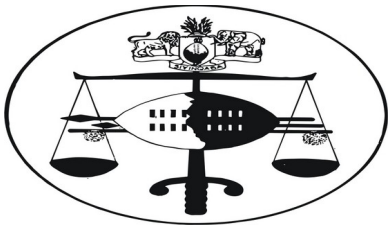

IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

CASE NO. 199/2008

In the matter between:-

PINKY TOI MNGADI **APPLICANT**

AND

CONCO (PTY) LTD T/A
COCA COLA SWAZILAND (PTY) LTD **RESPONDENT**

Neutral citation	**:**	*Pinky Toi Mngadi v Conco (Pty) Ltd t/a Coca Cola Swaziland (Pty) Ltd SZIC 03/2014 (11 February 2014)*
CORAM	**:**	**DLAMINI J,** *(Sitting with D. Nhlengetfwa & P. Mamba Nominated Members of the Court)*
Heard	**:**	**02 October 2013**
Delivered	**:**	**11 February 2014**

Summary: ***Labour law – Constructive Dismissal – Absolution from the instance*** *- In constructive dismissal cases, the enquiry is whether the Employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship and trust between the Employer and Employee. The function of the Court is to look at the Employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the Employee cannot be expected to put up with it. The test for absolution from the instance is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might [not should or ought to] find for the Applicant. Applicant has to make out a prima facie case.*

1. Absolution from the instance. This is what this ruling of the Court at this stage in this trial concerns. At the close of the case for the Applicant, the Respondent's representative moved an application that the case of constructive dismissal brought to this Court by Pinky Toi Mngadi be dismissed because she had failed to make out a *prima facie* case in the sense that this Court, applying its mind reasonably to the evidence, cannot find in her favour. The application by the Respondent is vehemently opposed by the Applicant through her representative, Attorney Musa Sibandze, who counter argued that the Applicant had presented prima facie evidence upon which a case of constructive dismissal had been established.

2. In a nutshell the evidence of the Applicant in this matter was as follows; She was initially employed by the Respondent in the year 2000 as a Customer Services Representative. She rose through the ranks from the very first year; first being promoted to Transport Coordinator and thereafter to Warehouse/Traffic Coordinator. Then in the year 2003 she was again promoted to Customer Services Manager. This is the same position she held at the time of her resignation. The Applicant further testified that she was appraised biannually in all the positions she occupied and had always excelled – scoring an impressive SM ('Successfully Meets' all the objectives) grade and on occasion she would even exceed the set objectives.

3. When she became Customer Services Manager in 2003, she initially reported to a certain Ms. Yvonne Scanlon who was an expatriate. When Scanlon left Zoe Dlamini took over as head of the department. That was nine months into her new position. After three months of Zoe taking over as head of the department, the Applicant left for training on a computer program. This program was specific to customer service and was on an information technology system that was to run the entire organization and its duration was nine months. She was elated to be amongst those chosen for this training as it meant she was gaining more knowledge and experience in some of the key functions on running the Respondent's organization. She however had reservations about going away for such a long period. She was concerned about retaining her managerial position. The new head of her department, Zoe Dlamini, allayed her fears and assured her that she would come back to her position

4. The Applicant further testified that she successfully completed the training and was ready to resume her duties as Customer Services Manager. However before she could return, a meeting was scheduled by Zoe whereat she (Applicant) expected that they would be discussing her transition back to her position. But that was not to be. To her surprise she was advised by Zoe to take up the position of Demand Planner – which she regarded as a demotion. This, Zoe suggested, apparently because the Applicant lacked

people skills and that her relations with her team were strained. Another reason for this suggestion was that Zoe was looking at developing a certain Sandra Matsebula who had been appointed Coordinator when the customer service department was restructured. The Applicant was taken aback by this proposal, especially in light of the previous assurances and undertaking by the same Zoe that she would come back to her managerial post. She declined to accept the proposal and Zoe relented. She was therefore able to reassume and continue in her position as Customer Services Manager. She pointed out though that from there relations between her and Zoe were strained.

