IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2519/15

In the matter between

NATASJA VAN EEDEN **Applicant**

and

HYPROP INVESTMENTS LIMITED **First Respondent**

WW FERREIRA N.O. **Second Respondent**

CCMA **Third Respondent**

Heard: 19 July 2017

Delivered: 22 November 2017

JUDGMENT

MONI. AJ

[1] This is a review application of an arbitration award against the applicant. It is defended by the respondent, Hyprop Investments Ltd (Hyprop). The applicant resigned with notice on 3 April 2014. On 10 April 2014 she declared a constructive dismissal dispute in terms of s 186(1)(e) of the Labour Relations Act[1] (LRA) to the third respondent Commission for Conciliation, Mediation and Arbitration (CCMA). The arbitration was heard by the second respondent (Commissioner) on 31 July 2014, 8, 12 September 2014, 11 December 2014, 5, 11 June 2015, 7 and 8 September 2015. This matter took an inordinate amount of time to be heard. This was purportedly due to postponement requests by both parties' representatives and the commissioner's availability. This extended period to arbitrate a matter should have been avoided. It is both the representatives' and the commissioner's duty to ensure that ventilation is not delayed. It is in the best interests of the parties that their dispute is expedited. Resolution of issues avoids delays. This is a matter where had both parties properly attempted conciliation, the matter could have been resolved at the CCMA.

[2] The applicant's review application is on the following grounds: firstly, that the commissioner applied the test for constructive dismissal incorrectly (even though he was aware of the test) therefore he did not apply his mind to the evidence before him. Secondly, the commissioner finds that there are mutually destructive versions and yet fails to explain why he believes Hyprop over the applicant, essentially, Hyprop's explanation for its conduct is deemed reasonable which the applicant believes is incorrect. Thirdly, the commissioner finds that because the applicant did not seek the assistance from the respondent's Human Resources (HR) department it disqualified her from proving that she was constructively dismissed. Fourthly, that the decision reached by the commissioner is one that a reasonable decision-maker could not reach.[2]

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[1] Act 66 of 1995 as amended.

[2] In *Herholdt v Nedbank Ltd (2013) 34 ILJ 2795 (SCA),* the Supreme Court stated that the reviewing court should examine the merits of the case "in the round". In the event that the court finds that the reasons provided by the arbitrator are erroneous and do not assist the court in determining whether the decision reached is one a reasonable decision-maker would reach, then the court must still consider whether apart from those reasons, the decision is one that could be reasonably reached in light of the issues and evidence in the matter. The effect of the *Herholdt* decision is that, even where the reasons

Condonation Application

[3] Before this Court considers the review application, I must consider the applicant's condonation application. The principles laid down in *Melane v Santam Insurance Company Limited*[3] by Holmes JA are well known. In the matter of *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[4], the Labour Appeal Court (LAC) elaborated upon those principles as follows:

> "Firstly, that there must be good cause for condonation in the sense that the reasons tendered for the delay had to be convincing. In other words, the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, i.e. of the kind that resulted in a miscarriage of justice."

[4] The applicant's review application is late by 26 court days, not 43 days. This delay is not excessive when considering the reasons for the delay, which are, *inter alia*, a breakdown in the applicant's marriage, separation in September 2015, dealing with the emotional effects that this had on her child and sitting for final LLB exams in November 2015. This Court accepts that the period before the applicant launched her review application was enormously stressful for her. Despite the respondent naming the delay as mere excuse, pathetic and void of merit; to know that the applicant was late because she ensured that her child's health, welfare, security and safety was placed above her own case, satisfies this Court and is compelling[5]. Furthermore, once a decision was taken to review

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given by a commissioner are clearly wrong and there has been some irregularity, such a decision may not be set aside if based on the issues raised and the evidence presented to the commissioner, the outcome was a reasonable one. The *Sidumo* test will, however, justify setting aside an award on review if the decision is "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the commissioner.

[3] 1962 (4) SA 532 (A)

[4] (2000) 21 ILJ 166 (LAC).

[5] Section 9 of the Children's Act 38 of 2005 provides: "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

the matter, the applicant acted swiftly. The respondent has not shown that it has suffered any prejudice because of the applicant's delay.

[5] As the above is insufficient to condone the applicant's lateness alone, I turn to consider the prospects of success; as such, the Labour Court in *Academic and Professional Staff Association v Pretorius No and Others*[6] reiterated the applicable factors to be decided upon when late filing of a review application is necessary, and said:

> "… a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay."

