IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

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 17 (16 April 2015)*

CORAM : **DLAMINI J,**
(Sitting with D. Nhlengetfwa & P. Mamba Nominated Members of the Court)

Heard : **06 November 2014**

Delivered : **16 April 2015**

Summary: ***Labour law – Constructive Dismissal*** *- 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.* ***Held*** *– in casu the Applicant has made out a case for constructive dismissal in terms of section 37 of the Employment Act No.5 of 1980.*

1. At the close of the case for the Applicant, the Respondent's representative, Advocate Flynn, moved an application for absolution from the instance. He submitted and argued that the case of constructive dismissal brought to this Court by Pinky Toi Mngadi against the Respondent 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, could not find in her favour. The absolution from the instance application by the Respondent was vehemently opposed by the Applicant through her representative, Attorney Sibandze. Sibandze who counter argued that the Applicant had presented *prima facie* evidence upon which a case of constructive dismissal had been established. After hearing the submissions and arguments of the parties' respective representatives, the Court made a finding that placing Ms Mngadi on the performance improvement plan process as opposed to the performance development plan was *prima facie* procedurally unwarranted from the very beginning. Hence the ruling was to the effect that the absolution application should fail.

2. At paragraph 21 of the ruling this Court stated thus;

> *"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."

3. Then at paragraph 22 the Court further found that;

"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 Ms Mngadi on the performance improvement plan process was prima facie procedurally unwarranted from the very beginning."

4. In effect the Court was saying the Respondent had some explaining to do in respect of this ‘PIP’ v ‘PDP’ processes. The Court wanted to hear the Respondent’s evidence in explaining why Manager Zoe Dlamini went against the performance improvement plan procedure by placing Ms Mngadi on the ‘PIP’ process when the overall rating she scored in her assessment was *‘on track with some’* as opposed to *‘not on track’*.

5. However, when it was the Respondent’s turn to present its evidence before Court, its Counsel, Advocate Flynn moved swiftly to inform the Court that the Respondent was closing its case. In effect the Respondent was saying even without the evidence of the Company CONCO, the Court could still not find in favour of Ms. Mngadi because she had failed to make out a case for the constructive dismissal claim she is pursuing. This now is the judgement of the Court in relation to the claim of the Applicant against her former employer.

6. Now, in the *‘Performance Warning Letter’* written to the Applicant by Manager Zoe Dhlamini, found at page 15 of bundle ‘R1’, Manager Zoe Dhlamini brought it to the attention of the Applicant that she had concerns regarding her performance. In that letter, Manager Zoe Dhlamini, put forth fundamental basics expected of the Applicant as a Manager. She also spelt out the list of agreed actions to be completed by the Applicant within

defined time frames. She also warns the Applicant that it is important that she takes responsibility to bring her performance to a 'successful performance level', and that if her performance does not improve within 3 months, further disciplinary action would occur. Lastly, she sends a chilling warning to the Applicant to the effect that her employment is not guaranteed during the duration of this plan. That is, should she continue to fail to meet the requirements of the action plan or engage in conduct that is inappropriate during the time frames outlined, then the company reserved the right to end her employment at anytime. Ms Mngadi felt that she was placed under a continuous threat of dismissal as a result of the warning letter and this took a toll on her health, which ultimately culminated in her hospitalisation as a result of stress related ill health.

7. The evidence before Court is that Applicant was not happy with the manner her issue was dealt with by her immediate supervisor hence she approached the General Manager for him to intervene in this standoff. However, the General Manager referred the matter to the Human Resources manager, who in turn informed the Applicant that the 'performance improvement plan' was the correct process to be used in the circumstances. According to Ms. Mngadi though, all the 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 questioned 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. Attorney Sibandze in his closing submissions and arguments on behalf of the Applicant contended that the written warning should have been preceded by certain steps as encapsulated in the company’s procedure under the heading *‘Analysing Performance’*. (See page 7 of bundle A1). In this regard the argument being that Manager Zoe Dhlamini should have first asked if the situation involved a formal company policy, law or health and safety? If it did not, then the next question should have been whether the situation is addressed in the employee’s PDP? If it was then, the next step

would be coach the employee and also provide feedback. The next step thereafter would have been to counsel and provide documentation. After which, would be to then give the written warning and an action plan. Finally, and in terms of the company's own procedures, the last step would be to separate.