5. After this incident and at her next appraisal in June 2006 she was scored to be not meeting the required standards of performance. According to the Applicant, Zoe's criticism of her work performance was not based on set objectives but rather on her people's skills and she could not pinpoint actual shortcomings in her work performance. She apparently scored 17 out of 28 tasks and therefore as far as she was concerned there was no reason for her to be scored as not performing and subsequently placing her on a performance improvement plan (PIP), which she feels was unjustified and the wrong route to take in managing her performance situation. Instead, so she testified, she should have been placed on a performance development plan (PDP), which according to her evidence she did not have at the time.

The performance development plan is apparently drawn to up-skill employees by providing a development plan which would indicate the training needed by the particular employee and this would include support through coaching and providing feedback.

6. After the June 2006 appraisal Zoe then issued a performance warning letter to the Applicant dated 18 July, 2006. In that performance warning letter she (Zoe) had the following complaints about her performance;

- *Her ability to identify real/key issues that need to be addressed in a situation.*
- *Her ability to view issues holistically (than in isolation).*
- *Her ability to appropriately address relevant issues thus effectively resolving and managing situations.*
- *Taking ownership and displaying accountability, judgement and decision making.*
- *Influencing others and getting results.*

7. According to Ms. Mngadi, all the above complaints against her by her immediate Supervisor, Ms. Zoe Dlamini, were not objective and therefore not measurable. Ms. Mngadi further testified that prior to 2006, she had been appraised several times but had never received a 'Developing Performance' (DP) rating. She had always been a 'Successful Performance' (SP) candidate. She therefore questions the 'DP' rating arguing that this was not a proper averaging of her overall performance. In terms of the

Respondent's policies a 'SP' employee is one who consistently delivers all agreed upon results and meets expectations and accountabilities. On the other hand a 'DP' employee sometimes meets agreed upon results, but not all expectations and accountabilities. As far as Ms Mngadi was concerned, the Respondent had breached its own procedures by giving her a formal written warning and placing her on the performance improving plan – which was unjustified. Unjustified in the sense that it was not set on the 'SMART' scale - in that it was not; specific, measurable, attainable, reasonable and time bound.

8. Ms Mngadi's further testimony was that she then wrote to the General Manager appealing that he intervenes and mediates in the issue between her and Zoe on the 'performance improvement plan' vs the 'performance development plan'. The General Manager then summoned the Applicant, Zoe and the Human Resources Manager to a meeting whereat he directed that the Applicant's appeal be handled by the Human Resources Manager. In handling the appeal of Ms Mngadi, the Human Resources Manager apparently sided with Zoe Dlamini, informing the Applicant that the 'performance improvement plan' was indeed the correct process to follow. And in her evidence Ms Mngadi stated that she relented on being so advised by the HR Manager.

9. The further evidence of Ms Mngadi was to the effect that this latest development took its toll on her health. She went through a depression and was hospitalized and eventually had to be seen by a Psychologist. According to her, the root cause of her depression was her working environment. She was booked off sick from 11 September 2006 up to 25 September 2006. She was supposed to resume her duties on 26 September 2006. But she did not. Instead she wrote a letter addressed to Zoe Dlamini in which she was tendering her resignation from her position, citing constructive dismissal. In the letter of resignation she accuses her Supervisor of harassment and unfair labour practices which she says were calculated to render her employment intolerable.

10. Interestingly when tendering her resignation Ms Mngadi also relies on four other grounds which add up to the 'performance improvement' vs 'performance development' plans. In chronological order these are; first - the intention of Zoe Dlamini to demote her from the position of Customer Services Manager (a Managerial position) to a Demand role – a lesser position. However, the Court finds it puzzling that Ms Mngadi under cross examination conceded that Zoe Dlamini dealt with her complaint of her demotion promptly, properly and to her satisfaction yet in her resignation letter, a year later, she still relies on this ground for her resignation. A reason she puts up for relying on this ground is that she did not believe Zoe

Dlamini to have been sincere when she withdrew the alleged demotion. This is absurd, at the least. On the one hand, under cross examination by Advocate Flynn, she accepted that her complaint was dealt with promptly, properly and to her satisfaction. She even stated that she accepts the fact that the email of Zoe Dlamini responding to her complaint was conciliatory and a commitment to her development. How and when then did she suddenly realize that Zoe was not being sincere in withdrawing the alleged demotion?