[6] In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others*[7] the Court said:

> "In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard. The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible."

[7] Should I find in favour of the applicant, the prejudice is automatic as is the miscarriage of justice.

[8] For this Court to find whether the applicant's prospects of success are strong, the facts and the reasons for review are considered below. I have alluded to this

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[6] (2008) 29 ILJ 318 (LC) at paras 17 – 18.
[7] (2015) 36 ILJ 232 (LC) at para 22.

matter being lengthy. What is expounded below is a short concise summary of the facts on record.

[9] The first respondent owns and manages properties. The applicant commenced her employment in February 2009. She worked in the Commercial Division as the Financial Manager. The Commercial Division consists of 3 properties, namely: Glenfield, Glenwood and Lakefield. The applicant had previously put her hand up to assist Malize Jacobs (Jacobs), the General Manager for the Retail Division, the applicant worked well with Jacobs. Jacobs mitigated for a higher bonus for the applicant because of her willingness to assist her and the way she did so. The applicant assisted Jacobs only in the financial space.

[10] The applicant's Commercial Division's General Manager was Robin Merrington (Merrington). Merrington and the applicant worked well together too. Merrington took maternity leave mid-March 2013. She was to return in August 2013 (6 months' later).

[11] The Commercial Division consisted of 4 personnel; namely, Merrington, the applicant and two handymen. When Merrington went on maternity leave, she was to hand over her duties to Jacobs. The handover was not comprehensive or thorough as such Jacobs did not know what Merrington's job entailed. In the purported 'handover' meeting Merrington agreed for Jacobs to change working systems to assist her as such, Jacobs was inundated with her own work. This was not mooted with the applicant prior to the agreement. Jacobs believed that the applicant would be able to do Merrington's work. Jacobs testified that the applicant had once told her that she did all Merrington's work. The applicant had never done Merrington's work. Further, there was no handover by Merrington to the applicant.

[12] The applicant's working environment was, *inter alia*, as follows:

12.1 She worked flexi-time;

12.2 She could take her lunch hour at the end of the day;

12.3 She spoke daily with her daughter, telephonically;

12.4 She could study during her free time;

12.5 Merrington managed the applicant, *inter alia*, as follows:

i. What and whom to bill;
ii. What to pay including but not limited to creditors, expenses, rates and taxes;
iii. What provisions to make, journals and general ledgers;
iv. Letting commission calculations; and
v. Updated leasing information.

12.6 The applicant dealt only with tenants' financial queries and not operational queries;

12.7 Merrington took minutes of meetings;

12.8 Merrington undertook all the operations of the commercial division (according to Jacobs this was not a lot of work);

12.9 Merrington prepared management packs, the applicant sent the financials to Merrington to be included; and

12.10 Merrington provided checks and balances, timeously.

[13] In or during February 2013, when Merrington mooted Jacob's supervision with the applicant, the applicant thought it was a good idea. As mentioned previously, the applicant and Jacobs worked well together. However, neither Jacobs nor Merrington explained to the applicant exactly what was required of her. Jacobs assumed that the applicant would fulfil Merrington's role. Further, Jacobs assumed that the applicant would embrace her way of doing things. As with all assumptions, Jacobs was incorrect.

[14] On 8 March 2013, Yvette Van Der Merwe (Van Der Merwe), a Hyprop Director, held a meeting regarding the fact that Jacobs would fulfil Merrington's position temporarily whilst on maternity leave. She indicated that there would be more work to do and that all employees would need to 'chip in'.

[15] Jacobs implemented a new tracking system and an excel spreadsheet that essentially duplicated the applicant's work. In one of the initial meetings, on 22 April 2013, the applicant attempted to explain this to Jacobs, there was a debate, wherein Jacobs relented with the retort: "Is jy gelukkig in jou hart?"; thereafter the applicant left the room. In cross-examination Jacobs testified that the fact that the applicant did not want to do 'it' was not a 'big deal', not deemed as a 'failure/refusal to carry out direct instructions'. In any event the task was merely delegated to Kobus de Beer (De Beer), the Operations Manager of the Retail division. However, it does not end there.

[16] The applicant believed that Jacobs should shoulder Merrington's tasks. This was discussed in a Friday night meeting after the quarterly report in May 2013. Jacobs told the applicant that she could not do Merrington's work. The applicant thus slowly adjusted towards doing Merrington's tasks until she was able to comfortably meet deadlines. The applicant did so believing that Merrington would return in August 2013 and things would revert to what they were previously. But it did not, Merrington did not return, instead she resigned at the end of her maternity leave. A temporary situation became permanent.

