



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case No: JR384/2010

In the matter between:

**DAVID LOUW**

Applicant

and

**SOUTH AFRICA LOCAL GOVERNMENT  
BARGAINING COUNCIL BENONI**

First Respondent

**COMMISSIONER MABHOKO MOTHOLE**

Second Respondent

**NOKENG TSA TAEMANE MUNICIPALITY**

Third Respondent

**Heard: 30 June 2015**

**Delivered: 18 September 2015**

**Summary:** Constructive dismissal – applicant facing disciplinary enquiry resigning because of threat contained in letter that civil and criminal action may be taken against him if he does not resign. If he resigns however, undertaking given that no such action will be taken. Distinguished from situation where employee resigns in the face of a disciplinary enquiry without such a threat.

**Constructive dismissal – whether in such a situation resignation reasonable or whether applicant should have stood his disciplinary enquiry.**

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## JUDGMENT

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**SNIDER AJ**

- [1] This is an application in terms of which the applicant seeks an order that the arbitration award<sup>1</sup> of the second respondent dated 4 February 2010 (“the award”) be reviewed and set aside, alternatively that the award be rescinded, further alternatively that the rescission of judgment application is referred back to the first respondent.
- [2] Neither of the parties has persisted with the rescission application in their heads of argument or in argument before me.
- [3] Accordingly I have adjudicated this matter on the basis that the relief sought by the applicant is as embodied in the first prayer referred to above.
- [4] The point was taken by the third respondent in its papers that the applicant was significantly dilatory in pursuing his review and there are allegations and argument to and fro in relation to the issue of condonation. The third respondent complains that the record was only filed a year after it was made available to the applicant.

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<sup>1</sup> Page 71 of the record bundle

- [5] The issue of condonation is first raised in the third respondent's answering affidavit<sup>2</sup> and it is clear that the applicant was, at the very best for him, inept in pursuing his review application.
- [6] He was also dilatory. He ultimately served the transcribed record of the arbitration only in July 2011 apparently a year after the record had been provided to him by the registrar of this court.
- [7] The applicant deals with his failure to apply for condonation in his replying affidavit.<sup>3</sup> Whilst the applicant does not set out a thorough explanation for his default, the point that he does correctly make is that his conduct has in no manner demonstrated a lack of interest from his side to have the matter finalised.<sup>4</sup>
- [8] Rule 7A(6) of the Labour Court rules provides that "*the applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.*" There is no time period provided for in the sub-rule.
- [9] In terms of item 11.2 of the Practice Manual of this court, which came into effect on 2 April 2013, records in review applications must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.
- [10] As set out above, the record in this matter was filed in July 2011, long before the Practice Manual came into effect.
- [11] This does not excuse the applicant's conduct, and it was certainly open to

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<sup>2</sup> Index bundle page 42

<sup>3</sup> Page 74 paragraph [3.1] ff

<sup>4</sup> Page 76 paragraph [3.13]

the third respondent to bring an application to dismiss the review application. However it did not.

[12] The applicant does attempt to justify the delay in a somewhat disjointed manner and also seems to be aware of the relevant provisions of the rules.

[13] I am accordingly satisfied that, under the circumstances, the applicant was not required to apply for condonation, although he might have been susceptible to an application to dismiss the review arising from his dilatory conduct.

[14] Even if I had to treat the situation as one that required condonation, I would have had regard to the oft cited *dictum* of Holmes JA in *Melane v Santam Insurance Company Limited*<sup>5</sup> and, on a conspectus of all the facts, given the applicant's strong prospects of success, as set out below, I would have granted condonation notwithstanding the relative paucity of his explanation.

[15] Briefly, the background to the matter is as follows. The applicant was employed by the first respondent on 1 July 2001;<sup>6</sup> he worked at the Eastern Gauteng Services Council which was the third respondent's predecessor in title.

[16] His position in the Eastern Gauteng structure was as a chief clerk in the financial section. At the time that the events dealt with herein took place the applicant was the manager of the income section of the third respondent's finance department.

