

**REPUBLIC OF SOUTH AFRICA**

Reportable  
Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN****JUDGMENT**

Case no: C 118/07

In the matter between:

**SOUTH AFRICAN POLICE SERVICES**

**Applicant**

and

**SAFETY AND SECURITY**

**SECTORAL BARGAINING COUNCIL**

**First respondent**

**U BULBRING N.O.**

**Second respondent**

**PJ VAN DEN BERG**

**Third respondent**

Heard: 23 August 2011

Delivered: 26 August 2011

Summary: Review – constructive dismissal.

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**JUDGMENT**

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STEENKAMP J

Introduction

[1] The third respondent in this application, Petrus Johannes van den Berg ("the employee") was a dog handler in the South African Police Services ("SAPS"), the applicant. He had about 14 years' experience as a dog handler and was particularly attached to the dog that was assigned to him, Storm. The employee had worked with Storm for a number of years and they had become particularly attached to each other when the events leading to this application unfolded.

[2] The employee resigned from SAPS on 18 July 2005. He referred a constructive dismissal dispute to the Safety and Security Sectoral Bargaining Council ("the Bargaining Council"), the first respondent. The second respondent, who is a panellist of the Bargaining Council, Ms Ursula Bulbring ("the arbitrator") found that he had been constructively dismissed and that the dismissal was unfair. She took into account, however, that he was partly to blame for the disintegration of the relationship between the parties and ordered SAPS to pay him only four months' compensation.

[3] SAPS seeks to have the arbitration award reviewed and set aside.

Background facts

[4] The facts are comprehensively covered in the arbitration award, spanning no fewer than 38 pages. I shall summarise them briefly.

[5] In November 2004, after an unsatisfactory evaluation of the dog, Storm, that was entrusted to the employee's care, Storm's work certificate was withdrawn. That led to conflict between the employee and some senior members of SAPS.

[6] In March 2005, the employee, together with other dog handlers, raised a grievance about the conduct of their commander at the Hermanus Dog Unit, one Vermeulen. On the day after a heated meeting with the senior commissioner of SAPS in the Western Cape, Ganief Daniels, Daniels transferred the employee to an administrative position – without Storm – in Zwelihle, the township adjacent to Hermanus.

[7] The employee was booked off for stress and anxiety. While he was at home, he received a letter from SAPS, instructing him to hand over the "state's property", including Storm. The employee lodged a grievance and referred an unfair labour practice dispute to the Bargaining Council.

[8] The employee's legal advisor at the time, Adv Johann Nortjé, interceded on his behalf. Nortjé agreed with Daniels that the employee should be placed at the Gordon's Bay dog unit, with Storm, on a temporary basis for three months.

[9] However, Vermeulen – who had to facilitate the transport to Gordon's Bay – did not do so, with the result that the employee did not report for duty in Gordon's Bay at the appointed time. Daniels then again instructed the employee to report for duty at Zwelihle without Storm.

[10] Nortjé subsequently met with a deputy to Daniels, one Adonis. The aim of the meeting was to explore the placement of the employee and Storm at another dog unit. It was agreed to arrange a further meeting with Deputy Provincial Commissioner Schooling. This was meant to be a step 4 meeting in the grievance procedure. However, SAPS cancelled the meeting.

[11] Nortjé sent two emails to Daniels and Adonis asking for a decision on the placement of the employee and Storm. They did not respond.

[12] The employee then brought an urgent application to this Court<sup>1</sup>, praying for an order to compel SAPS to follow the grievance process in an attempt to place him back into the dog handler post in Hermanus; not to separate Storm from him; and not to victimize him.

[13] The parties reached a settlement agreement that was made an order of court. In terms of that order, the employee and Storm would report to the Worcester dog unit pending the outcome of the dispute scheduled for arbitration. That arbitration was scheduled to take place before panellist Bill Maritz on 8 July 2005.

[14] Whilst consulting with his legal representative, Nortjé, on 7 July 2005, the employee learnt that SAPS planned to call nine witnesses to the arbitration. He became despondent and emotional, as he foresaw that SAPS – with endless resources funded by the taxpayer – would drag the dispute out in a war of

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<sup>1</sup> Case number C 392/2005.

attrition that would deplete him financially and emotionally. He was stationed in Worcester at this stage and Storm was housed in the SPCA kennels in less than optimal conditions in a small kennel, instead of at the employee's house. His wife was working in Somerset West and they hardly saw each other.

