



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1342/15

In the matter between:

AGRICULTURAL RESEARCH COUNCIL

Applicant

and

SILAS RAMASHOWANA N.O.

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

THABO MMAPHOKO SHAKU

Third Respondent

Heard: 20 June 2018

Delivered: 01 August 2018

Summary: Review application – constructive dismissal – resignation 15 months after the alleged unlawful deductions – the employee has to resign within a reasonable time of the trigger, which may be a once-off outrage or the last straw following the earlier string of events.

JUDGMENT

NKUTHA- NKONTWANA, J

Introduction

- [1] This is an application in terms of s145 of the Labour Relations Act¹ (LRA). The applicant, Agricultural Research Council (ARC), seeks an order reviewing and setting aside the arbitration award of the first respondent, Mr Silas Ramushwana (commissioner), under case number GATW2745-15 dated 23 May 2015. The arbitration proceedings were conducted under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The basis of the assail is that the commissioner found that the third respondent, Mr Thabo Shaku, (Mr Shaku) was constructively dismissed. Mr Shaku is defending the award.
- [2] ARC's primary ground of review is that the commissioner committed a material error in law when he wrongly applied the principles relating to constructive dismissal.

Background facts

- [3] The facts in this matter are largely common cause. Mr Shaku was employed as a Divisional Human Resources Manager: Animal Production Institute on 1 April 2009. He was issued with a laptop subject to the provisions of a Due Care Agreement (agreement). In terms of the agreement, Mr Shaku undertook to exercise due care with regard to the equipment in his possession and agreed to be liable for the monetary value of its replacement in the event it is lost due to his negligence.
- [4] On 21 December 2012, the laptop he had been allocated to was stolen from his motor vehicle. ARC's insurer refused to honour the claim for the loss of the laptop as its investigations showed that there was no forced entry into Mr Shaku's motor vehicle.

¹ Act 66 of 1995 as amended.

- [5] ARC undertook its own investigation which found that Mr Shaku had been negligent and had to pay for the loss of the laptop. Mr Shaku challenged the finding unsuccessfully. The replacement cost of the laptop was R11 763.33 and was deducted in three equal instalments of R3921.11. The last deduction was made in December 2013.
- [6] Mr Shaku was not happy with the decision to hold him responsible for the loss of the laptop because he was never given a chance to state his side of the story. According to Mr Shaku's evidence at the arbitration, he was a victim of crime that is prevalent in the area where the incident took place. His car lock system was jammed by criminals who managed to gain access into his car and stole his personal belongings together with the ARC's laptop. The matter was reported to the South African Police Services.
- [7] Mr Shaku also challenged ARC's insurer for repudiating the claim for the lost laptop. When he was not successful, he approached the Ombudsman for Short-term Insurance (Ombudsman) who was equally unable to assist as he did not have the jurisdiction to entertain the dispute. The Ombudsman's decision was communicated to Mr Shaku on 23 April 2013. On 26 July 2013, Mr Shaku advised ARC that he had instructed Legalwise to further pursue the matter with the Ombudsman and was still awaiting the outcome.
- [8] On 14 August 2013, ARC scheduled an enquiry into the loss of the laptop. Mr Shaku did not attend the enquiry because it took place after the decision to deduct his salary for the loss of the laptop had already been taken. He was of the view that ARC wanted to rubberstamp its previous decision. Mr Shaku once more approached lawyers to challenge the decision to hold him liable for the loss of the laptop and to effect deductions from his salary by ARC.
- [9] On 1 March 2015, Mr Shaku resigned from his employment with ARC with notice.

Review test

- [10] It is trite that the failure by a commissioner to apply his or her mind to issues which are material to the determination of a case constitutes an irregularity. However, in a case of constructive dismissal, the enquiry turns on the jurisdictional issue as established by the Labour Appeal Court in (LAC) in *Solid Doors (Pty) Ltd Commissioner Theron and Others*,² where it was held:

‘Having established what the requirements are for a constructive *dismissal*, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive dismissal - the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.’ (Emphasis added)

- [11] The test for constructive dismissal have been set out in a number of authorities and, as mentioned in *Solid Doors*, 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

² (2004) 25 2337 (LAC) (*Solid Doors*).

particular workplace or for a certain company and that is not due to any conduct on the part of the employer.’³

- [12] Put differently, as held by the LAC in *National Health Laboratory Service v Yona and Others*,⁴

‘...a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee. Ms Yona terminated her employment relationship with the appellant, by resigning with a month’s notice. She alleged that the resignation constituted a constructive dismissal in terms of section 186(1)(e) of the LRA. The appellant denied that Ms Yona was dismissed at all. Ms Yona bore the onus to prove her alleged constructive dismissal. The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.’ (Emphasis added)

- [13] The pronouncement in *National Health Laboratory Service* is in accord with the Constitutional Court finding in *Strategic Liquor Services v Mvumbi NO and Others*⁵ 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. Ultimately, the test remains whether it was reasonable to resign in order to escape the intolerable working environment. That is always a question of fact that depends on the circumstances of every case.⁶

³ *Supra* at para 28. See also *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and others* 2015] 9 BLLR 865 (LAC) at paras 7 to 9.

