



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2791/08

In the matter between:

SOLIDARITY OBO MJJ VAN VUUREN

APPLICANT

AND

LEKWA LOCAL MUNICIPALITY

FIRST RESPONDENT

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

SECOND RESPONDENT

COMMISSIONER RONALD MAUDU NO.

THIRD RESPONDENT

Heard: 17 December 2013

Delivered: 19 June 2014

JUDGMENT

Nkutha AJ

Introduction

- [1] Solidarity [“applicant”] on behalf of Mr Van Vuuren [“Van Vuuren”] seeks an order reviewing and setting aside the arbitration award issued by Mr R Maudu [“commissioner”] on 17 August 2008 under case number PM2971-07. In that

arbitration award, the commissioner found that the applicant failed to prove that Van Vuuren was constructively dismissed.

- [2] This application was opposed only by the first respondent.

Background facts

- [3] Van Vuuren had been in the employ of the first respondent since 1986 and at the time of his resignation he was the Manager: Secretariat. His immediate supervisor was the Executive Manager: Corporate Services, Mr Maimela.
- [4] According to the applicant, in October 2006 the respondent took away some of Van Vuuren's duties and authority over the staff members reporting to him without any consultation. Van Vuuren wrote plethora of memoranda to the first respondent wherein he complained about the changes in his job content and functions; and the overall work flow systems in his unit.
- [5] The first respondent, on the other hand, submitted that it responded to most of these memoranda and several staff meetings were also held in an attempt to resolve the issues that had been raised by Van Vuuren. The said issues affected all staff members in Van Vuuren's unit. Maimela testified these issues were subsequently resolved in a meeting between himself, the Municipal Manager and Van Vuuren and this evidence was never disputed by the applicant.
- [6] The last complaint memorandum from Van Vuuren was served on the first respondent on 30 March 2007 and he went on leave thereafter. On 4 April 2007, the first respondent sent one of its employees, Mr Mazibuko, to Van Vuuren's home to serve him with a letter of suspension. According to Mazibuko's evidence, he did not find the Van Vuuren on the day in question and had to return the next day. On 5 April 2007 Van Vuuren was at home but refused to receive the said letter of suspension.
- [7] Conversely, the applicant's evidence was that Van Vuuren was not at home on 5 April 2007 but when he came back, he found his daughter crying and terrified because there was a traffic officer who came to deliver a letter. He

went to work and found his office locked. Without inquiring about the reason for his office to be locked, he just filled a sick leave form since he was booked off sick until 13 April 2007. Whilst at home, he thought about the possible reasons for his office to be locked and thereafter decided to tender his resignation on 13 April 2007.

Grounds for Review

[8] The applicant contended that the arbitration award was reviewable based on the grounds summarised as follows, in that the commissioner:

- 8.1 failed to apply his mind to the relevant evidence, being the cumulative effect of the grievance; and
- 8.2 exceeded his powers or committed an irregularity in the conduct of the arbitration hearing.

Legal Principles and Analysis

[9] It is incumbent upon the Court to establish whether or not there is a *prima facie* case to interfere with the arbitration award on review. Section 145 of Labour Relation Act 66 of 1995 as amended ["LRA"] provides limited grounds for review and is suffused by the constitutional standard of reasonableness.¹ In essence, the applicant must show that the decision reached by the Commission for Conciliation, Mediation and Arbitration ["CCMA"] commissioner is one which a reasonable decision maker could not reach.²

[10] In terms of section 186(1)(e) of the LRA a constructive dismissal occurs when "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee." This definition, therefore, presupposes a situation where the termination of employment is involuntary as the employer behaved in a deliberately oppressive manner that left the employee with no option but to resign in order to protect his or her interests.³

¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para108.

² Above n 1 at para 107 to 109.

³ John Grogan *Workplace Law*, 9th ed, (2007) Juta , at 115.