[17] In or during August 2013, Van Der Merwe held another meeting wherein she explained that Merrington was not going to return. Further, Merrington was not going to be replaced as the buildings were on the market to be sold. She reiterated that everyone would have to work a little harder. The short-term misgivings now became long term for the applicant. Considering the above, Jacques Oosthuizen (Oosthuizen), the Financial Manager for Hyprop, suggested that the applicant apply to their in-house counsel for exposure especially since she was studying towards an LLB degree. This she did. Also, he noted that Jacobs, as far as Van Der Merwe was concerned, 'walked on water' and advised the applicant against complaining about her.

[18] I pause here to elucidate the applicant's personal concern. The applicant thought that with the sale of the buildings and her redundancy she would be made to immediately pay back her double study loan.

[19] Jacobs knew of the applicant's purported 'inflexibility' almost from inception and did nothing using her managerial prerogative to resolve it. Instead, Jacobs began to, *inter alia*, leave the applicant 'out of the loop'. At one stage the applicant tells Jacobs that she will not be 'uitgehaal as 'n klein brat nie'. The issues the applicant had, that led to the work environment becoming tainted were as follows:

19.1 Jacobs had an issue with the applicant's flexi-time, talking to her daughter telephonically during the day and studying during her free time;

19.2 At first, the applicant performed the operational functions because it was only temporary, but her willingness to continue on a full-time basis, changed when Merrington failed to return and, *inter alia*, the extra work, additional hours and Jacobs' supervision became permanent and Jacobs became disparaging;

19.3 It is common cause that Jacobs relied on the applicant's financial management acumen. And, so she requested that the applicant draft minutes of their meetings. This was a task that the applicant never had to do before. Despite Jacobs' lack of financial management acumen, the applicant was made to utilise Jacobs' documents. The applicant believed that the documents she presented were sufficient. Jacobs was unpersuaded. Further, she was made to redo work that was correct from inception.

19.4 Jacobs would have queries at the 11th hour on delivery day budgets. This would mean that the applicant would miss her

deadline and look incompetent in the eyes of Jacques Oosthuizen. The applicant felt as if she became Jacobs' fall guy. Jacobs did not apologise in instances when the applicant had been correct all along;

19.5 Jacobs took her time to oversee and respond to documents that needed immediate attention;

19.6 The applicant also did not believe that the new systems implemented by Jacobs benefitted the first respondent; and

19.7 Further, the applicant required oversight on financial management documentation, in terms of ordinary checks and balances. This support was seldom provided by Jacobs timeously.

[20] When Merrington resigned, Jacobs and Merrington did not do a final handover. In or during October/November 2013, the applicant put up her hand for Merrington's position. This was declined by Van Der Merwe without justification.

[21] According to Jacobs, at the outset of Merrington's maternity leave (March 2013) she detected reluctance on the part of the applicant to assist her. However, according to Jacobs, this reluctance stops in April 2013. And, only begins again in November 2013. Jacobs did not discipline the applicant for her reluctance because the fact that she did not want to do 'it', *inter alia*, the tracking system, was not an issue for the first respondent and Jacobs' extra role was only temporary. When the *status quo* became permanent, the applicant became 'difficult'. Despite this, Jacobs does not discipline the applicant or guide her into the new role. Instead, Jacobs complains to Van Der Merwe about the applicant, before 2013 was out. As such, Jacobs was frustrated about the applicant's

repeated negligent mistakes, her failure to listen and adhere to her instructions which was, according to her, disrespectful. The applicant was also not a team player. She did not deny the applicant flexi-time; she just wanted to know specifically when the applicant was leaving. This contradicts Van der Merwe, who in an email explains to the applicant that Jacobs has a right to monitor her working hours.

[22] Despite the difficulties that Jacobs is having with the applicant, Jacobs does not touch base with Merrington to ascertain if she experienced the same frustrations with the applicant. Or perhaps, it is not a big deal for Jacobs. It is a big deal for the applicant who is experiencing Jacobs' management of her.