⁴ (2015) 36 ILJ 2259 (LAC) at para 30; see also *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (JR1078/14) [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC); (2018) 39 ILJ 1568 (LC) at paras 5 to 16.

⁵ (2009) 30 ILJ 1526 (CC) at para 4.

⁶ *Mafofane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) at para 49.

Analysis

- [14] Turning to the facts of the present case, Mr Shaku's case is that by deducting the amount for the replacement of the lost laptop, ARC made his continued employment intolerable. His challenge is that he was not negligent in losing the laptop and the insurer ought to have honoured the claim and that the decision to hold him liable for the loss was unfair.
- [15] The ARC's initial investigation had recommended that Mr Shaku be held liable. However, that decision was never implemented even though unsuccessfully appealed by Mr Shaku. It is common cause that Mr Shaku spent almost seven months, from about January 2013 to August 2013, pursuing the ARC's insurer, challenging the repudiation of the claim for the loss of the laptop. He even approached the Ombudsman and when he found no joy, he instructed lawyers to take the matter further.
- [16] In August 2013, ARC acceded to his request and instituted an enquiry into the loss of the laptop. In fact, Mr Shaku through Legalwise, had threatened to issue summons should ARC proceed with deductions as he had not been given a chance to state his side of the story. Mr Shaku did not attend the hearing that sat on 14 August 2013. His evidence was not he did not want to be part of a hearing that was just merely going to rubberstamp the initial decision. Clearly, Mr Shaku's decision not to attend the enquiry was ill-advised. The employer may recover loss incurred due to the fault or negligence of an employee in terms of section 34(2) of the Basic Conditions of Employment Act (BCEA).⁷ In this instance, the ARC was also entitled to effect the deductions in terms of the agreement.
- [17] The deductions from Mr Shaku's salary only commenced in October 2013 with the last deduction effected in December 2013. In a letter dated 31 October 2018, Mr Shaku's erstwhile attorneys, Van Wyk and Ayre, made it clear that they were instructed to challenge ARC's decision to effect the deductions, including seeking an interdict. Nothing happened until the last deduction. Mr

⁷ Act 75 of 1997.

Shaku continued working up until his resignation on 1 March 2015. In his resignation letter he states that:

'I hereby resign as a Divisional Human Resources Manager: Animal Production Institute albeit under duress because of the amount of R11, 567.00 which was unlawfully deducted from my salary.'

- [18] What he, however, failed to mention in his resignation letter is the fact that the deductions were effected during October 2013 to December 2013, 15 months prior. Also, as senior human resources manager with access to legal advice, he knew what recourse was available in a case of unlawful deduction. In fact, he had threatened to avail himself to litigation in order to vindicate his rights. However, it is now apparent that those were empty threats and it would seem that Mr Shaku accepted the turn of events and continued working.
- [19] I, accordingly, find it very opportunistic of Mr Shaku to use the incident that took place 15 months prior to the date of his resignation to support a case of constructive dismissal. I concur with counsel for ARC's submission that if indeed the conduct of the ARC was so egregious and Mr Shaku's only reasonable alternative was to resign, he would not have waited for 15 months to resign. It is my view that in order to succeed in a claim that the working conditions were intolerable, the employee has to resign within a reasonable time of the trigger, which may be a once-off outrage or the last straw following the earlier string of events.
- [20] The reality is that Mr Shaku had a legal remedy to the alleged oppressive conduct of ARC but he elected to continue to work. Clearly that shows that the working conditions were not unbearable.⁸ The commissioner made much of Mr Shaku's evidence that he had been side-lined on labour relations matters and he was not informed of CCMA cases. This compliant was raised for the first time during the arbitration hearing. I have taken notice of the fact that even the LRA 7.11 referral form, like the resignation letter, refers to the unlawful deductions as a trigger.

⁸ *Old Mutual Group Schemes v Dreyer and Another* (1999) 20 ILJ 2030 (LAC) referred to with approval in *Albany Bakeries v Van Wyk and Others* (2005) 26 ILJ 2142 (LAC) at para 28.

Conclusion

- [21] In all the circumstances, I am persuaded that there was no constructive dismissal as Mr Shaku failed to prove that the ARC made his continued employment intolerable. The commissioner evidently misconstrued the nature of the enquiry and clothed himself with the jurisdiction he did not have.
- [22] In the view I take, the award stands to be reviewed and set aside. There is no need to revert the matter back to the CCMA given the conclusion I have arrived at.
- [23] On the issue of costs, I am disinclined to saddle Mr Shaku with costs since he is an individual litigant and his conduct in defending the award was, in my view, not frivolous.⁹
- [24] In the premises, I make the following order:

Order

1. The arbitration award dated 23 May 2015 under case number GATW2745-15 is reviewed and set aside and replaced with the following order:
 - ‘1.1 Mr Shaku failed to prove that he was constructively dismissed.
 - 1.2 The CCMA lacks jurisdiction to entertain the dispute.’
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

⁹ *Kabe v Nedbank Ltd* (JS633/13) [2018] ZALCJHB 173 T at paras 41 to 50.

Appearances:

For the applicant: Advocate L Steenkamp

Instructed by: Etienne Loots Attorneys

For the respondent: Advocate T Cooper

Instructed by: Parker Attorneys

LABOUR COURT