[17] Various disciplinary charges were preferred against the applicant. Save to state that these charges had to do with alleged irregularities / misconduct

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<sup>5</sup> 1962 (4) SA 531 (A) at 532 c-f

<sup>6</sup> Transcript, record bundle page 4 line 13

perpetrated the applicant; it does not serve to deal with them in any great detail. They were not the main subject matter at the arbitration and were neither proved by the third respondent nor disproved by the applicant in the arbitration. The allegations were simply not dealt with in the arbitration with nearly the particularity and forensic examination that would be necessary in order to make a determination either way. As will appear below however it is necessary to determine if there was a *prima facie* case for the applicant to answer in the disciplinary proceedings.

- [18] The focus of the arbitration was whether the applicant was constructively dismissed pursuant to a letter from the third respondent's attorney referred to below.
- [19] On 15 April 2008 the applicant was given a notice of suspension pending investigations into "serious allegations."<sup>7</sup> On 2 October 2008, more than 5 months later, the applicant was given a charge sheet.<sup>8</sup> The date of the proposed disciplinary enquiry was 13 October 2008. On 11 November 2008, the disciplinary hearing apparently having being postponed, the third respondent's attorneys, in response to a letter from the applicant's attorneys proposing a two to three month settlement of the matter, addressed a letter to the applicant's attorneys<sup>9</sup> ("the response letter") which included the following paragraph, numbered four –

"Our client's further instructions are that in the event of your client not tendering his resignation aforesaid the disciplinary enquiry will go ahead in full force. Then, and in that event our client considers to proceed to institute criminal proceedings against your client and / or bringing civil action to recover whatever financial losses your client has caused our client or both action. Accordingly and against the set out above client therefore rejects your client's offer."

[20] The “resignation aforesaid” referred to in the above paragraph is mentioned in paragraph three of the response letter which states –

“Our client is prepared to accept your client’s resignation from employment without any financial settlement.”

[21] The crisp question for decision before me is whether paragraph four of the response letter created a situation which could legitimately be relied on by the applicant in alleging his constructive dismissal by the third respondent.

[22] There are no other pertinent circumstances which emerge from the record which are relevant for this determination.

[23] The test to be applied in determining whether or not there was a constructive dismissal is an objective one, that is to say whether or not the commissioner was correct in coming to the conclusion he did.<sup>10</sup>

[24] Section 186(1)(e) of the Labour Relations<sup>11</sup> (“the LRA”) provides that –

“(1) ‘Dismissal’ means that . . .

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

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<sup>7</sup> Indexed bundle page 49

<sup>8</sup> Indexed bundle pages 51 to 56

<sup>9</sup> Indexed bundle pages 57 and 58

<sup>10</sup> Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others unreported decision of the LAC under case number JA53/2014; SAPA & Others v S A Rugby & Others 2008 (20) 29 ILJ 2218 (LAC) and Solid Doors (Pty) Ltd v Commissioner Theron & Others (2004) 252337 (LAC) at para [29]

<sup>11</sup> Act 66 of 1995, as amended

[25] It is not contentious between the parties in this particular matter that the employee brought the contract to an end. That particular requirement of section 186(1)(e) of the LRA is accordingly fulfilled.

[26] In order to answer the question set out in paragraph 21 above, it must be determined whether -

26.1. the reason for the employee's action was that the employer had rendered the prospect of continued employment "intolerable"; and, allied to this;

26.2. the employee had no reasonable alternative other than terminating the contract.

[27] In the event that I find that these two statements correctly reflect the facts in this matter, it will then be necessary to consider what order is appropriate in the circumstances.

[28] In *Pretoria Society for the Care of the Retarded v Loots*<sup>12</sup> the following passage appears setting out the test for a constructive dismissal -

"When an employee resigns or terminates the contract as a result of a constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption

and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

[29] The question must also be asked as to whether the employee had any reasonable option other than to resign or to abandon the contract.<sup>13</sup>

[30] There must be a causal nexus between the acts of the employer of which the employee complains and the decision to resign. Grogan<sup>14</sup> gives the example of an employee resigning after filing grievances and it is then proved that his primary motive was to obtain a better job, the claim based on constructive dismissal will fail. Such claims will also fail if the employee’s primary motive is to make money out of the employer.