9. According to Attorney Sibandze, the Court is left with questions on why it was necessary to place an employee, who was performing, on a performance improvement plan which was totally unjustifiable. Not only that, Sibandze further questioned why the company fast tracked the process in breach of its own procedures and rush to serve the employee with a written warning that exposed her to possible termination at any time. Indeed these questions have not been answered. Manager Zoe Dhlamini, nor anyone else from the company CONCO, has not appeared before Court to explain and rebut the evidence of the Applicant. As it is, the contentions of Ms Mngadi that the effect of the Respondent company's unjustifiable conduct was that she was faced with a situation where she had a sword hanging over her head have not been rebutted. Further, the fact that this resulted in her being hospitalised because of stress caused by the situation at the workplace has not been disputed.

10. As correctly pointed out by the Applicant's Counsel, in the absence of evidence explaining the Respondent's motives, the Court is only left to make inferences and depend upon the evidence of Ms Mngadi. In the Court's ruling we set out the test as enunciated in the ***Pretoria Society for the Care of the Retarded v Loots*** case, wherein it was pronounced that 'it is not necessary to show that the employer intended any repudiation of the contract; [instead] the Court's function is to look at the conduct of the employer as a whole and determine whether in effect, judged reasonably and sensibly that employee cannot be expected to put up with it'.

11. As mention afore, the Respondent declined the opportunity to give an explanation for the conduct of Manager Zoe Dhlamini, opting instead to close its case without leading any evidence in defence of its case. Advocate Flynn though on behalf of CONCO in his closing submissions and arguments correctly pointed out that in terms of section 37 of the Employment Act, the onus rests with the employee to show that she could not reasonably be expected to continue her employment. In this regard, the test is objective and not subjective. Flynn went on to submit that there must be objective unfairness which drove the employee to believe that there was 'no way out but to walk away'. He then referred the Court to the ***Glory Hlophe v SNIP Trading Case No.69/2002*** where the Court quoted with approval this statement; '*Mere unreasonableness or illegitimate demands*

by the employer according to this approach 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'

12. Another submission on behalf of the Respondent was that Ms Mngadi should not have second guessed the outcome of 'PIP' process. Effectively this means she should have awaited the results of the process instead of predicting its outcome. But this line of argument seems to ignore the Court's finding and Applicant's contention that the 'PIP' process was *prima facie* procedurally unwarranted in the circumstances of the case of Ms Mngadi. 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'. As we stated in the ruling, that a Manager in the capacity of Zoe Dhlamini, has discretion in the placing of an Associate into a PIP is not in issue. However, such discretion is only limited to Associates who have 'not on track' assessment ratings, which was not the case with Ms Mngadi as her rating was 'on track with some'.

13. Advocate Flynn relied heavily on the fact that the Applicant had to prove that there were no avenues of escape open to her except to resign, on the basis of the ***Mafomane v Rustenburg Platinum Mines LTD*** **case [2003] 10**

BLLR 999 (LC)]. What he conveniently ignores is that the Applicant had been to the General Manager, the pinnacle of the CONCO, who directed that her complaint be dealt with by the Human Resources Manager. The HR Manager in turn informed the Applicant that the performance improvement plan was the correct process to follow. This despite the fact that in terms of CONCO's own policies and procedures clearly state under which circumstances an Associate was to be taken through the PIP process. In terms of the uncontroverted evidence before this Court, after the General Manager Ms Mngadi had nowhere else to go. She had exhausted the internal structures without help. The next thing was that she was then hospitalised as a result of stress which was related to the harassment she was enduring at the work place. Flynn also suggested that she should have reported an unfair labour dispute with CMAC or this Court. But he ignores the evidence of the Applicant that she had been hospitalised as a result of the stress caused by her harassment at the hands of Manager Zoe Dhlamini. Should she have endured more frustration and harassment still trying to prove that the Employer was breaching its own policies and procedures by making her undergo the PIP process? We do not think so. The Court has noted that the Applicant was graded on 27 tasks. Of these 6 were graded as 'Developing Performance' (DP), only 3 graded as 'Not Meeting Expectations' (NP) and the rest, 17 in total, representing 63%, were graded as either 'Exceptional Performance' (EP) - 2 or 'Successful Performance'

(SP) - 15. This is a clear indication that the Applicant was an above average performer.