[23] Jacobs insists that the applicant take a day's annual leave when she leaves work an hour and a half early to watch her child play sport. She starts to undermine the applicant, personally, for instance, at the year-end party, Jacobs refuses to buy the applicant a Gautrain ticket because 'you are not part of my staff'. She castigates her staff for wanting to wait for the applicant to arrive at the train station. She does not want her staff to fraternise with the applicant. In December 2013, the applicant threatens to resign, Jacobs persuades her not to. (This is odd for Jacobs who is purportedly experiencing so much frustration with the applicant.) According to Jacobs, she managed to calm the applicant down and stop her from resigning by requesting the applicant to think of the welfare of her daughter. It is this Court's opinion that Jacobs knew that with the applicant gone, she would be inundated with more work and it was for this reason she asked the applicant to think of her daughter. In fact, when the applicant did leave, there was madness and mayhem in the office and this is the sense I get from Jacobs' account in her testimony.

[24] On 18 February 2014, the applicant sought Van Der Merwe out, requesting her assistance with Jacobs. Van Der Merwe advised the applicant to set out her

grievances in writing and allow Jacobs to reply in the same manner. Should the two of them be unable to resolve things, then Van Der Merwe would get involved.

[25] Unbeknownst to the applicant, Van Der Merwe and Jacobs had been discussing her for a while and so Van Der Merwe was already involved.

[26] The applicant forwards her letter of complaint to Jacobs on 27 March 2014. According to Jacobs this is the first time she became aware as to how the functions between Merrington and the applicant were split. This corroborates the applicant's assertion that Jacobs was inundated, the applicant undertook Merrington's job and Jacobs neither does Merrington's work nor oversee and manage the applicant as a general manager should.

[27] The above-mentioned letter ventilates the applicant's issues and the fact that Jacobs has failed to appreciate that the applicant was busy too and trying to find her feet in a new, albeit temporary, portfolio. The insinuations that she was uncooperative were unfair. The applicant offers examples of her frustrations in the hope that Jacobs would see her point of view. Further, her examples show Jacobs out to be hostile toward the applicant creating an environment that sees the applicant take the blame for tardiness and ineptitude.

[28] Whilst Jacobs replies to the applicant that she does not have time to read her email, in her testimony, she is so upset that she immediately goes to Van Der Merwe who ultimately assists Jacobs in drafting her reply.

[29] Further, Van der Merwe specifically tells Jacobs not to involve HR.

[30] On 2 April 2014, Jacobs furnishes the applicant with a letter stating that:

30.1 Negligent mistakes are being made;
30.2 Direct instructions are not executed;
30.3 There is no proper support for Jacobs; and
30.4 The applicant is inflexible.

[31] None of the applicant's grievances are acknowledged. There is seemingly no understanding of the applicant's issues. Jacobs (and Van Der Merwe) skirt around the issues in order to move forward. It is at this juncture that I pause and revert to my initial sentiments about this matter. One cannot resolve issues if they are not ventilated. When one understands another's issues one can see the iceberg. Not only the 30% that is above the water but also the 70% below it. Understanding of this is crucial because Jacobs (and Van Der Merwe) should have taken the time to analyse and reflect on her participation in the applicant's grievances. Instead, Jacobs wanted to meet the applicant to discuss a way forward and her ideas to improve the working relationship. In her testimony, Jacobs had big plans. However, Jacobs never expounds on them. The applicant wanted to focus on what has gone wrong, in order to move forward and this was as advised by Van Der Merwe. Why Jacobs (and Van Der Merwe) chose to blame the applicant is a mystery. This was the opportunity to make things right. For some reason, irrelevant to this Court, Jacobs (and Van Der Merwe) chose not to take the 'gift' provided to her by the applicant's letter.

[32] It is Jacobs' (and Van Der Merwe's) reply that makes the applicant realise that there is no intent on the part of the employer to help her resolve the situation she finds herself in and she resigns giving a month's notice. Van Der Merwe invites the applicant to her office and asks her if she has another position to which the applicant says 'no'. Van Der Merwe tells the applicant that she can take time off to find herself an alternative position. HR holds an exit interview with the applicant and advises the applicant that she can leave immediately. The applicant does not work her notice period not of her choosing.

<u>The test for Constructive Dismissal</u>

[33] Constructive dismissal is defined in the LRA in section 186(1)(e) as termination of employment by the employee because the employer made continued employment intolerable. Precedent has established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal. In other words, the employee must prove that the resignation was not voluntary,

and that it was not intended to terminate the employment relationship.[8] Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.[9]

[34] When the applicant answers Van Der Merwe that she has no other position to go to, that reply, for this Court, is sufficient to show that her resignation was not voluntary. Further, the applicant resigns with notice, however she is told by HR to leave immediately. This was an opportunity for HR to attempt to resolve the matter. In *Strategic Liquor Services v Mvumbi NO and Others*[10] the employee resigns with the quip 'I am going to get fired anyway so I might as well resign'. When the applicant, in *casu*, receives Jacobs' reply, a similar sentiment is observed by this Court.

