REPORTABLE

CASE NO: LCA 14/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

LABOUR SUPPLY CHAIN NAMIBIA (PTY) LTD **APPELLANT**

and

NDAPEWA HAMBATA **RESPONDENT**

CORAM: **Smuts, J**

Heard on: 27 January 2012

Delivered on: 3 February 2012

JUDGMENT

Smuts, J

[1] This is an appeal against an award made by an arbitrator, Mr P Mwandingi under s 89 of the Labour Act, 11 of 2007 ("the Act"). This appeal was initially opposed but a notice was subsequently filed by the respondent's legal practitioner withdrawing opposition to the appeal and stating that the appeal would proceed on an unopposed basis.

[2] Even in the absence of opposition or an appearance on behalf of the respondent, I would need to be satisfied that the award should be set aside. The appellant is represented Mr S Horn who filed heads of argument prior to the hearing.

[3] The appeal essentially raises two questions of law.

[4] The first concerns the question of jurisdiction. The point was taken at the arbitration that the arbitrator lacked jurisdiction by virtue of an agreement styled "an addendum to the employment agreement". This purports to raise an agreement between the parties to agree to private arbitration. This preliminary point was dismissed by the arbitrator and the appellant contends that he erred in doing so.

[5] The second issue concerns the nature of the test to be applied in determining whether there was a constructive dismissal. It is common cause that the respondent had resigned her position with the appellant. The arbitrator found that she had been constructively dismissed. The appellant contends that this was on the basis of incorrect principles. I

deal with these two issues in that sequence. A further point was raised that the dispute between the parties had become settled. In view of the conclusion I reach in respect of the second question, it is not necessary to deal with that issue.

Private arbitration agreement

[6] The respondent was employed on 1 March 2010 in terms of an agreement entitled "Limited Duration Contract of Employment Agreement". She was appointed as a "picker" by the appellant which carries on business as a temporary employment service provider or what would be commonly known as a labour hire or labour broker concern. The appointment was for the respondent to be employed as a picker at the premises of a client of the appellant. (I had thought that her occupation was a packer, but was assured by Mr. Horn that the designation "picker" is correct. Despite this, it would seem by virtue of the location of the employment at a warehouse and not at vines or an orchard that the term should be packer).

[7] The employment was of a limited duration and for a six month period, to expire upon 31 August 2010. The respondent's remuneration was N$9.24 per hour or as stated in her evidence N$1,700.00 per month. On the same day that she signed her employment agreement, the respondent also allegedly signed a further document entitled "Addendum to Employment Contract: Private Arbitration and

Conciliation". The pertinent portion of this addendum is as follows:

> *"The employer and employee shall refer all disputes arising from this agreement to private arbitration as per section 91 of the Labour Act, 11 of 2007.*
>
> *The parties by their signature to this document bind themselves to this arbitration agreement and consent herein to appoint the Professional Arbitration and Mediation Association of Namibia to facilitate and convene the arbitration process and hearing.*
>
> *In a dispute arising between the parties from this agreement will be resolved by means of arbitration in terms of the PAMAM Arbitration Rules, as provided for in this agreement.*
>
> *Such dispute should be declared by giving written notification thereof to the employer, within a period of 30 calendar days after the date of the cause of action arising."*

[8] The addendum further provides that the decision of a single arbitrator would be final and binding on the parties and that they may be represented by "an admitted or non-admitted legal practitioner (sic) or any other person of his or her choice". It also provides that each party would carry their own costs and that the costs of the arbitrator would be paid by both parties in equal shares. It finally provides that

the agreement to private arbitration can only be terminated by written consent of both parties.

[9] It is common cause between the parties that the respondent signed a brief resignation note on 21 July 2010 and subsequently laid a dismissal complaint with the Labour Commissioner's office. When the complaint proceeded to arbitration, the point was then taken by the appellant's managing director who represented it in those proceedings, claiming a lack of jurisdiction by virtue of the agreement to private arbitration. At the arbitration proceedings, the appellant disavowed both her signature to the agreement and denied all knowledge of its import. She stated that she is literate, having attended school and having completed grade 10. But it would appear from the record that the respondent did not appreciate or understand the effect of this addendum. In view of the conclusion I reach concerning an agreement of this nature, it is not necessary to further address the question as to whether there was proper consensus in respect of this addendum.

[10] The appellant claims that this addendum would preclude arbitration under the Act by virtue of the provisions of s 91 of the Act. The portions of that section relevant to this enquiry are embodied in sub-sections (1) and (2), which provide:

> *"(1) For the purposes of this section "arbitration agreement" means any agreement contemplated in subsection (2) and includes the*

arbitration procedure contemplated in section 73.

(2) Parties to a dispute contemplated under this Act may agree in writing to refer that dispute to arbitration under this section".