[15] The employee instructed his legal advisor to approach Daniels again with a request for a permanent placement at the Worcester dog unit. Nortjé spoke to Daniels telephonically at about 21:00 on 7 July. Daniels agreed that it would be in everyone's best interest to facilitate such a transfer and undertook to do his best to support it. He also approved two weeks' leave for the employee to arrange his and his wife's relocation to Worcester. Daniels was the second highest ranking SAPS official in the Western Cape after the Provincial Commissioner, Mzwandile Petros. In his own words at the arbitration, after Cronjé requested the employee's permanent transfer to Worcester, Daniels said, "I never had a problem because once again, pointing out to you, showing my willingness all the time, to settle this particular matter... I would support this particular project."

[16] On the understanding that he would be relocated – with Storm – to Worcester permanently, the employee withdrew his grievance at the arbitration on the morning of 8 July 2005.

[17] On 17 July 2005, an article appeared in *Rapport* newspaper, headed "*Superhond agter tralies*", with a photograph of Storm kept behind a wire fence in a kennel. The next day, 18 July, SAPS sent the employee a letter informing him to report to Zwelihle and to return Storm. Daniels confirmed in his evidence that this decision was motivated by the *Rapport* article.

[18] Upon receiving this letter, the employee realised that his intended permanent transfer to Worcester was not going to happen and that Storm would be removed from him. He applied to SAPS to buy Storm. The request was declined. On 22 July 2005 he tendered his resignation. He then referred the constructive dismissal dispute that led to the arbitration forming the subject matter of this review application to the Bargaining Council.

The legal framework and the appropriate test

[19] I recently had occasion to review the case law on constructive dismissal and the appropriate test on review.<sup>2</sup> I can do no better than to repeat those views *verbatim*.

[20] In those cases, I considered the *dictum* of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*.<sup>3</sup> Although the court in that case had to consider s 186(1)(b) of the LRA<sup>4</sup>, it dealt with it as a species of constructive dismissal and held as follows:<sup>5</sup>

"The issue that was before the Commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain a dispute in terms of section 191 of the Act.

"The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court....

"The question before the court a quo was whether on the facts of the case, a dismissal had taken place. The question was not whether the finding of the Commissioner that they had been a dismissal of three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction, irrespective of its findings to the contrary."

[21] Section 192 of the LRA provides that:

"(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

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<sup>2</sup> See *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and others* (C 272/2010, Labour Court, Cape Town, 24 August 2011; and *Western Cape Department of Transport and Public Works v Fritz N.O. and others* (C 846/2008, Labour Court, Cape Town, 26 August 2011).

<sup>3</sup> (2008) 29 ILJ 2218 (LAC).

<sup>4</sup> Section 186(1)(b) provides that dismissal means that – "an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

<sup>5</sup> At paras [39] – [41].

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

[22] In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration – or on review by the Labour Court – is whether the dismissal was fair; and whether the finding of the arbitrator in this regard was reasonable.

[23] In the case of an alleged constructive dismissal in terms of section 186(1)(e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the CCMA did not have jurisdiction in the first place, even though the Commissioner can only make that finding *ex post facto*.

[24] As I pointed out in *Asara* and in *Western Cape Department of Transport*, I am bound by the authority in *SA Rugby*.<sup>6</sup> This court also applied the dictum in *SA Rugby* in the subsequent case – heard post *Sidumo* -- of *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others*.<sup>7</sup> In that case, dealing with a constructive dismissal, Basson J explicitly held that the question of whether a dismissal had taken place goes to jurisdiction and that the review test as laid down in *Sidumo* does not find application in reviewing a jurisdictional ruling.

[25] The test I have to apply in dealing with the review of the finding on constructive dismissal, therefore, is not whether the conclusion reached by the Commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*, but whether the Commissioner correctly found that Mr van den Berg had been dismissed.

[26] Section 186(1)(e) of the LRA defines a constructive dismissal. The section states that:

"Dismissal means that –

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<sup>6</sup> *Supra*.

