she was not dismissed, erroneous.

[46] The requirements of the law and fairness militate against a costs order in this matter.

[47] In my view, the appeal ought to succeed.

[48] I accordingly make the following order

a. The appeal is upheld

b. The order of the court a *quo* is set aside and replaced with the following:

The review application is dismissed with no order as to costs.

c. No order as to costs is made.

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C. J. Musi AJA

I concur.

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Tlaletsi ADJP

I concur.

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Mokgoatlheng AJA

APPEARANCES:

FOR THE APPELLANT:	Adv. Naidoo
	Instructed by Garlicke & Bousfield Inc
	La Lucia Ridge
FOR THE RESPONDENT:	Adv. Van Niekerk
	Instructed by Millar & Reardon Attoreys
	Dursan

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