[11] This section contemplates that parties to a dispute have the option to agree in writing to refer that specific dispute to arbitration. In s 91(1) an agreement of this nature is stated to specifically include an arbitration procedure contemplated in s 73. That section concerns disputes arising from the application, interpretation and enforcement of a collective agreement between an employer (or employers' organisation) and a union.

[12] Section 73 expressly requires that collective agreements must provide for a dispute resolution procedure including an arbitration procedure to resolve disputes concerning the interpretation, application or enforcement of a collective agreement in accordance with the dispute mechanisms contained in the Act. This section however provides that the parties may refer the dispute to the Labour Commissioner where the collective agreement does not provide for a procedure or where the procedure is not operative. This section, when read with s 91 and its express reference to Part D of Chapter 8 (which provides for private arbitration) thus contemplates the referral of such a dispute by way of an agreement to private arbitration.

[13] The question arises as to whether the addendum would constitute an agreement to submit to private arbitration as contemplated by the Act. The reference to include collective agreements in s 91(1) would thus not limit the operation of private arbitration in s 91 to collective agreements. But where a submission to private arbitration is not contained in a collective agreement, s 91(2) in my view contemplates that there would first need to be a dispute between the parties which is then referred to arbitration. This would seem to me to arise from the clear language employed and the intention of this section, considered in the context of the Act, construed as a whole. It would thus be open to parties to a dispute contemplated by the Act to enter into an agreement to refer that specific dispute to private arbitration. But only once a dispute has arisen, would the parties be able to refer it to private arbitration if they so agreed.

[14] The agreement which the appellant relies upon does not in my view meet the requisites of this section. It would seem that the respondent and other employees of the appellant would be required to sign the addendum when entering the appellant's employ. There would be thus no dispute between the parties at that time. It would follow in my view that the addendum does not amount to an agreement to private arbitration under the Act. It would seem to me to undermine the very purpose of the Act for an aspirant employee to sign such a contract when entering into the employ of an employer and to thus contract out of the protective provisions of the Act.

[15] In view of my finding that the addendum would not amount to an agreement to private arbitration as contemplated under s 91(1), it is not necessary for me to consider the further question, not raised or argued, as to whether such an agreement would in any event in the circumstances of this case be unenforceable by reason of being against public policy. Quite apart from seeking to require that a prospective employee contract out of several of the protective provisions of the Act, the agreement would furthermore require that the parties must equally bear the cost of the private arbitration in question. Quite why this should be enforced against an employee who earns N$9.24 per hour was not explained to me on behalf of the appellant.

[16] After I raised these concerns with Mr Horn, he informed me that the appellant would no longer persist with this point. In view of the fact that it was raised and a ruling made upon it, it has been necessary for me to deal with it.

[17] Although the arbitrator rejected the preliminary point relating to absence of jurisdiction for different reasons, his decision to do so is upheld.

Constructive dismissal

The arbitrator found that the respondent had been constructively

dismissed by the appellant. This question is to be assessed against the factual background to this component of the enquiry.

[18] The respondent stated at the proceedings that a supervisor in the employ of a client company to the appellant where the respondent performed her work, CIC, had told her to resign. This, she stated, arose in the following way. A security guard, employed by a security company at the premises (of the client company) where the respondent worked had apparently accused the respondent of being implicated in the theft of face lotion. It had not been found upon the respondent but in the locker of a female security guard. It would seem that the security guard alleged that the respondent was complicit in the theft of that lotion.

[19] On the appellant's version the security guard then raised this more than once with the respondent. She in turn complained to the supervisor at the client company, Mr Boois, (also referred to as Mr van Damme,) about the accusations levelled against her by the security guard. It was then that the supervisor had suggested to her that if she was unhappy in her employment, she should consider resigning. The respondent stated that he informed her that if she did so she would receive three months pay plus a further N$1,000.00 as a bonus.

[20] This supervisor was called by the appellant as a witness. He denied making any such promise but confirmed that he had suggested to the appellant that she may want to resign if she was unhappy in her

employment, given her ongoing dispute with the security guard in question.

[21] The respondent also stated that the security guard in question had requested her to fill in a form and informed her that he had the right "to chase her from the company". When asked if she believed this by the arbitrator, she answered in the negative. The respondent also stated that she then went to the supervisor in the employ of the appellant, Mr Heita Nghiyoonanye and stated that he made a similar promise to her had been given by Mr Boois.

[22] Mr Nghiyoonanye gave evidence for the appellant and denied this. He stated that he would not have any authority to do so. Nor was there any precedent in the appellant's employment regime for such a promise to be made. He testified under oath that the respondent had come to his office and said she wanted to resign. In response, he said that she may do so but that she should herself record this in writing and provided a blank piece of paper for her to record that she wanted to resign. It is common cause that the respondent stated under her signature on 21 July 2010:

"I Ndapewashali Hambata want to resign from LSC."