[35] The above conclusion stems from *Murray v Minister of Defence*[11] where the court held that the employer

> "made no effort whatever to explain the job to the plaintiff, to illuminate its parameters and challenges, and to engage him in a process that would enable him to consider it properly. The navy's decision not to return the plaintiff to his post presented it with a classic reorganisation or rationalisation problem. Given

[8] The LRA now provides in section 192, **Onus in dismissal disputes**, that in any proceedings concerning any dismissal, the employee must establish 'the existence of the dismissal', but once this is done, 'the employer must prove that the dismissal is fair'.

[9] Some of the principal cases are *Amalgamated Beverage Industries (Pty) Ltd v Jonker* (1993) 14 *ILJ* 1249 (LAC) (Stafford J); *Jooste v Transnet Ltd* (1995) 16 *ILJ* 629 (LAC) (Myburgh J) (representing the culmination of the pre-1995 LRA jurisprudence of the labour courts); *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 *ILJ* 361 (LAC) (Froneman J); *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) (Nicholson JA); *Van Der Riet v Leisurenet Ltd* [1998] 5 BLLR 471 (LAC) (Kroon JA); *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) 21 *ILJ* 988 (Revelas J); *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) (Trengove AJ).

[10] (2009) 30 ILJ 1526 (CC);

[11] [2008] 6 BLLR 513 (SCA) ; 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at paras 54 and 56.

> the outcome of both court-martials, the decision not to return him to his post involved no fault on the plaintiff's part. In these circumstances the law clearly places a duty on the employer to consult fully with the employee affected and to share information to enable him to make informed decisions. The navy did not fulfil this responsibility until after the plaintiff resigned.
>
> This observation warrants elaboration. Explaining the job offer was anything but superfluous. The job the navy proposed for the plaintiff was an entirely new position, carved out from a previous post that embraced both 'protection services' and 'amphibious warfare'. Navy staff referred colloquially to the old post simply as 'SSO protection services'. The plaintiff thought his new duties would embrace amphibious warfare, for which he had neither suitable qualification nor inclination. He was wrong. But his misperception was both understandable and reasonable. And the navy never put him right. Nor did it make any effort to ensure that he knew what he was being offered, or what it would require of him."

[36] I turn to consider the rest of the above rubric.

[37] In *Mafomane v Rusternburg Platinum Mines Ltd*[12] wherein the court held that the employee must prove that s/he terminated the contract of employment because continued employment had become intolerable due to the employer's own making, caused by the employer and within the employer's control. S/he could no longer reasonably be expected to endure the workplace environment and there is no reasonable alternative to escape the intolerability other than to resign. Resignation must be a last resort, if not an applicant would find it hard to characterise the resignation as a constructive dismissal. Whilst the perspective of intolerability must be that of a reasonable person - It is an objective test that this Court must follow . The court in *Mafomane* held that it would be unfair to deny the remedies of dismissal to employees who resign because their continued employment became intolerable from their perspective. The ultimate test however, remains whether it was reasonable to resign to escape the intolerable working environment. That is always a question

[12] [2003] ZALC 87 (11 August 2003).

of fact that depends on the circumstances of every case. The idiosyncrasies of the employee, are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position. This is the rubric used by this Court in considering the applicant's prospects of success.

[38] Secondly, in *Murray*[13] the Court held:

> "In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences."

[39] So, the critical circumstances 'must have been of the employer's making'.[14] The applicant works well with Jacobs. Jacobs takes over the applicant's manager's portfolio. Jacobs is inundated already and so delegates the portfolio to the applicant without informing her or educating her about what is required of her. Jacobs does not even know what the portfolio requires. A temporary arrangement becomes permanent; the applicant is told she cannot have the job she is doing, she must do more and the building may be sold and she may be made redundant and have to pay pack a double study loan. The employer begins to interfere with the applicant's working times, her telephone discussions with her daughter and the applicant's ability to study. Disparaging remarks are made about the applicant by Jacobs, she is shown up to be inept by Jacobs and Van Der Merwe betray the applicant's trust by assisting Jacobs' to reply to the applicant's grievance.