11. The second ground she relies on in her letter of resignation, besides the 'PIP' against 'PDP' one is that in early 2006, she was advised that her total remuneration would be reduced by approximately E2,000.00 per month with effect from January 2007. What emerged though under cross examination by the Respondent's Representative was that the issue in respect of remuneration was not specific to the Applicant only but rather applied across the broad spectrum of Managerial staff. Indeed there is no merit to the suggestion that she was specifically the target of this remuneration review. And interestingly, Ms Mngadi conceded under cross examination that this exercise was not harassment directed at her. The Court also notes that she resigned before the implementation of such review exercise – if ever it eventually was.

12. The third ground she relies on is that, after the resignation of a certain Philisiwe Dlamini in early August 2006, Zoe Dlamini and a certain subordinate of the Applicant - Sandra Matsebula – decided that Ms Mngadi should take up Lee-Anne's duties and that the said Lee-Anne would then perform the resigned Philisiwe's duties. This was a legitimate managerial decision meant to deal with an unforeseen situation of the resignation of one of the employees. Indeed, viewed objectively, it cannot be said to constitute a valid ground for the Applicant's resignation. The Court is in full agreement with the Respondent's representative that it clearly demonstrates Ms Mngadi's subjective view of her Supervisor's conduct.

13. The fourth ground she lumps up together with the others is that of the Bottlers' forum. Apparently, she had delegated a certain junior employee, Ms Mona Lesedi, to give a presentation to Bottlers at their forum. Ms Zoe Dlamini was not happy with such delegation and using her discretion, as the head of the department, she intervened and directed that the Applicant does the presentation. Again when this is viewed objectively, this was a legitimate intervention by the head of the unit. The Court fails to comprehend how the Applicant could construe such as undermining her authority. Another thing, the event she complained of in her letter of resignation occurred more than a year before she eventually resigned.

14. The test for determining whether or not an employee was constructively dismissed was set out in ***Pretoria Society for the Care of the Retarted v Loots (1997) 18 ILJ 981 (LAC) at page 985*** where the Court held as follows;

> *"…the inquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a 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 a contract: the Court's function is to look at the employer's conduct as a whole and determine whether…its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it."*

15. In an application for absolution from the instance the paramount question to be exclusively considered by a Court is: 'At the close of the case for the Applicant, is there evidence upon which a reasonable man might find for the Applicant'? ***(See Gascoyne v Paul & Hunter 1917 TPD 170).*** In *casu* that is, at the close of the case for Pinky Toi Mngadi, is there a *prima facie* case against the Respondent Conco (Pty) Ltd t/a Coca Cola Swaziland (Pty) Ltd. This Court is enjoined to fully apply its mind to all the evidence that is before it at this stage of the trial. And it has been warned that Courts should

be extremely cautious when faced with such absolution applications. In other words, they should be ungenerous in granting absolution from the instance at the close of the Applicant's case.

16. In all the four grounds that have been mentioned above the Applicant conceded under cross examination that she did not escalate any of them through the Company's formal grievance procedures. In other words, she did not exhaust her rights. The principle in respect of constructive dismissal is that where a reasonable alternative to resignation exists, there can be no constructive dismissal. The Employee must prove that the Employer deliberately rendered the employment relationship intolerable and that resignation was an act of last resort. The reasonable alternative to Ms Mngadi's resignation in this regard, being the formal dispute procedures which she failed to utelise in the four grounds she relies upon for her constructive dismissal. The Applicant's mere unhappiness about the manner in which she was treated in these four grounds was insufficient to prove a claim of constructive dismissal. Objectively viewed the Respondent's conduct had not been calculated to drive Ms Mngadi away. Furthermore she had failed to raise the four issues she relied on for her constructive dismissal claim with management before she resigned.