- [11] Commissioners are therefore enjoined by section 186(1)(e) of the LRA to enquire whether there had been a dismissal or not, which is an issue that goes to the jurisdiction of the CCMA. However, that inquiry is different from the one whether or not the CCMA has jurisdiction to entertain a dispute. In *Hickman v Tsatsimpe NO*,⁴ the Court held that the standard of review established by *Sidumo* which poses the enquiry as to whether the decision reached by a commissioner is one that a reasonable decision maker could not reach, is not applicable in the context of an enquiry into the CCMA's jurisdiction, and in particular whether a dismissal in terms of section 186(1)(e) has happened or not.
- [12] In *S.A. Rugby Players' Association (SARPA) and Others v S.A. Rugby (Pty) Limited and Others; S.A. Rugby (Pty) Limited v SARPU and Another*,⁵ the LAC formulated the test for the enquiry concisely as follows:

"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....This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties..."

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 there had been a dismissal of the 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 finding to the contrary."

⁴ [2012] 5 BLLR 493 (LC) at para 6.

⁵ (2008) 29 ILJ 2218 (LAC) at paras 40 and 41.

[13] Accordingly, the test I need to apply 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 Van Vuuren had been dismissed.⁶ In doing so, it is necessary for me to determine whether the respondent had been dismissed within the meaning of section 186(1)(e).

[14] In *Solid Doors (Pty) Limited v Commissioner Veron and Others*,⁷ the LAC held as follows:

“... 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 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.”

[15] The Constitutional Court, in *Strategic Liquor Services v Mvumbi NO and Others*,⁸ held that the test for constructive dismissal does not require that the employee should have no choice but to resign, but only that the employer should have made continued employment intolerable.

[16] Davis JA, dealing with the intolerability of the continued relationship in *Jordaan v Commissioner for Conciliation, Mediation and Arbitration and Others*,⁹ stated that:

“This dictum represents a salutary caution that contractive dismissal is not for 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

⁶ *Asara Wine Estate and Hotel (Pty) Limited v J.C. Van Rooyen and Others* (2012) 33 ILJ 363 (LC) at para 23.

⁷ (2004) 25 ILJ 2337 (LAC) at para 28.

⁸ (2009) 30 ILJ 1526 (CC) at para 4.

⁹ (2010) 31 ILJ 2331 (LAC) at 2335.

become intolerable that no reasonable option, save termination is available to her." [Emphasis added]

- [17] While in *Old Mutual Group Schemes v Dreyer and Another*,¹⁰ the Court held that the mere holding of a disciplinary enquiry does not amount to duress entitling the employees to bypass the internal appeal processes. The Court found that the employees' contention that the internal processes would have been futile to appeal was without foundation.
- [18] Where an employee could reasonably be expected to invoke a grievance procedure, the resignation will not be regarded as a constructive dismissal. In this regard, resignation ought to be an action of "the last resort".¹¹ Put differently, the employee must prove that he/she had no opportunity to take up the dispute with other levels of management.
- [19] In the context of the above legal canons, it is clear that the Court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The collective impact, in its totality, of the conduct of both parties stands to be assessed as well.¹²

Application of Legal Principles

- [20] The omphalos of Van Vurren's complaint was that the first respondent removed certain of his duties and as a result he was placed in a position where he did not know what his job description entailed and was left with threats of disciplinary hearing for poor performance.
- [21] However, it was the first respondent's evidence that there were attempts to attend to Van Vruuren's complaints in several meetings, both informal and formal. In fact, Maimela testified that there was a particular meeting held with Van Vuuren, the Municipal Manager and himself wherein the said concerns were amicably resolved.¹³ It was only when the complaints did not stop after

¹⁰ (1999) 20 ILJ 2030 (LAC),

¹¹ *Lubbe v ABSA Bank BPK* [1998] 12 BLLR 1224 (LAC).

¹² *Marsland v New Way Motor and Diesel Engineering* (2009) 30 ILJ 169 (LC) at 188G.

¹³ Transit of the proceedings page 365 lines 1 to 20; page 357 lines 1 to 11.

all the attempts that Van Vuuren was reminded of his job description as his complaints were channelled at monitoring performance of his supervisor in derelict of his own duties. Van Vuuren, himself conceded that he was never subjected to any poor performance inquiry.