[23] It is also common cause that she duly did so and collected her outstanding pay in the sum of N$1,728.38 during the following week and on 28 July 2010. When collecting her pay, she was however required to sign a form containing her name that she received the sum in full and final settlement of all claims against the appellant by virtue of her "consensual termination of employment". In view of the conclusion I reach, it is not necessary to determine whether this constituted a valid and enforceable compromise.

[24] In the course of the arbitration, the respondent stated that she did want to resign but her desire to do so had arisen in the circumstances of the accusation levelled against her and after a suggestion to that effect made by Mr Boois together with the alleged promises made by him and by Mr Nghiyoonanye.

[25] Mr Nghiyoonanye also testified that at the time the respondent approached him to resign, he was unaware of the allegations made by the security guard against the respondent. He said that he only learned of these after she had left the employ of the appellant on 21 July 2010. The respondent had stated that Mr Nghiyoonanye was aware of the allegation or imputation when she had approached him.

[26] The arbitrator approached the enquiry on the basis that the appellant had the burden of proof of essentially establishing that there had not been a constructive dismissal. This is incorrect. This Court

has referred to constructive dismissal as arising where an employee terminates or agrees to terminate the employment relationship due to the conduct of an employer and under circumstances which render the termination tantamount to or in substance a termination by an employer. [1] This Court proceeded in that matter to hold, with reference to South African authority [2], that an employee essentially had the onus to establish that the resignation amounted to a constructive dismissal. Only once this is established, would the onus then shift to an employer with reference to the circumstances which prompted the resignation as being fair or unfair.

[27] The applicable test was recently lucidly explained by Cameron, JA in the South African Supreme Court of Appeal as follows: [3]

> *"[12] …… These cases have 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. Once this is established, the inquiry is whether the employer (irrespective of any intention to*

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[1] Cymot (Pty) Ltd v Mcloud 2002 NR 391 (LC) at 393

[2] Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC) at 638 B.

[3] Murray v Minister of Defence 2009(3) SA 130 (SCA) at 137 at par [12]-[13]. This approach is reaffirmed by the Constitutional Court in Strategic Liquor Services v Mvumbi NO 2010(2) SA 92 (CC) at 94

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.

[13] It deserves emphasis 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 circumstances '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 may 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 (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case."

[28] The arbitrator thus clearly misunderstood the test in establishing a constructive dismissal (and the concept itself) and specifically the

question of the onus.

[29] Even upon the respondent's own version considered on its own, it would not seem to me that the test was established. But the respondent had the onus to establish that her resignation amounted to a constructive dismissal as contemplated by the authorities. Both the respondent's supervisor in her employment with the appellant, Mr Nghiyoonanye, as well as the supervisor on the side at the client company, Mr Boois, denied making the alleged promise to her. But more importantly, in considering all the facts, it would rather seem to have occurred that Mr Boois had suggested that the respondent may wish to resign, given her unhappiness arising from the accusations levelled against her. This would not in my view amount to conduct calculated or likely to destroy or damage the employment relationship.

[30] The respondent herself stated that she wished to resign and it would seem that her ultimate unhappiness was rather a consequence of not having received the incentive which she contends had been promised to her for her resignation. Her employment would in any event had come to an end at the end of the following month. Mr Nghiyoonanye's version was not disputed, despite being subjected to vigorous cross-examination by the arbitrator. It is also unlikely that he would offer such an incentive which would amount to payment after her employment would have come to an end.

[31] Upon these facts, it is clear to me that the respondent did not establish a constructive dismissal. The arbitrator erred in making a finding of that nature. It would follow that the arbitrator's award would need to be set aside for this reason alone.

[32] It is accordingly not necessary to further address his award in an amount equal to four months employment even though the respondent's employment contract would have ended on 31 August 2010, a little more than a month after her resignation.

[33] In setting aside the award, I also wish to refer to certain irregularities which occurred in the proceedings. Despite the representative of the appellant expressly requesting it, the arbitrator declined to require that the respondent give her evidence under oath. She merely made a statement even though the arbitrator permitted cross-examination of her. On the other hand, he required that the appellant's witnesses to give their evidence under oath. This amounts to an irregularity. Parties are to be treated alike.

[34] In the course of their testimony, the arbitrator subjected the appellant witness to extensive and hostile cross-examination. This is not in keeping with his position as an arbitrator. Whilst I appreciate that an arbitrator may in the context of an unrepresented employee need to ask probing questions of an employer's witnesses, an arbitrator should not descend into the arena and engage in vigorous and hostile cross-

examination of the witnesses of one side, including on issues which were not even raised in the employee's statement. This also constitutes an irregularity in those proceedings. Had there not been the incorrect application of the test involving constructive dismissal, I would have been inclined to set aside the proceedings on the grounds of these irregularities.

[35] The order I accordingly make is that the award of the arbitrator dated 1 November 2010 is hereby set aside.

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Smuts, J

ON BEHALF OF APPELLANT **MR. HORN**

Instructed by: **MB DE KLERK & ASSOCIATES**