[40] I turn to assess the review application.

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[13] supra at para 8.
[14] *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 50.

[41] The starting point in determining the power of the Labour Court to intervene is the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[15]. According to the Constitutional Court, the main objective of review is to determine whether the commissioner has perpetrated some irregularity that has denied either party a fair hearing. A review of a commissioner's decision is not an appeal. The test in the *Sidumo* matter reduces the significance of an commissioner's reasons because the reviewing court applying the test examines the result. There is a low threshold of interference set by *Sidumo*.

[42] After perusing the arbitration award and the record it is evident that the commissioner applies his mind to a slice of the evidence. I am unsure as to whether he considered it all. As stated above, in constructive dismissal matters the commissioner must apply his mind to the circumstances in totality. In Paragraph 25 of the award the commissioner quotes the test for constructive dismissal from the *Pretoria Society for the Care of the Retarded v Loots*[16] matter as:

> "The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it's effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it"

[43] Further, the commissioner makes use of precedent without fully comprehending the *ratio decidendi* of each case he seeks to follow to legitimise the reasons for his award. His failure means that the test is not applied correctly. Also, the commissioner refers to CCMA case law as if they are precedent when they are not binding on him at all.

[44] What concerns this Court and it was not addressed on this point is how the Afrikaans emails were dealt with in evidence. They were not transcribed for the

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[15] (CCT 85/06) [2007] ZACC 22.
[16] (1997) 18 ILJ 981 (LAC).at 985 A-B

commissioner. Further, he failed to adequately refer to them in his award. It may have been because they were not transcribed. The emails are crucial to the constructive dismissal tests espoused above. It seems as if the commissioner failed to take cognisance of their importance. A resignation and the reasons therefore are vitally important to found jurisdiction of the CCMA. It is irregular, in terms of section 185 of the LRA, for the commissioner not to have taken cognisance of the emails.

[45] The commissioner believes that HR should have been involved and that it was the applicant's duty to have involved the HR. In her evidence, Jacobs states that Van Der Merwe did not want HR to become involved. The commissioner is clearly incorrect on this score.

[46] The commissioner is confronted with mutually destructive evidence and fails to elucidate on why he believes Jacobs over the Applicant[17]. Upon my perusal of the record, Jacobs struggles to give answers to the questions asked. In cross-examination she provides explanation for things that are not asked of her. She continuously tries to guide the spotlight on her and her workload and how frustrated she was but cannot give cogent answers as to why she failed to discipline or performance manage the applicant. She contradicts Van Der Merwe with the changing of the applicant's working times and does not, in her testimony, come up with the big plans she had for the applicant to ensure that the applicant remains working. This gives credence to the applicant's assessment that her working environment has become intolerable. Jacobs, is not as reliable and credible as the applicant. The probabilities point towards the applicant's version as true as opposed to Hyprop's version. Because the commissioner does not explain his preference for Jacobs, I cannot consider it. I can only conclude that he failed to apply his mind to the tests he needs to when considering mutually destructive versions. The applicant has good prospects of success.

Conclusion

[17] *Assmang Limited (Beeshoek Mine) v Commission for Conciliation Mediation and Arbitration and Others* (JR911/13) [2015] ZALCJHB 6;

[47] I find that the applicant on a balance of probabilities, has satisfied the constructive dismissal test. I find that the applicant was constructively dismissed and that same was unfair.

[48] As mentioned initially, the resolution of the applicant's issues should have been dealt with before arbitration. In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[18] the court stated that:

> "the entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure."

[49] The above was endorsed by *Strategic Liquor Services*.[19]

[50] The above assists me with the awarding of costs in this matter. I therefore make the following order.

Order

1. The condonation application is granted with costs;

2. The arbitration award is reviewed, set aside and replaced with the following:

   2.1 The applicant was constructively dismissed.

[18] [2008] ZASCA 24; 2009 (3) SA 493 (SCA) at para 34.
[19] *Supra.*

2.2 The applicant is awarded 6 (six) months' compensation;

2.3 Costs of transcription of the record are borne by the Respondent; and

2.4 There is no other order for costs.

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N Moni

Acting Judge of the Labour Court

Appearances:

For the Applicant:	G Van Der Westhuizen
Instructed by:	Du Pre Le Roux Attorneys
For the Respondent:	A Snider
Instructed by :	Larry Dave Inc.