IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: CA 4/03

In the matter between

SOLID DOORS (PTY) LTD APPELLANT

And

COMMISSIONER J.P. THERON 1ST RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

2ND RESPONDENT

GRANT CLAPTON 3RD RESPONDENT

JUDGMENT

JAFTA AJA

[1] The appellant is Solid Doors (Pty) Ltd which is a registered company engaged in the wood industry and has its principal place of business at Rivonia, Johannesburg. The first respondent is a commissioner of

the Commission for Conciliation, Mediation and Arbitration **("the CCMA")**, the second respondent in the present case. He arbitrated the dispute which led to the current proceedings. The third respondent was employed by the appellant in 1997. He is the employee party to the alleged dismissal dispute which has given rise to this litigation.

[2] The third respondent was employed by the appellant in 1997 as a sales representative. As a result of certain events that will emerge later in this judgment, the third respondent referred to the CCMA for, initially conciliation, and, later, arbitration a dispute of an alleged unfair dismissal by the appellant. The first respondent issued an arbitration award in favour of the third respondent and awarded him compensation. The appellant was aggrieved by such award and brought an application in the Labour Court to have it reviewed and set aside. The Labour Court dismissed that application with costs. With the leave of that Court, the appellant now appeals to this Court against the order of the Labour Court. Before dealing with the appeal, it is necessary to set out the circumstances surrounding the dispute. I propose to do this with reference to the evidence that was led in the arbitration proceedings before the first respondent.

Factual background and arbitration.

[3] The first witness called to testify was the employee who was the only witness called in support of his claim. The appellant then led the evidence of Mr Stanley Schenker **("Schenker")** who had been the chairman of the disciplinary hearing. Thereafter the hearing was adjourned. It resumed on 29 August 2001 before the first respondent. On that date the appellant was also represented by an attorney. Two more witnesses were called on its behalf. They were Messrs David Robertson and Bradley Morris who were present at the disciplinary hearing.

[4] In his testimony the employee stated that after he had joined the appellant its sales figures for the Cape Town branch were increased by more than 100% through his own effort. However, the relations between him and Schenker who was his supervisor were not good. The employee suggested that Schenker was threatened by his experience in the wood trade. As a result Schenker continued to change sales targets by setting new and unrealistic targets so that the employee could fail to meet them. The employee further testified that he would also be threatened with dismissal when he failed to carry out instructions given by Schenker. Some of those instructions made it difficult for him to perform his

duties. He was also subjected to disciplinary actions which he regarded as unwarranted. Restrictions such as being denied access to a warehouse and to certain files were placed on him. The cellular phone which had been allocated to him for use in the performance of his duties was withdrawn by the appellant. The above actions prompted the employee to write a letter of complaint to Schenker. Meanwhile the latter served him with a notice informing him of the charge preferred against him and inviting him to attend a disciplinary hearing scheduled for 22 March 2000.

[5] The employee regarded the latter hearing as an act of victimisation and a farce but he attended the hearing. Schenker chaired the disciplinary hearing. The employee said that at the hearing he asked Schenker to place on record that he (i.e. the employee) was not entitled to take tea and lunch breaks, after he had been informed by Schenker that sales representatives were not entitled to tea and lunch breaks. There was an acrimonious exchange between him and Schenker. During that exchange of words Schenker told the employee to **"f….off"** and the employee left the hearing. He proceeded to his office where he wrote a letter to Schenker. In the letter, which was dated 22 March he stated that Schenker had dismissed him. The letter read as follows:

" Stan,

Furthermore the disciplinary hearing held at 8 am this morning, which I strongly feel is another victimisation of myself. I find it totally unacceptable that you refused to take down some statements you made, that reps do not get tea and lunch breaks. I take it that I am dismissed when you said 'f…off" so I am now vacating the premises. I also feel that I did not have sufficient time to prepare for the meeting.

Yours sincerely
Grant Clapton."

[6] In contrast to the employee's version Schenker testified that there had never been any ill- feeling between him and the employee. He said that they enjoyed a cordial relationship to the extent that they would have lunch together when they had gone out to see clients and at times he would allow the employee to drive his vehicle. When the employee experienced financial problems, he was the one who recommended that the employee be given a loan by the appellant. He said that, if he had wanted to dismiss the employee, he would have done so in 1998 when the opportunity for dismissing him presented itself. He said that during that period the employee's work performance was poor and as a result

he had to speak to him on a number of occasions about his poor performance. He said that the employee performed satisfactorily in 1999 after he, i.e. Schenker, had given the employee an opportunity to improve his performance.

