



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2126/2016

In the matter between

NAMPAK PRODUCTS LIMITED t/a NAMPAK GLASS

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE
CHEMICAL INDUSTRY**

First Respondent

NOMUSA MBHELE N.O
Respondent

Second

ANDRIES MYBURGH
Respondent

Third

Date heard: 19 July 2017

Date delivered: 25 October 2017

Summary: Review Application: The employee resigning and claiming constructive dismissal after the employer had initiated a programme to assist him to cope with his working conditions.

The employee alleged that the programme was not implemented but never lodged a grievance against the alleged non-implementation of the programme.

The employee resigning in the face of incapacity process.

The award reviewed and set aside.

JUDGMENT

MOLEBALOA AJ.

Introduction

- [1] This is a review application launched by the Applicant, Nampak Products Limited t/a Nampak Glass, in terms of Section 145 of the Labour Relations Act¹, (the LRA) to have the arbitration award issued under case: GPCHEM332-15/16 dated 24 August 2016 reviewed and set aside. The award was issued by the Second Respondent, N Mbhele, the Panellist, who acted under the auspices of the First Respondent. The application is opposed by the Third Respondent.

Background facts

- [2] The Third Respondent was employed by the Applicant on 06 January 1997 as a Machine Operator until 10 March 2016 when the Third Respondent resigned from his employment.
- [3] During his long tenure as the employee of the Applicant, the Third Respondent suffered several medical problems. However, some of the accidents he was involved in that affected his health condition took place outside his workplace. His medical and accident records can be summarised as follows:
- 3.1 In 1989 the Third Respondent fell from the motorbike and suffered back injuries.

¹ Act 66 of 1995 as amended.

- 3.2 On 14 May 2014, while on duty, the Third Respondent was injured as he slipped and fell on the floor wearing damaged safety boots. In the same year he had lungs problems due to fluid in his lungs.
- 3.3 On 14 May 2015, the Third Respondent was reported suffering from chronic bronchitis.
- 3.4 On or about 21 August 2015 the Third Respondent underwent heart operations as a result of blocked arteries.
- 3.5 On 28 November 2015, he had a heart attack and was booked off sick until 04 January 2016.
- 3.6 On 05 March 2016 he nearly injured his hand while operating a machine.
- [4] As a result of the Third Respondent's medical condition, the Applicant informed him on 04 February 2016 that it was in a process of placing him on temporary or permanent disability. However, the Applicant's doctor did not sign the temporary/ permanent disability forms as he believed he could still perform his duties.
- [5] On 24 February 2016² the Applicant and the Third Respondent had a consultation meeting in terms of which the Third Respondent was placed to work as MNR / Hot set checker light duty after it was reported that the Third Respondent would be undergoing an operation on 13 April 2016.
- [6] On 10 March 2016 the Third Respondent tendered resignation as according to him the Applicant's management did not support him in his medical condition. This was after an incident that nearly injured his hand on 05 March 2016.

² Page 73 of the record.

- [7] He then lodged a dispute of constructive dismissal with the First Respondent and the Second Respondent was appointed to arbitrate the said dispute.

The arbitration award

- [8] The Second Respondent found that the Third Respondent discharged the onus that he was constructively dismissed and ordered the Applicant to compensate the Third Respondent in the amount of R265 576.10 which was equivalent to the Third Respondent's ten months' remuneration.

The review application

- [9] Aggrieved by the Second Respondent's award, the Applicant launched a review application citing numerous grounds. Having carefully scrutinised these grounds, I could safely conclude that the gravamen that runs like a golden thread through all cited grounds of review is that the Second Respondent arrived at a decision no reasonable decision-maker could have reached on the same set of facts in finding that the Applicant had constructively dismissed the Third Respondent.

Evaluation

- [10] Constructive dismissal is defined in section 186(1)(e) of the LRA as a dismissal where an employee terminated the employment relationship with or without notice because the employer made continued employment intolerable for the employee.
- [11] Since the Third Respondent alleged to have been constructively dismissed, the onus of proof was on him to prove that he resigned and that such resignation constituted a dismissal in terms of Section 186(1)(e) of the LRA.