<sup>7</sup> (2009) 30 ILJ 2093 (LC) para [6].

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".

[27] The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots*<sup>8</sup>. Although that case was decided under the 1956 LRA, the principles remain the same. In *Loots*, the court held that --

"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 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".

[28] The court held<sup>9</sup> further that when an employee resigns or terminates the contract of employment as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves that his/her fears were unfounded, then he has not been constructively dismissed and his/her conduct proves that he has in fact resigned.

[29] The Constitutional Court recently remarked in *Strategic Liquor Services v Mvumbi NO & others*<sup>10</sup> that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.

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<sup>8</sup> (1997) 18 ILJ 981 (LAC) at page 985. See also *Woods v WM Car Services (Peterborough)* (1981) ILR 347 at 350.

<sup>9</sup> at page 984.

<sup>10</sup> (2009) 30 ILJ 1526 (CC); [2009] 9 BLLR 847 (CC) at para [4].

[30] In *Eagleton & Others v You Asked Services (Pty) Ltd*<sup>11</sup> this Court considered the three requirements that an employee must prove in order to claim constructive dismissal. These requirements are that:

- 22.1 the employee terminated the contract of employment;
- 22.2 continued employment had become intolerable for the employee; and
- 22.3 the employer must have made continued employment intolerable.

[31] In *Chabeli v Commission for Conciliation, Mediation and Arbitration & others*<sup>12</sup> the court held that in order to prove a constructive dismissal, the employee has to show that the employer had made the continued employment relationship intolerable and that, objectively assessed, the conditions at the workplace has become so intolerable that he had no option but to terminate the employment relationship.<sup>13</sup> As I recently stated in *Value Logistics (Pty) Ltd v Basson & others*<sup>14</sup>, I doubt that this strict test survives the formulation by the Constitutional Court in *Strategic Liquor Services (supra)*.

[32] The test remains, though, that the conduct of the employer must be judged objectively.<sup>15</sup>

[33] I also have regard to the recent *dictum* of the Labour Appeal Court in *Jordaan v CCMA*<sup>16</sup>, where the court cited with approval its earlier decision in *Old Mutual Group Schemes v Dreyer*<sup>17</sup> where Conradie JA said:

"Buitendien sou so 'n werknemer wat uit die bloute bedank dit gewoonlik moeilik vind om 'n hof te oortuig dat hy werklik konstruktief ontslaan is. Die bewyslas rus op die werknemer... Die bewyslas is nie 'n ligte een nie... Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgever die voorsetting van sy diens onuithoudbaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld, maar hom nie aanstaan nie. Net soos ontslag is 'n

<sup>11</sup> (2009) 30 ILJ 320 (LC) at para 22.

<sup>12</sup> (2010) 31 ILJ 1343 (LC).

<sup>13</sup> (2010) 31 ILJ 1343 (LC) at para 17. See also *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 ILJ 1240 (LC) and *Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO & others* (1998) 19 ILJ 1584 (LC); [1998] 10 BLLR 1062 (LC).

<sup>14</sup> Case no C1025/09 (Labour Court, Cape Town, 26 May 2011).

<sup>15</sup> *Smithkline Beecham (Pty) Ltd v CCMA* (2000) 21 ILJ 988 (LC) 997B; *Kruger v CCMA & Another* [2002] 11 BLLR 1081 (LC) 1085D; *Lubbe v ABSA Bank Bpk* [1998] 12 BLLR 1224 (LAC) para 8; *Mafofane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 49.1.

<sup>16</sup> [2010] 12 BLLR 1235 (LAC) 1239 B-E.

<sup>17</sup> (1999) 20 ILJ 2030 (LAC) 2036.

gedwonge bedanking 'n allerlaaste opsie. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar nog ander uitweë is nie."

And Davis JA continued:

"This dictum represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her."

[34] In *Murray v Minister of Defence*<sup>18</sup> -- cited with approval by the Constitutional Court in *Strategic Liquor Services* -- the Supreme Court of Appeal 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'."