[7] Schenker went on to say that from January 2000 the employee's performance decreased dramatically after he had received a bonus pay about which he was unhappy. Schenker testified that the employee complained that for two years in a row he had received a bonus amounting to only 75% of his monthly salary. Schenker said the employee told him then that he had just come from an overseas trip and had hoped that the bonus pay would cover his travelling costs.

[8] Schenker testified that shortly thereafter he was informed that the employee had asked for a copy of the restraint of trade agreement between himself and the appellant. Schenker also saw a legal opinion addressed to the employee on the status of the restraint of trade agreement. Schenker telefaxed a copy of the legal opinion to the chairman of the appellant in Johannesburg. After receiving the legal opinion the appellant's chairman suspected that the employee was contemplating leaving the appellant and ordered that certain measures be put in place including that the employee be restricted from

gaining access to certain areas of the appellant's premises because the appellant feared that the employee would take its trade secrets to its competitors.

[9] Insofar as the withdrawal of the company cellular phone was concerned, Schenker said that the employee had the habit of switching it off when he was out of office or when he had not come to work and he could not be contacted. As a result the appellant's chairman directed that it be withdrawn because it did not serve the purpose for which it had been given to him. Schenker further said that just before the restrictions were imposed on the employee, his work performance had deteriorated and he had been absent from work for days during which he claimed to have been sick. However, continued Schenker, on the employee's return to work, it had been noticed that the company vehicle used by the employee had covered an extra mileage of 1000 km on its odometer clock. It was also observed that a number of private calls had been made from the company cellular phone allocated to him despite the fact that during that time the employee did not contact the appellant and the appellant had been unable to get hold of him on the cellular phone.

[10] The discovery of the legal opinion addressed to the employee occurred shortly after the employee had been out to see a client in Vredendal which is about 300 km

from the appellant's office. On that occasion the employee failed to visit other clients in the same area although he had spent the entire day out of the office. The employee's failure to visit other clients appears to have angered Schenker and the appellant's chairman. The appellant's chairman directed that a disciplinary action in respect of the trip to Vredendal be taken against the employee. On 17 March 2000 Schenker gave the employee notice that required him to attend a disciplinary hearing on the 22nd March 2000.

[11] On the 22nd March 2000 a disciplinary enquiry against the third respondent was held. Mr Schenker chaired the inquiry. Apparently Schenker made a statement in the course of the inquiry to the effect that the sales representatives were not entitled to tea or lunch breaks whereupon the third respondent asked or demanded him to put that down in the record of the proceedings. It would seem that at that stage Schenker told the third respondent to **"f….off"** and this prompted the third respondent to immediately leave the inquiry.

[12] Schenker said that before the hearing commenced, he had acknowledged having received a certain letter of complaint from the employee and promised that he would respond to it after the hearing. Schenker also said that at the hearing the employee was uncooperative and that he

disrupted the proceedings. Consequently, said Schenker, it was difficult for him to keep order during the hearing. He said that the employee shouted at him while he was recording the proceedings and out of desperation he responded by telling the employee to **"f…..off for a minute"**. Schenker said that the employee had thereupon left the hearing and later returned with the letter of 22 March, which has been quoted above already, in which he said that he had been dismissed. Later on the same day the employee wrote another note addressed to Schenker that read thus in part: **"In the light of my dismissal, kindly advise when I must return the company vehicle."**

[13] After receiving the employee's letter, Schenker sought to set the record straight and clear the misunderstanding that the employee seemed to have had that he had been dismissed. Schenker responded by a letter on the same date he received the employee's letter. In his letter Schenker said:

> "Kindly return to our offices to complete our meeting. Please note that the allegations that you have been fired are not correct. Please advise me so that we can arrange a convenient time."

