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IN THE LABOUR COURT OF SOUTH AFRICA **NOT REPORTABLE**

BRAAMFONTEIN CASE NO: JR1077/01

2002.09.20

In the matter between

C H STRAUSS Applicant

and

CCMA Respondent

J U D G M E N T

PILLAY, J: I am indebted to the parties for their concise presentation of the case which has enabled me to decide the matter expeditiously.

The facts in this review are as follows:

The applicant alleges that the first respondent commissioner's award is reviewable because, on the evidence before her, there was no indication that the third respondent had committed an unfair labour practice as the applicant who had the onus of proof, had failed to prove on a balance of

probabilities that the third respondent had undertaken to double her salary after three months' probation, review it every three months and increase it every six months. The commissioner had found that the applicant's evidence had been rebutted during cross-examination. As a result of this finding the commissioner dismissed the applicant's claim of unfair labour practice. That decision was reviewable, it was submitted.

The applicant alleged at the arbitration, and reiterates in these proceedings, that the terms of the contract were in writing. It is common cause that the written contract, which appears in the bundle from pages 21 to 28, constituted the terms of the written contract, However, she further alleges that the other verbal terms of the contract were as stated in paragraph 7 of her notice of motion. More importantly, the terms she relies on as constituting the alleged unfair labour practice were that:

"After my three month probation my salary would double. Thereafter I would receive a salary increase every six months and a salary review every three months."

The principal argument on behalf of the applicant is that the respondent failed to testify. The commissioner therefore

had not been placed with all the information and could therefore not have assessed on the balance of probabilities the material before her.

I turn to consider the commissioner's reasoning and to determine whether there can be any validity in the applicant's submissions.

It is not in dispute that the evidence before the commissioner was that the applicant had earned R8 000 per month when she was an employee at Centenary Services. It was also not in dispute that the evidence before the commissioner was that, in terms of the contract of employment, she was to be paid R4 000 per month by the third respondent.

It is also common cause that the contract of employment states at paragraph (b):

"Remuneration: Gross salary of R4 000 per month and your salary reviewed. The employee's salary will be reviewed on the anniversary date of the employee joining Paracon or from the last increase date."

It is common cause that the applicant commenced employment on 23 August 1999. It is also common cause that she received an increase in March 2000 and was entitled to

have her salary reviewed in August 2000 in terms of the written contract.

The terms relating to the salary review, as recorded in the written contract, are completely contrary to the applicant's oral evidence. Applying the parol evidence rule the document must speak for itself, which it did. It is not in dispute that the applicant bore the onus of proof on a balance of probability. In those circumstances the commissioner was entitled to draw the inferences she did, to rely on the written document and to find that, on the evidence before her, that there was no indication that the third respondent had committed any act of unfair labour practice.

The evidence that I have referred to, that is the contract of employment and the facts that are common cause before me today and which were common cause before the arbitrator, are sufficient to dismiss the applicant's claim.

However, the commissioner went further and drew an inference from the fact that the applicant had been employed at R8 000 and that she had accepted employment at half that rate. The commissioner was not persuaded by the applicant's version. She enquired of the parties whether there had been a pre-arbitration meeting to determine whether, on the evidence

presented before her it was probable that there was such an undertaking by the third respondent as alleged by the applicant, and whether the third respondent had acted unfairly by failing to comply with such an undertaking. She found on the evidence, led by the applicant in the form of the contract of employment, that she was fully aware of the provisions relating to her salary. Given the fact that she had been previously employed, she was also familiar with employment contracts.

It is common cause before me here today that she stood up for herself and was, as both parties seem to agree, hard-headed and firm about her position.

On those facts too the commissioner was justified in drawing the inference that the applicant could not reasonably have come to the conclusion that the terms of her contract of employment were as she had stated them to be. The commissioner also took into account the applicant's delay in launching her application.

On the facts that were common cause before the commissioner and before me today there is no evidence that the applicant protested about the third respondent's alleged breach of its verbal undertaking. Such breach, on the

applicant's version, should have occurred three months after her employment. The first written communication about the alleged breach, it is common cause, was on 5 June 2001, a day before the arbitration.

The applicant's version is that she had protested verbally prior to that, on several occasions. Her explanation for not having written to the third respondent about this issue is that the third respondent did not like to use paper. I understand from that that the third respondent was reluctant to record issues in writing.

Be that as it may, she nevertheless lodged a written complaint in August 2000 about other matters, without raising the alleged breach of the verbal undertaking. The alleged breach of the undertaking is so fundamental and serious, relative to the applicant's other grievances, that one would her to have done something more decisive, like referring a dispute to the CCMA as soon as it had occurred. It is common cause that she did not do so.

On those facts alone I am satisfied that the arbitrator's award is justifiable on the basis of the material before her.

The other factors which render this award unassailable is that the applicant alleges that the commissioner should have

heard the evidence of the respondents. I have not been informed, and nor does the applicant rely on any evidence, that the arbitrator was prevailed upon by any party to make a ruling on whether the third respondent's witnesses should testify. If the arbitrator was not called upon to make such a ruling then the arbitrator must decide the matter on the material before her. It is not up to the arbitrator to call witnesses. This is the sort of matter where the applicant's own version did not make out a case. If it did not make out a case the third respondent was not put to its defence, and the commissioner was entitled to draw the appropriate inferences in the circumstances.

Those are briefly my reasons.

At the outset Mr Jonker assured me that I need not read the record. In reply, and after having heard Mr Rossouw, he suggested that I should read the record. I informed him that he was at liberty to raise and point me to any matter anywhere in the record that contradicted any submission that Mr Rossouw made. None of the portions to which I was referred to have made a serious or any dent on Mr Rossouw's submissions. Nor have I been pointed to any evidence on the record which contradicts the material evidence to which Mr Rossouw

referred me. Those portions of the record to which Mr Jonker referred me to I do not have any difficulty in accepting his submissions.

These relate firstly to whether the applicant made certain admissions. I accept that she did not on the record. However that portion of the record to which he referred also showed that the applicant was being evasive.

The other portions of the record to which Mr Jonker me to continued to show me that the applicant was not meek and submissive. She had asserted herself and did not accept the respondent's version. That too I accept. Other than that I was not shown any other portion of the record that might be material to the applicant's case and which refuted the allegations or the submissions made by Mr Rossouw.

In those circumstances I have been able to dispose of this matter on the facts that are common cause before me and expeditiously, without having read the entire record.

The application for review is dismissed with costs.

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D PILLAY J

ON BEHALF OF THE APPLICANT:	MR JONKER
ON BEHALF OF THE RESPONDENT:	MR ROSSOUW