14. The Court has already stated the requisite test for determining whether or not an employee was constructively dismissed. In this regard we once again reiterate the authority of ***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 effect, the duty of this Court in this present matter is to determine whether the Employer in this matter, CONCO (PTY) LTD t/a Coca Cola Swaziland (PTY) LTD, 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 Pinky Mngadi, the Employee. In making this determination, the Court does not need to look into whether the Employer intended a repudiation of the contract of employment neither does the Employee need to show any such intention by the Employer. All the Court need do is to interrogate the Employer's conduct as a whole and decide whether, reasonably judged, it was such that Ms Mngadi could not have been expected to put up with it.

16. It is a finding of this Court that in this matter before us, the Employer, CONCO (PTY) LTD, without any reason sufficient in terms of their own policies and procedure, conducted itself in a manner that ultimately destroyed the relationship of confidence and trust with its Employee Pinky Mngadi. Whether that was intentional or not is not the issue. What the Court is concerned with is that the conduct of the company, through Manager Zoe Dhlamini, was such that in all fairness, when judging it objectively, the Court finds that indeed Ms Mngadi could not have been expected to put up with it any longer. We further find that in the circumstances of her case, she could not even be expected to await the outcome of the procedurally flawed process. Over and above that, the uncontroverted evidence before this Court is that even during this procedurally flawed process, Zoe Dhlamini continued to undermine the Applicant. She unnecessarily added responsibilities to her but was failing to

coach and mentor her. As far as the Applicant was concerned she was not acting in good faith.

17. The evidence before this Court indicates that the Applicant resigned on the basis that she did not believe that the Employer would reform or abandon the pattern of creating the unbearable work environment she was enduring at the hands of Manager Zoe Dhlamini. The South African Constitutional Court in the case of ***Strategic Liquor Services v Mvumbi NO & Others (2009) 30 ILJ 1526 (CC)*** remarked that the test for constructive dismissal does not require that the Employee have no choice but resign, but only that the Employer should have made continued employment intolerable.

18. In ***Murray v Minister of Defence (2008) 29 ILJ 1369 (SCA) at para 13*** – cited with approval by the South African Constitutional Court in *Strategic Liquor Services* – the South African Supreme Court emphasised that;

> *"the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly*

> *and reasonably do that make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked 'reasonable and proper cause'."*

19. Taking into account all the circumstances of this matter, the finding of the Court is that there was objective unfairness which drove the Applicant to believe that there was no way out but to resign her lucrative job. It is a further finding of this Court that the Employer in this case was culpably responsible for the intolerable condition that forced Ms Mngadi to walk away from her job. The conduct of the Employer *in casu* lacked reasonable and proper cause. In effect this means that the Applicant succeeds in her claim of constructive dismissal against the Respondent. She has made out a case of constructive dismissal in terms of section 37 of the Employment Act.

20. The evidence before Court is that after she resigned from her employment with the Respondent she got another job within a matter of days at Swazi Can. This new job was not as well paying as her previous one with CONCO. She did not stay for long at this new job, resigning a mere 3 months later and relocating to the Republic of South Africa. There she remained unemployed for about 3 months before securing her next job with

an information technology (IT) company where she still earned much less than what she was getting at CONCO. This IT company was liquidated after some time and she remained unemployed for a longer period of about a year before securing yet another job with a financial institution where she still earned less than at CONCO. She has two dependants, her mother and a 22 years old son. The Court has considered the evidence before it in respect of the Applicant's monthly remuneration and is convinced that at the time of her constructive dismissal she was remunerated at the rate of E 31,984.67 (Thirty one thousand nine hundred and eighty four emalangeni and sixty seven cents) per month.

21. Taking into account all the evidence and circumstances of the case, the Court accordingly makes the following order;

a) The Respondent is hereby ordered and directed to pay the Applicant as follows;

i)	***Notice Pay***	***E 31,984.67***
ii)	***Additional Notice pay***	***E 29,080.00***
iii)	***Severance Allowance***	***E 72,700.00***
iv)	***10 months Compensation***	***E 319,846.70***
	Total :	***E 453,611.37***

22. The payment aforementioned is to be made within 30 days hereof. The Court also makes an order that the Respondent pays the Applicants costs.

The members agree.

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T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 16th DAY OF APRIL 2015

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