[14] Schenker said that the issue was further clarified to the

employee's trade union by him in a telephone conversation and in letters that he subsequently sent to the union on 22 and 23 March 2000. In the letter dated 23 March Schenker said to the union:

> "Further to our fax of 22 March 2000 and our brief telephone conversation of the same date, we wish to once again reiterate that the allegations that Mr Clapton has been fired or dismissed are not correct. Our disciplinary hearing of 8 am yesterday morning was not concluded and in any event the nature of the hearing in no way would have resulted in dismissal. The unfortunate choice of words used by the undersigned is regrettable and only meant as an appeal for restraint from Grant's unreasonable behaviour during the course of the meeting. May we request that Grant return to the office so that we may bring our meeting to a conclusion and then resolve any outstanding issues."

[15] On 24 March the union responded to Schenker's letter of the previous day. The first three paragraphs of that letter are important. They read thus:

> "We refer to your letter of 22 March 2000 and that of our member of the same date and your further letter of 23 March 2000. We are advised by our member that your attitude and terminology in instructing our member to 'f….off' are indicative of the whole nature of the employment relationship, wherein our member has been bullied, discriminated against and unfairly treated by the company. Our member denies any 'unreasonable'

> behaviour. Per contrary, he has always conducted himself in good faith and in keeping with the employment contract. The employment relationship is now irretrievably broken down by you as our member cannot trust you to apply fair labour practices. You have breached the employment contract. Our member has, consequently elected to abide by his dismissal, albeit unfair, and to pursue a claim of unfair dismissal via the CCMA."

[16] It will be noted from the letter referred to above that the union stated that the employee had been bullied, discriminated against and unfairly treated by the appellant and that the appellant had caused an irretrievable breakdown in the employment relationship. It will also be noted that the union further said that the employee had elected to abide by his dismissal which it regarded as a breach of the employment contract. Apparently the appellant sent another letter to the union on 30 March. That letter prompted a reply from the union on the same date. The second paragraph of that letter reads: **"You cannot overlook the dismissal, the victimisation / grievance and irretrievable breakdown of the relationship. [Emphasis supplied]** The employee's union proceeded to say in the next paragraph: **"You have breached the contract of employment".**

[17] Furthermore, it was common cause between the parties that the employee did not return to work despite the appellant's pleas for him to do so. Eventually the

appellant dismissed him in April 2000 on the ground that he had deserted. It is notable that this dismissal was not challenged anywhere and it does not form the subject-matter of the present proceedings. The employee referred the dispute to the CCMA. There is a dispute between the parties whether that dispute was one concerning an ordinary dismissal or constructive dismissal. The appellant says it was a dispute about an ordinary dismissal whereas the employee says that it was a constructive dismissal. It is not necessary at this stage to say anything about this.

[18] After hearing evidence from both sides the commissioner found that the restrictions, which were imposed by the appellant on the employee, were not only unjustified but that they also caused an irretrievable breakdown in the employment relationship between the parties. The commissioner held that instead of imposing the measures that the appellant imposed, it should have charged the employee with misconduct relating to the allegations that he abused the cellular phone, the motor vehicle and **"his sick leave entitlement"**.

[19] The commissioner also found that the appellant was not entitled to institute a disciplinary enquiry on 22 March because the charge did not warrant a formal hearing and that the hearing **"had the hallmark of being trumped**

up". The commissioner concluded by making a finding to the effect that, when the obscene remark by Schenker was made at the disciplinary hearing, the relationship between the parties had already reached a breaking point and consequently the employee terminated the employment. However, the latter finding by the commissioner appears to contradict another finding by him in which he stated: **"Mr Clapton has in my opinion discharged the onus on him, to establish that the company made his continued employment intolerable, and that he was dismissed."**

The review application

[20] In the Labour Court the appellant challenged the commissioner's award on two bases, namely, that because the dispute relating to constructive dismissal was not referred to conciliation before arbitration, the commissioner had no jurisdiction to arbitrate it. The other ground was that before the commissioner the employee had failed to prove that a constructive dismissal as envisaged in s 186 (1) (e) had occurred because he did not show that he is the one who terminated the employment. As a result the appellant contended that the award was unjustifiable and irrational.

