

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Reportable
CASE NO. D 937/08

In the matter between:

AQUASOFT INVESTMENTS CC

Applicant

and

NOMUSA MASANGO

First Respondent

J NGWANE N.O

Second Respondent

COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION

Third Respondent

Date Heard: 1 September 2011

Date of Judgment: 30 September 2011

JUDGMENT

REDDY AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (the LRA)¹:

¹ 66 of 1995.

1. to review and set aside an arbitration award dated 19 October 2008 under case number KNDB 4462-08 handed down under the auspices of the Commission for Conciliation Mediation and Arbitration,
2. to substitute the award with an award that the applicant (the “employer”) did not dismiss the first respondent (the “employee”) and
3. for costs.

[2] The application is opposed by the employee.

Factual background

[3] The salient aspects of the matter are that the employee was employed as a machinist around June 2005. During the course of her employment, the place of work changed and she was placed at the second factory. At the second factory the employee was required to work on Saturdays whereas at the previous workplace she worked from Mondays to Fridays.

[4] There are disputes about the circumstances that led to the termination of the employment relationship. The applicant testified during the arbitration hearing that there was no dismissal but that the employee had resigned. It testified through its manager, Rafik Goolam (Goolam) that the employee initially worked on Saturdays and thereafter refused to do so. On Monday 7 April 2008, one of the drivers was absent and Goolam had done the driving for half the day. He gave instructions to a supervisor, Nicky, to do a routine check of the work whilst he was away from the factory.

[5] Nicky was checking the employees' score cards, to see the number of items sewn by the employee, when she noticed that the employee's score was low. Nicky asked the employee why was her score so low to which the employee responded:

"Why are you asking me, do you have a problem with me only?"

Nicky replied

"No, I do not have a problem with you only, the problem is I have noticed you haven't achieved your targets and I need to know the exact reason as to why you haven't achieved your targets."

The employee then, whilst waking up from her seat, said
"I am tired of this shit company"

and left the factory.

[6] Goolam met the employee on his way into the factory and assumed that she was on her way to the toilet. Later when he asked Nicky about the scores, she informed him that "One machinist has left the company with no valid reason". He responded to Nicky that perhaps the employee was "a bit frustrated" and she would return the next day.

[7] The employee did not return to work.

[8] Goolam, under cross-examination, denied the employee's version and specifically denied that he swore at her.

[9] The employee testified at the arbitration hearing that she was dismissed and had not resigned. She was required to work on Saturdays and that there was an increase in the number of items she had to sew. She could not work on Saturdays as she had to attend driving lessons. Further she was often sworn at and verbally abused by Goolam. On 7 April 2008, he had asked her why she had not worked the previous Saturday. He swore at her and told her to pack her bags and leave.

[10] The employee denied under cross-examination that Goolam did not verbally abuse her previously and on the day in question. She was also adamant that it was Goolam, and not Nicky or Mr Farhaad who spoke to her on that day. She also placed this version on record when Goolam was under cross-examination.

[11] The award makes reference to the evidence of Nicolette Jensen (Nicky), the applicant's second witness. This evidence was not transcribed, or if it was, it was not placed before this Court.

[12] The award summarises Nicky's evidence as follows:

- i. the employee was confronted by Jensen about her scores at which point the employee left;
- ii. confirmation that Goolam did swear at employees.

[13] The second respondent (whom I shall refer to as “the commissioner”) found that Goolam raised his voice at employees and did use vulgar language when addressing them. The crux of his analysis of the evidence is recorded hereunder in the following paragraphs as numbered in the award:

“6.9 Rafik’s attitude to give the applicant an ‘ultimatum’ to work Saturdays or [sic] failing which to work night shift was unreasonable.

6.10 It is therefore probable that the applicant reported to work on Monday 7 April 2008 after her failure to work on Saturday and that Rafik is [sic] prone to screaming and using vulgar language abused the applicant verbally causing her to leave the company.

6.11 It is my opinion that the cumulative effect of verbal abuse on an employee may render the continuation of employment relationship [sic] intolerable.

6.12 Whether Rafik told the applicant to leave the workplace or not but [sic] his conduct towards the applicant was sufficient to cause the continuation of the employment relationship intolerable [sic].

6.13 Taking all this evidence which included the contradictions between Nicolette’s and Rafik’s evidence, and the corroborated evidence of

the applicant and Nicolette on Rafik's use of vulgar language in the workplace I find it probable that the applicant was constructively dismissed by the respondent on 7 April 2008.

- 6.14 I further find the applicant's dismissal was both procedurally and substantively unfair and that the applicant is entitled to her relief of compensation for unfair dismissal."

Grounds of review

[14] The employer submitted that the commissioner committed a gross irregularity in the conduct of the proceedings, alternatively misconducted himself in his duties as arbitrator, in that the decision reached by him was not a decision that a reasonable decision-maker could have made. The commissioner issued the following award:

- "7.1 The applicant Nomusa Monica Masango's dismissal by the respondent Aquasoft Investments cc was both procedurally and substantively unfair.

- 7.2 I order the respondent to pay to the applicant an amount equivalent to five (5) months salary a sum of R 419-00 x 4.333 = R 9 077-64.