[31] It must be shown that the employee had no reasonable option in the circumstances other than to terminate the contract. See *SmithKline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others*<sup>15</sup>

[32] Counsel also referred me to the decision of Steenkamp J in *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen & Others*.<sup>16</sup>

[33] Steenkamp J observed that where a reasonable alternative to resignation exists, there can be no constructive dismissal. He referred to *SmithKline Beecham (supra)*<sup>17</sup> wherein it was held that if the employee is too impatient to wait the outcome of the employer’s attempts to find a solution to the perceived intolerable solution, and resigns, then constructive dismissal is

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<sup>12</sup> 1997 (18) ILJ 981 (LAC) p984 D-G

<sup>13</sup> *Albany Balers Limited v Van Wyk & Others* (2005) 26 ILJ 2142 (LAC) paragraphs [28]; [29] and [30] on page 2150

<sup>14</sup> Dismissal, Jutastat, 2013 reprint page 58

<sup>15</sup> *SmithKline Beecham* (2000) 21 ILJ 988 (LC)

<sup>16</sup> (2012) 33 ILJ 363 (LC)

almost always out of the question.

[34] It is submitted on behalf of the third respondent that the applicant was at large, under the circumstances, to stand his disciplinary enquiry and establish his innocence, thereby doing away with the sting of the threat that was made against him as set out above.

[35] What distinguishes the current matter from *Asara (supra)* is the threat contained in the response letter. A determination of the effect that the threat, objectively viewed, would have had on the applicant is the core aspect of this matter.

[36] There is a further passage in *Asara (supra)* which is valuable to the current analysis<sup>18</sup>

“The commissioner proceeded to find that van Rooyen was not guilty of misconduct. This illustrates that the commissioner misconceived the nature of the enquiry before him. Van Rooyen had resigned before a disciplinary enquiry could be held. In the arbitration proceedings, it was not incumbent on the applicant to prove its case on misconduct. In line with the authorities cited above, it was sufficient to illustrate *prima facie* that there was a case for van Rooyen to answer, and accordingly that it was reasonable to take disciplinary action against him.”

[37] The third respondent's representatives made significant efforts at the arbitration to show that indeed there was a case for the applicant to answer and I am satisfied that, on a *prima facie* basis, this was achieved. However the case was certainly not proven and the distinguishing feature remains

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<sup>17</sup> At p997 D - E and p998

<sup>18</sup> *Asara (supra)* paragraph [47] page 374

the threat.

- [38] The following was stated by the Constitutional Court in *Strategic Liquor Services v Mvumbi & Others* –

There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no 'choice'. The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.<sup>19</sup>

(My emphasis)

- [39] The submissions on behalf of the third respondent are that the applicant perceives the response letter as a threat upon which he could claim to have been constructively dismissed as he believed that he would be found guilty either way. It was submitted that this was a palpable misreading of the said letter, was contrived and fell to be rejected.

- [40] It was further submitted that the applicant lead no evidence to support his claim of constructive dismissal and that the applicant had the alternative, of standing his disciplinary enquiry and thereby clearing his name, as set out above.

- [41] I am unconvinced that the applicant's evidence was as sparse as submitted on behalf of the third respondent.

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<sup>19</sup> 2010(2) SA 92 (CC); (2009) 30 ILJ 1526 CC at paragraph [4]

- [42] It is true that the applicant does refer to a fear that he would be found guilty regardless, arising from the threat indicated in the response letter.<sup>20</sup> However this is by no means the only evidence he gave in relation to the threat contained in the response letter.
- [43] He also states that he was “*feeling that I would rather resign because I felt it was rather unnecessarily and there was no reason to get involved in a civil case.*”<sup>21</sup> He further states that he “*was not prepared to continue working for the respondent due to the threats that were made in the (response) letter*”.<sup>22</sup>
- [44] Clearly the applicant took the remarks in the response letter as a threat and, at least on his version, resigned as a result thereof<sup>23</sup> although he does also link the threat in the response letter to his allegation that there was already effectively a guilty finding.<sup>24</sup>
- [45] It matters not that the applicant may be able to clear his name by standing his disciplinary enquiry. This begs the question as to whether it is a reasonable alternative for the applicant.
- [46] The following passage from the decision in *Asara (supra)* is relevant –

Where a reasonable alternative to resignation exists, there can be no constructive dismissal. Accordingly, where the employee has the option of facing a disciplinary hearing, but resigns, there can be no talk of constructive dismissal. This appears to me to be a correct statement of the law, unchanged by the dictum in *Strategic Liquor*