[21] Regarding the jurisdiction point, the Court a quo found that the Commissioner had the necessary jurisdiction to

arbitrate the dispute. The Court's finding was based on the following reasons:

> "Insofar as the argument of the nature of the dispute is concerned and what exactly was conciliated and referred to arbitration, the arbitrator dealt with the question properly and intelligently and should not be criticised for the approach that he adopted. It was difficult to properly characterise this dispute from the outset. There was a dismissal for absenteeism. There was also a 'walk- out' at a disciplinary hearing after the unfortunate words referred to had been uttered. It was quite conceivable that there could have been some confusion as to the nature of the dispute. From the record and from the arbitrator's reasoned award it is quite apparent that all issues were properly aired and that the correct dispute was ultimately arbitrated."

[22] What the Labour Court said in the passage quoted above does not answer the question which was posed by the appellant's objection to that Court's jurisdiction to adjudicate the constructive dismissal case. That there had been a dismissal for absenteeism or that there had been **"a walk-out at a disciplinary hearing"** do not in any way indicate what the dispute was that had been referred to the CCMA. What the Labour Court was required to do in order to deal with the appellant's objection was to first and foremost examine the referral document which it did not do. I do not say that the referral document would be the only source of information but it certainly is the

primary source of information to determine what the dispute was that was referred to the CCMA.

[23] Regarding whether the employee sufficiently proved that he was constructively dismissed, the Labour Court accepted the reasons given by the commissioner for the finding that the employee had been constructively dismissed. In this regard the Court a quo reasoned as follows:

> "The next question to be asked is whether objectively, the third respondent [appellant] was entitled to leave the meeting and not return. The arbitrator found that he was entitled to do so in the circumstances and that he was constructively dismissed. He made a factual finding and reasoned very carefully with reference to all evidence, that the third respondent could not be blamed for leaving the meeting and his dismissal was therefore unfair. I am unable to fault the reasoning in a review application."

[24] For the above reasons the Labour Court dismissed the application with costs. As it appears below the Court a quo adopted an incorrect approach and erred in accepting the commissioner's reasons as justifying the findings and the award made by him.

The appeal

[25] The appellant sought to have the commissioner's award

reviewed and set aside on a number of grounds. One of these- which was also pursued on appeal – was the commissioner's finding that the third respondent had been constructively dismissed was unjustifiable and irrational. The appellant's case in the review application was that the employee had failed to show that he had been constructively dismissed and the commissioner's finding in this regard fell to be reviewed and set aside.

[26] In our law a constructive dismissal occurs when an employee is the one who terminates the contract of employment and he does so owing to the continued employment having been intolerable for him due to the conduct of the employer. The concept of constructive dismissal is defined in s 186 (1) (e) which in part reads as follows:

> "**Dismissal' means that –**
>
> **(a)…..**
>
> **(b) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."**

[27] In **CEPPAWU & Another v Aluminium 2000 CC [2002] 5 BLLR 399 (LAC)** this Court had occasion to

consider and define the meaning of the section. Writing for the Court **Nicholson JA** said at para [30]:

> "Constructive dismissal involves a resignation because the work environment has become intolerable for the employee as a result of conduct on the part of the employer. (see section 186 (1) (e)."

[28] It should be clear from the above that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.

[29] Having established what the requirements are for a

constructive dismissal, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that – even on review- must be established objectively. That is so because if there was no constructive dismissal- the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one – even on review- is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.

[30] In this case I have no hesitation in finding that the first requirement for a constructive dismissal, namely, that the employee terminated the contract of employment, is absent. The employee's case was that he had been dismissed by Schenker when he told him to **"f…off!"** It was never his case that he was the one who terminated

the contract of employment. In his letter of the 22nd March, which he seems to have written soon after he had walked out of the disciplinary hearing, the employee himself said in part: **"I take it that I am dismissed."** In another note of the same day that he addressed to Schenker, he opened the first sentence thus: **"In the light of my dismissal…."** Even in its letter of the 11th April 2000 the union wrote in part: **"This is a dismissal whichever way you look at it."** Also the union said: **"Our member has accepted the dismissal"** but will seek financial compensation **"for the unfairness thereof."**

[31] It may well be that Schenker had created a less than comfortable situation for the employee's continued employment but the employee did not terminate the contract of employment. The employee may have misunderstood what Schenker said in desperation during the inquiry and stuck to his wrong understanding even when he and his union were repeatedly told not only that the statement had not been intended to say he was dismissed but also when they were told that the charges he was facing in the disciplinary inquiry when he stormed out would not have been sufficient to warrant a dismissal. The employee and his union only have themselves to blame.