- 7.3 This amount to be paid to the applicant within fourteen (14) days of the date of receipt of this award."

Evaluation

[15] The commissioner, in concluding as he did, melded portions of each version (a resignation and a dismissal) to arrive at a finding that the employee was constructively dismissed.

[16] The tests for each of these terminations of employment are different. Simply put, a resignation is an employee's termination of the employment relationship of her own free will. A dismissal is a termination of the relationship by the employer. A constructive dismissal is a termination of the contract of employment by the employer, with or without notice, because the employer made continued employment intolerable for the employee. The usual procedural rights relating to a hearing prior to a dismissal by an employer are absent in a constructive dismissal.

[17] There were two irreconcilable versions before the commissioner in how the termination came about. According to the evidence, the termination was either through a resignation by the employee or a dismissal by the employer. There were material disputes of fact before the commissioner.

[18] To come to a conclusion on the disputed facts, the commissioner had to make findings on (a) the credibility of the various witnesses; (b) their reliability; and (c) the probabilities. The commissioner did not do so. See *Sasol Mining (Pty) Ltd v*

*Commissioner Ngqeleni*² and *SFW Group Ltd and Another v Martell et Cie and Others*³ quoted therein.

[19] The test for constructive dismissal is three fold:

- i. The employee must have terminated the relationship;
- ii. The continued employment must be intolerable;
- iii. The employer must have made the continued employment intolerable.

See *Solid Doors (Pty) Ltd v Commissioner Theron and Others*.⁴

[20] Once a constructive dismissal is proved, the onus shifts to the employer to prove that the dismissal was fair. The central question then is whether the conduct of the employer that prompted the employee to resign was fair or unfair. In other words, a constructive dismissal is not inherently unfair; a court will consider the circumstances with a view to establishing whether the employer's conduct was justified.

[21] The commissioner did not apply his mind to the above principles. For the award to be rationally connected to the evidence and the law, it ought to have recorded an analysis of the evidence that supports the conclusion that the dispute is neither a summary dismissal by the employer (by telling the employee to leave) nor a voluntary resignation. The commissioner ought to have found that the employer had made the continued employment intolerable by virtue of Goolam's persistent verbal abuse of the

² [2011] 4 BLLR 404 (LC).

³ 2003 (1) SA 11 SCA.

⁴ (2004) 25 ILJ 2337 (LAC).

employee, the new demands of an increase in the number of items to be sewn and that she performs services on a Saturday. Further that the employee had no other option but to resign and that the employer's conduct in this regard was unjustifiable. Further he should have found that the employer did not tell the employee to leave but that the employee had done so for the above reasons. He ought to have rejected Goolam's evidence that he did not verbally abuse the employee, that neither Nicky nor Mr Farhaad spoke to the employee on the day in question and that he, Goolam, expected her to return to work.

[22] The commissioner does not evaluate the evidence of the witnesses, their demeanour, their reliability and the probabilities of their versions. Rather at paragraph 6.12 he arrives at the following confused conclusion "Whether Rafik told the applicant to leave the workplace or not but [sic] his conduct towards the applicant was sufficient to cause the continuation of the employment relationship intolerable" [sic]. He also does not explain how he makes the finding that the constructive dismissal was procedurally unfair.

[23] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁵ Ngcobo J stated:

"Where a commissioner fails to have regard to the material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, ..., the

⁵ [2007] 12 BLLR 1097 (CC) at para 268..

commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the proceedings, as contemplated in section 145 (2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."

[24] The same applies to a commissioner who fails to properly resolve an irreconcilable dispute of fact. See *Sasol* supra at paragraph 10.

[25] For these reasons the commissioner's award falls to be reviewed and set aside.

[26] The employer submitted that the award should be replaced with an award that no dismissal occurred. As recorded earlier, the full transcript of the evidence is not before me. The Court did not have regard to Nicky's transcribed evidence. It is not clear from the award whether Nicky testified that Goolam verbally abused the staff generally or the employee. This has a bearing on whether the employer's conduct made the relationship intolerable. It is also not clear whether Nicky confirmed Goolam's evidence of her alleged sole interaction with the employee on the day in question before the employee allegedly left. I am therefore not in a position to make any finding based on demeanour or any other aspect of credibility. I will not be in a position to determine the reliability of each witness and the probabilities of each version. The matter is best referred to the CCMA for a rehearing before another commissioner.

[27] In respect of costs, it is neither of the parties' fault that the award is of such a poor standard. Further there is no explanation by the employer why Jensen's evidence is not included in the record. This is no fault of the employee. Had that evidence been placed before this Court, the award may have been substituted by another award. Although the review is successful fairness dictates that costs should not follow the result. I accordingly make the following order:

1. The arbitration award made by the second respondent and dated 19 October 2008 is reviewed and set aside;
2. The matter is referred to the CCMA for a hearing *de novo* before another commissioner;
3. There is no order in respect of costs.

Reddy AJ

Appearances:

1. For the applicant: Mr J Forster of Forster Attorneys
2. For the respondent: Mr P Jafta of Jafta Incorporated