[22] Other than the memoranda of complaints that had been submitted over a period of a year, Van Vuuren never lodged a formal grievance in accordance with the South African Local Government Bargaining Council [“SALGBC”] Grievance Procedure Collective Bargaining [“Grievance Procedure”]. In terms of clause 2.1.1 of the Grievance Procedure, the aggrieved employee must lodge his grievance with his immediate supervisor in writing and on the prescribed form. If the grievance is not resolved to the satisfaction of the aggrieved employee after the third step with the Municipal Manager, the grievance may be referred to the SALGBC for adjudication.¹⁴

[23] In the memorandum dated 12 March 2007, Van Vuuren writes, in response to his supervisor’s memorandum, that:

“4. Even though I communicate with you in memorandums you don’t reply to most of the urgent matters contained in the relevant memorandums but only to what suits you.

5. Will it serve any purpose to visit your office and to discuss problems as far as inter alia agendas of meetings are concerned if you don’t reply to the problems I have identified in writing herein?”¹⁵

[24] It can be deduced from above that Van Vuuren shunned every serious attempt to resolve his complaints through his intransigent attitude. Nonetheless, in a staff meeting of 13 March 2007, which was also attended by Van Vuuren, all the issues that were the crux of his complaints were discussed.¹⁶

¹⁴ See clause 2.3.4 of the Grievance Procedure.

¹⁵ See page 61 of the record.

¹⁶ See page 73 to 67 of the record for the agenda and the minutes of the said meeting.

- [25] There is no evidence of what triggered Van Vuuren's memorandum of 30 March 2007, which lodges a grievance. But on his own version, Van Vuuren's was on annual leave from 30 March to 5 April 2007 and on sick leave from 5 to 13 April 2007. It is inconceivable that Van Vuuren's expected the first respondent to attend to the said grievance in his absence and when it had been lodged in flagrant breach of the Grievance Procedure.
- [26] It would seem that Van Vuuren's subsequent moves were informed by the first respondent's letter of suspension delivered at his home on 5 April 2007. Even though Van Vuuren disputed having received the said letter, it remains undisputed that there was an attempt to serve him.
- [27] Ultimately, Van Vuuren attributed his decision to resign to the first respondent's decision to lock his office, a fact he discovered on 5 April 2007 before he went on sick leave. Maimela testified that Van Vuuren's office was locked simply because there was an investigation conducted against him and hence he was placed on precautionary suspension. Van Vuuren conceded that he never asked his supervisor for the reasons for locking his office but on 13 March 2007, the day he was supposed to return to work, he tendered his resignation without voicing his complaint about the locking his door.¹⁷
- [28] In line with *Old Mutual Group Schemes*, Van Vuuren's suspension and the subsequent locking of his office did not amount to duress and would entitle him to bypass the internal Grievance Procedure. Indeed, I agree with the commissioner that Van Vuuren had enough time to consider and explore all possible options at his disposal before deciding to resign. He could have escalated his grievance to the Municipal Manager, alternatively referred it to the SALGBC in terms of the Grievance Procedure.
- [29] On consideration of the evidence as a whole, I am persuaded that the applicant failed dismally to prove a case of constructive dismissal. Therefore, the commissioner correctly applied his mind to the evidence before him and found that Van Vuuren had resigned out of his own making; as such no constructive dismissal ever took place.

¹⁷ Lubbe, above n11.

Costs

[30] There is no reason to depart from the usual rule that costs follow the result in respect of the applicant. The applicant ought to have better advised Van Vuuren not to institute these proceedings or at least withdraw the application especially in the light of the fact that no replying affidavit had been filed which in a sense meant that the allegations contained in the first respondent's answering affidavit remain unchallenged.

Order

[31] In the premises, I make the following order:

1. Condonation for the late filing of the applicant's written submissions is granted; and
2. The application is dismissed with costs.

Nkutha AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Solidarity Trade Union

For the First Respondents: A Mosam