- [12] The requirements of constructive dismissal are trite. In *Solid Doors (Pty) Ltd v Theron N.O and Others*³ the court held as follows:

“It should be clear from the above that 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 had 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. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.”

- [13] The court had to say the following in the matter of *Pretoria Society for the Care of the Retarded v Loots*⁴:

“When an employee resigns or terminates the contract as a result of 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 in fact resigned.”

³ (2004) 25 ILJ 2337 (LAC) at para 28.

⁴ (1997) 18 ILJ 981 (LAC) at 984 E-F.

- [14] In the matter *in casu* the Third Respondent resigned and thereby terminating the employment contract he had with the Applicant. The question however is not just whether the Third Respondent brought the employment contract to an end, which he clearly did, but whether or not he voluntarily brought the same to an end. In *Jooste v Transnet Ltd t/a SA Airways*⁵ the court said the following:

“it follows from what I have said that in a matter in the Industrial Court in which the applicant resigned, but avers that he was constructively dismissed, the first actual inquiry is whether in resigning, the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the inquiry is at an end”.

- [15] In determining whether the employee voluntarily resigned, circumstances surrounding his dismissal must be looked into. Did he resign because of the employer or did he resign for unrelated or unfounded reasons. The test is objective as the employee's case must fail if it is found that the reasons he relies on are unrelated to work or related but unfounded. About the objectivity of the test the court said in *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁶:

“What is clear is that the test for determining whether or not the termination of employment constituted a constructive dismissal is an objective one. The subjective apprehensions of an employee can therefore not be a final determinant of this issue. The conduct of the employer must therefore be judged objectively. It would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when these perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the Act.”

⁵ (1995) 16 ILJ 629 (LAC) at 638A-639B).

⁶ (2000) 21 ILJ 988 (LC) at paras 38 and 42.

“Quite plainly, from all the findings made by the second respondent, it is apparent that she found the dismissal to be a constructive dismissal because the third respondent subjectively regarded the situation as intolerable. She approached the matter from the third respondent's point of view and not from an objective point of view. Even though the second respondent was entitled to take into consideration the third respondent's subjective perceptions, she failed to have regard to the decisive question of whether or not, objectively regarded, the conduct of the applicant was unfair.”

- [16] In the matter in *casu*, the Third Respondent alleged that his resignation was an act of last resort. He did not have confidence in the Applicant anymore. He lodged a grievance on 19 May 2014 for being belittled by the shift manager after he was injured on duty.⁷ On 09 February 2015 he lodged a grievance alleging that he was attacked and pushed⁸. However, the Third Respondent continued working and the issues raised in the two separate grievances would therefore not constitute the last straw that broke the camel's back. Subsequent to these two grievances there was no other grievance lodged with the Applicant. At least as at this stage, resignation would not have been an act of last resort as the Third Respondent continued working. This factor does not appear to have been taken into account by the Second Respondent in the determination of the issue that was before him.
- [17] On 04 February 2016 the Applicant and the Third Respondent had an incapacity meeting⁹ where an agreement was reached indicating how the Applicant would assist the Third Respondent going forward. The company's nursing sister was to arrange with company doctor to look at what can be done to assist the Third Respondent. It was further agreed¹⁰ that follow-up meetings will be called to address other issues that may be identified in the future.

⁷ Page 103 of the record.

⁸ Page 106 of the record.

⁹ Page 94 of the record.

¹⁰ Page 95 of the record.