[32] Mr de Klerk, who appeared for the employee, sought to argue that the employee left the appellant's employment due to an intolerable working environment that had been created by the appellant and on that basis constructive dismissal had been established. The answer to this submission is simply the one that has been emphasized above, namely, that there is absolutely no evidence that it was the employee who terminated the contract of employment and that means that the first element of constructive dismissal is absent. Therefore, the existence of such dismissal was not established.

[33] The commissioner found that the employee terminated the employment relationship. However, this is contrary to clear evidence and is inconsistent with the employee's own case.

[34] The key finding made by the commissioner to the effect that the employee was constructively dismissed has no factual basis whatsoever. Not a shred of evidence indicating that the employee resigned was placed before the commissioner. It seems that the commissioner completely misconstrued what is required for constructive dismissal to occur. In setting out in paragraph 7 of the award what the employee would have to prove, the commissioner left out the requirement that

the employee had to establish that he had terminated the contract of employment. He just referred to the requirement that continued employment must have been intolerable. His finding that there was no realistic prospect of mending the relationship between the parties is contradicted by the content of the employee's letter of complaint wherein the latter asked for the resolution of the matter so that the parties' relationship could return to normality.

[35] It appears that once the commissioner had found the conduct of the employer to have created an intolerable situation for the employee to continue working, he came to the conclusion that there was a termination of employment as contemplated in s 186 (1) (e). Support for this can be found in the last three sentences of paragraph 7 of his award where he sought to define what the issues were and what the employee needed to show in order to succeed. The last three sentences read: **"Since the employer denies Mr Clapton was dismissed on 22 March 2000, Mr Clapton bears the onus of proving the employer indeed made his continued employment intolerable. If he is able to discharge this onus, he was dismissed. It is then for the employer to prove his dismissal was fair."** In these sentences the commissioner says, among other things, that, if the employee showed that the employer made continued employment

intolerable for him, then dismissal will have been proved. This is blatantly wrong when one is referring to constructive dismissal as the commissioner was because the employee must prove that he terminated the contract. In this case it was never the employee's case that he terminated the contract but his case was that the employer terminated it. There was no basis for the commissioner to find that there was constructive dismissal.

[36] Another ground upon which the appellant sought to have the award reviewed and set aside was that the commissioner had no jurisdiction to arbitrate a constructive dismissal dispute because such a dispute had not been referred to conciliation. The appellant contended that the dispute that had been referred to conciliation concerned an ordinary dismissal as opposed to constructive dismissal. The employee disputed this and contended that the dispute that he had referred to conciliation concerned constructive dismissal.

[37] In the referral form, the employee had this to say in response to a question as to why he thought that his dismissal was procedurally unfair: "**No proper procedures convened to effect the dismissal. The employer instructed the applicant to "f…off" during the disciplinary hearing, hence the hearing was incomplete and should not, in any event, have resulted in such a dismissal."** To a question in the referral form

as to why he thought that the dismissal was substantively unfair, he answered in part: **"No grounds for dismissal. Applicant had been following the employer's instructions in leaving Vredendal in time to return to the office by 16:00."** In the light of the conclusion that I have reached on the other ground upon which the appellant attacked the award, it is not necessary to decide this point. It should suffice to say that the decision of this Court in **NUMSA & others v Driveline Technologies (Pty) Ltd & Another (2000) 21 ILJ 142 (LAC)** may well have stood in the way of Counsel for the appellant's submission in this regard.

[38] In all of the circumstances I conclude that there was no constructive dismissal established in this matter and there was absolutely no basis for the finding to the contrary by the commissioner. It follows that the appeal must succeed. I can see no reason why costs should not follow the result in this matter.

[39] Accordingly the following order is made:

1. The appeal is upheld with costs.
2. The order of the Court a quo is set aside and replaced with the following order:

"(a) The arbitrator's award dated 12

September 2001 under case number WE31706 is hereby set aside.

(b) The third respondent is ordered to pay the costs of this application."

JAFTA AJA

I agree.

ZONDO JP

I agree.

MOGOENG JA

Appearances:

For the appellants	:	Mr M. J. Van As
Instructed by	:	Berkowitz Attorneys
For the third respondent	:	Mr M.P. de Klerk
Instructed by	:	De Klerk Attorneys
Date of judgment	:	22 September 2004