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<sup>20</sup> Transcript page 17 lines 14-16

<sup>21</sup> Transcript page 17 lines 20-22

<sup>22</sup> Transcript page 18 lines 4-11

<sup>23</sup> Transcript page 42 lines 24-25

<sup>24</sup> Transcript page 50 lines 6-10

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- [47] I find the threat contained in the response letter troubling. The third respondent manifests its intention, by way of the threat of civil litigations and criminal action against the third respondent, to coerce the applicant into resigning without compensation. Whether or not the third respondent would be sufficiently mischievous as to follow through on the threat regardless of the merits of the suit or complaint contemplated, is not a question I have to decide.
- [48] The mere reporting of the applicant to the South African Police Services and / or the institution of civil proceedings would, in themselves, have an extremely deleterious impact on the applicant.
- [49] Guilt, innocence, criminal and civil liability are often not entirely straightforward to establish, as anyone in the legal profession will attest. It is quite understandable that an individual would not want to become immersed in these potentially murky waters.
- [50] The meaning of what the third respondent says is clear; if the applicant were to resign, all of these potential problems would be instantly removed. The fact that the threat uses the word “considers” is neither here nor there. The intention is manifest.
- [51] It is highly undesirable in the context of an employment relationship that the third respondent should offer to excuse the applicant from reporting him criminally and suing him civilly in return for his resignation without recompense.
- [52] The question then becomes whether the applicant, as a reasonable man,

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<sup>25</sup> Asara (supra) p371 para [31]

would have regarded the threat and the indication that it gave of the potential danger he would be placing himself in if he were not to heed it, as being sufficiently serious to justify his resignation.

[53] In my view the answer to this question is yes, a reasonable man, guilty or not, would not want to face these prospects. Accordingly the applicant has established that he was constructively dismissed.

[54] Having found that the first respondent was constructively dismissed and that accordingly, objectively, the commissioner was wrong in his award, I am of the view that I should now determine the matter in terms of section 145(4) of the LRA.

[55] It is correct that there were disciplinary proceedings pending in respect of serious charges and an assessment of the transcript suggests at least *prima facie*, there was a case for the applicant to answer.

[56] I cannot however find that the applicant was opportunistic in resigning pursuant to the threat contained in the response letter. He had ample opportunity to resign prior to receipt of the letter.

[57] It is also the case that the response letter, as submitted by counsel for the third respondent, was sent in the context of a settlement negotiation.

[58] The fact that the third respondent was always at large to proceed civilly against the applicant or make a criminal complaint is irrelevant. It was the undertaking to relieve him of that possibility if he resigned that constituted the threat and the element of coercion.

[59] In light of what is set out above I am of the view that relief should be

afforded to the applicant.

- [60] This is not a situation where reinstatement would be appropriate and the applicant did not seek to be reinstated.
- [61] The applicant seeks compensation and the third respondent seeks the dismissal of the application alternatively the referral of the dispute back to the first respondent for a hearing *de novo* before another commissioner.
- [62] In my view this court is in as good a position as a commissioner would be to determine the matter and all the relevant material is available.
- [63] There are no degrees of comparison for the word “intolerable” as used in section 186(1)(e). There is though, certainly, a broad scope of conduct on the part of an employer, more and less egregious, that can cause a constructive dismissal. In this case it was a single incident, not a pattern that led to the dismissal. It is also the case that the letter was sent in the context of settlement negotiations and that there was at least a *prima facie* case against the applicant in the disciplinary proceedings.
- [64] Accordingly I believe that the appropriate outcome in this matter is that the applicant be compensated and that such compensation should be in an amount equal to three months of the applicant’s remuneration as at the date of his dismissal.
- [65] In relation to the question of costs, I am of the view that costs should follow the cause. The third respondent was the author of its own demise and has caused the applicant, an individual, to incur costs in this matter.
- [66] Accordingly I make the following order:

66.1. The arbitration award issued by the second respondent dated 7 February 2010 is reviewed and set aside.

66.2. The third respondent is to compensate the applicant in a sum equal to three months remuneration as at the date of his dismissal.

66.3. The third respondent is to pay the applicant's costs.

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SNIDER, A J

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate H J Snyman instructed by Geyser Attorneys

For the Third Respondent: Advocate T Machaba instructed by Ntanga Attorneys