- [18] Another meeting was held on 24 February 2016 where the Third Respondent committed to work as MNR/ hot set checker light duty. This was a positive act on the part of the Applicant to assist the Third Respondent. Mr Diemieniet, the Third Respondent's legal representative at arbitration, also seemed to have accepted that the agreement of 24 February 2016 was a positive act. He indicated as follows during cross-examination of the Applicant's witness: "*the first time you initiated anything was on 24 February 2016...*"¹¹. There is however a contention whether the agreement was subsequently implemented. As indicated in the preceding paragraph there was no other grievance the Third Respondent lodged with the Applicant after 09 February 2015.
- [19] The Third Respondent preferred to do light duty at cold end. However, as Mr Van As argued, there was no finding by the Second Respondent that the Third Respondent could not do light duty at the hot end as per the agreement of 24 February 2016. The Second Respondent also did not find that placing the Third Respondent at hot end to do light duty would make his continued employment intolerable. Furthermore, no record exist that the Third Respondent went back to the Applicant to have the agreement changed because it did not suit him anymore and that the Applicant unreasonably refused to relook into it. Even if he did and the Applicant refused, the Third Respondent was by then aware of the grievance processes as he already followed them previously on two different occasions. He, however, did not lodge a grievance this time around when the arrangement was not implemented, as according to him it was not. The Second Respondent, without a grievance lodged and without having found that light duty at hot end would create intolerable conditions for the Third Respondent, continued to find that the Third Respondent was constructively dismissed. This decision is not consistent with the material evidence that was properly before her.
- [20] About the incident on 05 March 2016 where the Third Respondent's hand was nearly injured, he testified that he did not inform Joe Peterson about the

¹¹ Page291 lines 11-12 of the record.

incident¹², instead he went to Mayela the HR Director and asked him about incapacity process. It can thus be safely concluded that the alleged non-implementation of the agreement on 24 February 2016 and the incident of 05 March 2016 were never raised to managers with relevant authority. There was no grievance laid in respect of either of them.

- [21] There was no other meeting as the Third Respondent resigned on 10 March 2016. The Third Respondent did not clearly indicate the last straw that pushed him to resign. At some point he was uncomfortable with the incapacity process the Applicant had started. Such cannot constitute a valid ground for resignation. Resigning in the face of a process sanctioned by the LRA cannot constitute a valid ground. In any event, he had a remedy in terms of the unfair labour practice processes to challenge the dismissal based on incapacity. This also does not appear to have been taken into account by the Second Respondent.
- [22] Whatever the reasons for his resignation, the Third Respondent did not file a grievance with the Applicant to deal with such reasons that broke the camel's back. It cannot be sustainable that he did not lodge the grievance the last time around because he did not have confidence anymore with the Applicant.
- [23] The test to determine whether the Second Respondent's award is reviewable or not is as enunciated in the case of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*¹³ and expounded in subsequent cases i.e *Andre Herholdt v Nedbank Limited and Gold Fields Mining South Africa (PTY) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and other*¹⁴.
- [24] As demonstrated above, the Second Respondent misapplied the principle of constructive dismissal. She also did not properly apply herself to the facts of

¹² Page 162 lines 10-15 of the record.

¹³ 2008 (2) SA 24 (CC).

¹⁴ [2014] 1 BLLR 20 (LAC).

this case. It is axiomatic that the Third Respondent resigned just after reaching an agreement with the Applicant regarding light duty at hot end. Though the Third Respondent's referred to several medical certificates, none eliminated light duty at hot end. The incident of 05 March 2016 was not reported. There was therefore no incident after 24 February 2016 which amounted to a breach of employment contract by the Applicant to justify the Third Respondent's resignation. The Second Respondent therefore issued an award a reasonable trier of fact could not have issued. She committed material errors.

[25] In *Head of the Department of Education v Mofokeng and others*¹⁵, the Court stated the following at paragraph 33:

"Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determine with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issue to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesis be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision, the nature of competing interest impacted upon by the decision, and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on the

¹⁵ [2015] 1 BLLR 50 (LAC).

grounds alone. The arbitrator however must be shown to have diverted from correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[26] In conclusion, the Second Respondent produced an unreasonable award and stand to be reviewed and set aside.

Costs

[27] I am of the view that this is not a case warranting a costs order against any of the parties.

[28] Accordingly, I issue the following order:

Order

1. The Second Respondent's arbitration award made under the auspices of the First Respondent under case: GPCHEM332-15/16 dated 24 August 2016 in which it was found that the Third Respondent discharged the onus that he was constructively dismissed and ordered the Applicant to compensate the Third Respondent in the amount of R265 576.10 is hereby reviewed and set aside.
2. The Second Respondent's award is substituted with the order that the Applicant did not constructively dismiss the Third Respondent.
3. There is no order as to costs.

M S Molebaloa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate. Van As

Instructed by Cliffe Dekker Attorneys.

For the Respondent: Advocate R Pottas.

Instructed by J Diemieniet Attorneys.