#### Application of the law to the facts

[35] The arbitrator noted, after a lengthy exposition of the evidence, that this was "not simply a case of the employer making employment intolerable. Van den Berg was also part of the problem". She found that the employee contributed to the breakdown of the relationship, especially his disrespect and arrogance towards a superior officer when Storm was tested in 2004. It is for this reason that she ultimately awarded the employee only four months' compensation, despite her eventual finding that there was nevertheless a constructive dismissal. This appears to me to be a reasonable finding that cannot be interfered with on review.

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<sup>18</sup> (2008) 29 ILJ 1369 (SCA) at para 13. The position of the SCA was confirmed in the case of *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 ILJ 575 (LC) at paras 27 and 40.

[36] It is common cause that the employee resigned. The arbitrator thus had to find whether his employment was intolerable; and if so, whether the employer was to blame.

[37] As I have stated, the arbitrator concluded that the employee was partly to blame, at least in the initial phase around the testing of Storm. That finding is supported by the evidence.

[38] The arbitrator then analysed the further events, though, and concluded that SAPS made continued employment intolerable. In coming to this conclusion, she took into account the following factors:

(a) Daniels's transfer of the employee to Zwelihle on 16 March 2005 could only be described as punishment. It meant that he could not work with his dog; in fact, he could not work as a dog handler at all.

(b) After having been booked off sick, the employee was transferred to Gordon's Bay; yet Vermeulen frustrated the transfer. He was upset by the employee's complaints "and wanted to make his life as difficult as possible".

(c) The Gordon's Bay transfer was withdrawn in error and too hastily. SAPS then transferred the employee back to Zwelihle and not to Hermanus.

(d) The action that gave rise to the resignation was Daniels's not following through on his good faith undertaking to Nortjé that he would support the employee's permanent transfer to Worcester.

[39] This summary of events that ultimately made continued employment intolerable is consistent with the evidence and cannot be faulted. The employee followed the prescribed internal procedures. His internal grievance was not addressed. He referred a dispute to the Bargaining Council. He withdrew that at the last minute, on the understanding that it had been resolved to the mutual satisfaction of the parties. But it was not to be. The letter of 18 July 2005, instructing him to report to Zwelihle despite everything that had gone before, was understandably the last straw.

[40] I agree with the arbitrator's finding that SAPS was primarily responsible for making the continued employment relationship intolerable; and, in the words of

the SCA in *Murray*, it was culpably responsible. I noted earlier that, in *Strategic Liquor Services v Mvumbi NO & others*<sup>19</sup>, the Constitutional Court stated that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable. That was the case here.

[41] With regard to the remedy, the arbitrator quite properly took into account the employee's own role in the deterioration of the relationship. In that context, compensation equivalent to four months' remuneration only is not unreasonable.

[42] The further finding that the dismissal was unfair is also supported by the evidence.

[43] The award is not reviewable.

#### Costs

[44] This matter has dragged on for six years. SAPS was not faced with a turbulent employee that it had to reinstate against its wishes; all it had to do was to pay him four months' salary. It is not stated on the papers what the employee earned at the time, but the amount owing to him is far less than the legal costs expended by SAPS and the State Attorney, who saw fit to brief counsel in both the arbitration and in these proceedings. These costs, bearing no relation to the award they seek to review, appeared to be of little concern to them; one might cynically ascribe that to the fact that it is paid by the taxpayer. The arbitration award was a reasonable one. It is difficult not to form the view that SAPS was fighting a war of attrition, funded by the taxpayer, against a single, unemployed individual who does not have the same resources. SAPS's internal legal advisor, Jacobus van der Westhuizen, stated before the commencement of the unfair labour practice proceedings in 2005 already that SAPS would take any adverse outcome on review; those words proved prophetic.

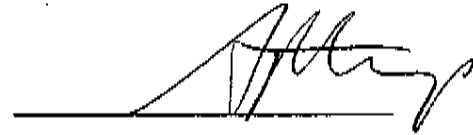
[45] In law and fairness, costs should follow the result.

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<sup>19</sup> (2009) 30 ILJ 1526 (CC); [2009] 9 BLLR 847 (CC) at para [4]

Order

[46] The review application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'A J Steenkamp', is written over a horizontal line.

A J Steenkamp

Judge

APPEARANCES

APPLICANT:

J van der Schyff

Instructed by the State Attorney, Cape Town.

THIRD RESPONDENT:

A Heyns

Instructed by Wynand du Plessis, Bellville.