17. In ***Smithkline Beecham (Pty) Ltd v CCMA [2000] 21 ILJ 988 at 997*** it was stated that where an employee is too impatient to await the outcome of the Employer's attempts to find a solution to a perceived intolerable situation and resigns, constructive dismissal is out of question. This goes to show that Ms Mngadi's failure to raise the grievances she later relied on in her resignation letter compounds issues for her even further. It has been long held that mere unreasonableness or illegitimate demands by the Employer do not amount to constructive dismissal, as long as the Employee retains a remedy against the Employer's conduct, short of terminating the employment relationship. ***(See:*** **local decision of *Jameson Thwala v Neopac Swaziland I/C Case no. 18/1998*).** Indeed the salutary caution that constructive dismissal is not for the asking is true. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of those problems suffice to justify constructive dismissal. ***(See Jordaan v CCMA [2010] 12 BLLR 1235 (LAC) quoted in Asara Wine Estate & Hotel (Pty) Ltd v JC Van Rooyen & Others (2012) ILJ 363).***

18. Another difficulty for the Applicant in respect of these four grounds above is that they occurred a year before she manifested her decision to resign. In ***Western Excavating (ECC) Ltd v Sharp1978 1 All ER 713 at page 717 D-F Lord Denning MR*** had this to say;

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he will be leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.* ***Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged.*** *He will be regarded as having elected to affirm the contract."* (Court's emphasis)

19. Then there is the 'performance improvement plan' v 'performance development plan' ground which the Applicant also lumps up with the other four grounds to make up a total of five. The Court points out at the very outset that resignation in the face of poor work performance management does not give rise to a constructive dismissal claim. Now coming to the 'PIP' against 'PDP' ground of the Applicant, she states that according to the performance evaluation plan she had scored above average. Evidence she presented to Court showed that she scored 17 out of

the 28 tasks and therefore there was no reason why she was scored as not performing.

20. In terms exhibit document ‘R3’, which was part of the Respondent’s exhibit documents, the purpose of the performance improvement plan procedure is to outline the process of performance improvement planning (PIP). Performance Improvement Planning is defined as a disciplined progressive process to address performance that falls below successful performance standard. The procedure to be adopted in terms of document ‘R3’ is outlined at page 4 thereof under paragraph 5 headlined ‘PROCEDURE’. Therein the procedure is spelt out as follows;

> ***“a) If an associate’s performance is assessed and found to be ‘Not on Track’ during the mid-year review or, whose performance appraisal rating is ‘Developing Performance (DP)’ or ‘Not meeting performance expectations (NP)’ at year end, the associate should be given an opportunity to improve and meet the required standard, by taking the associate through the PIP process”*** **(Court’s emphasis).**

21. In terms of the performance improvement plan procedure an associate is taken through the PIP process during the mid-year review only when that associate’s performance, upon assessment, is found to be ‘Not on Track’. Sub-paragraph (d) of paragraph 5 of document ‘R3’ further qualifies the

taking of an associate through the PIP process by stating that *'the placing of an associate into a PIP, who has 'NOT ON TRACK' rating during the mid year review shall be at the discretion of the Manager'*. A Manager in the capacity of Zoe Dlamini has discretion in placing an associate into a PIP in terms of this provision. But such discretion is only limited to associates who have 'Not on Track' ratings.

22. The assessment of Ms Mngadi was conducted mid-year. The overall rating she was given in this assessment was an 'On Track with Some'. A question the Court then asked itself in this regard is; why she had to be taken through the PIP process when she was not rated 'Not on Track'? Clearly this requires an explanation from the Respondent. Why did the Respondent, through Manager Zoe Dlamini, breach its own procedures as outlined in the performance improvement plan procedure? From the evidence currently at the disposal of the Court, placing the Ms Mngadi on the performance improvement plan process was *prima facie* procedurally unwarranted from the very beginning.

23. Based on the above finding by the Court, this in effect means that the absolution from the instance application by the Respondent should fail. That is the ruling of the Court. The Court makes no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 11th DAY OF FEBRUARY 2014

For the Applicants: *Attorney M. Sibandze (Musa M. Sibandze Attorneys)*
For the Respondent: *Advocate P. Flynn. (Instructed by Cloete-Henwood Associated)*