THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 948/2021

In the matter between:

HOLLARD INSURANCE COMPANY LTD Applicant

and

PHELELE KAPUEJA-KETA First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

JOSEPH MPHAPHULI *N.O.* Third Respondent

Heard: 15 February 2023

Delivered: 24 May 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 24 May 2023.)

JUDGMENT

VAN NIEKERK, J

Introduction

[1] The applicant seeks to review and set aside an arbitration award issued by the third respondent (the arbitrator) on 29 April 2021. In his award, the arbitrator found that the first respondent (the employee) had been constructively dismissed and awarded her compensation in a sum equivalent to 12 months' remuneration.

Factual background

[2] The factual background to the dispute is not contentious. The employee was employed by the applicant in 2011, and moved through the ranks to the position of Executive Head: Life (Africa), based in Johannesburg.

[3] Two projects undertaken by the applicant are germane to the present application. First, the 'branch in a box' project (BB) involved the appointment of partners to launch projects throughout South Africa, in terms of a franchise model. The second project, the 'enterprise and supplier development' project (ESD), was designed to provide funding to some of the partners or franchisees. The employee's duties and responsibilities related to the branch in a box project, administered by Hollard Life. The ESD was administered by the applicant's head office.

[4] The financial crime the risk management team (FCRM) is the applicant's internal forensic team. In broad terms, its mandate relates to financial crime risk management activities. In terms of the applicant's policy, employees are required to provide all necessary assistance to the FCRM when it executes its activities.

[5] During April 2018, the employee (and others) were contacted by FCRM which was conducting investigations into and overspend to beneficiaries of the ESD project. The employee agreed to meet with FCRM and assisted them with the investigation. The employee, and others, were furnished with the draft report on 25 September 2018. The report highlighted weaknesses in the control

environment. No adverse findings were made against the employee pursuant to this investigation.

[6] In February 2019, the applicant pointed FTI Consulting to conduct a forensic investigation in respect of irregularities relating to beneficiaries of the ESD. FTI Consulting was mandated to conduct interviews and obtain statements from the former chief executive officer of Hollard Life, and the employee, and further to assist with criminal procedures. FTI contacted the employee about the investigation. The employee provided information and assisted with the investigation. No adverse findings were made by FTI against the employee pursuant to this investigation.

[7] The applicant subsequently lodged a criminal complaint against persons and entities alleged to have been involved in criminal conduct pursuant to the investigations conducted by both FCRM and FTI. FTI was engaged to assist it with the drafting of affidavits for some of the persons who had provided information to the FCRM and FTI during the investigations. These persons included the employee and the former chief executive officer of Hollard Life. The employee made much in her evidence of the affidavits sought by the applicant; her version was that she was being forced to sign an affidavit in respect of matters that were outside of her sphere of responsibility.

[8] In December 2019, the employee tendered her resignation. Following a meeting with the chief executive officer, the employee withdrew her resignation.

[9] During the course of the same month, the applicant appointed Advisory Services to conduct a BB partner financial review, and to conduct an internal governance review, being an assessment of the applicant's internal governance and practices surrounding the BB project. The applicant established an oversight committee to engage with BDO to receive status updates from time to time. On 18 March 2020, BDO provided a status update which included a slide with the heading 'employee flags'. The slide made specific reference to the employee and included comments 'inadequate project management', 'no regard for governance

or organisational processes', and 'inadequate record management '. Unknown to the persons who attended the status update, the employee became aware of the slide. She took up this issue and her complaints in relation to it with both BDO and the applicant.

[10] On 20 April 2020, the employee lodged a grievance in writing relating to what she termed the 'continuous investigations' and the 'BDO report and the incorrect statements'. She required an explanation as to how statements had been made about her in employee slides, how BDO had arrived at the conclusions recorded in the slide, and an apology for how she'd been treated over the previous '+2' years, confirmation from the applicant that the BDO review was the final contribution that she would make and that she would not be required to participate in any further investigations relating to the BB and the ESD projects. Further, the employee required confirmation from the applicant that she would receive the full BDO report and be granted an opportunity to provide final input prior to its finalization.

[11] Grievance hearings were conducted on 8 and 14 May 2020. On 20 May 2020, a grievance outcome was a suit in which recommendations were made including a recommendation that the applicant's management (and specifically Ms Ruele, the chief executive officer of Hollard Life, and the chief risk officer at Holland, Wikus Luus, submit a written apology to the employee for a confidentiality breach, that those components of the BDO report which relate to the employee would be shared with her. In particular, it was recommended that the applicant acknowledge its reciprocal accountability to uphold environment to support the employee in future, should the occasion present itself.

[12] On 22 May 2020, the employee addressed a letter to the applicant's human resources manager objecting to the grievance outcome. On 27 May 2020, at 9:13, the employee received a letter of apology from Ruele. At 12:18, the employee tendered her resignation in writing. On 28 May 2020, the employee received a second letter of apology from Ruele. On 30 May 2020, Luus sent a letter of apology to the employee.

[13] The employee referred a constructive dismissal dispute to the second respondent, the CCMA. The dispute was ultimately referred to arbitration.

The award

[14] In his arbitration award, the arbitrator found that there was a constructive dismissal and that the applicant should pay the employee compensation in an amount of R2.1 million, being the equivalent of 12 months' remuneration.

[15] The arbitrator found that through the testimony of its witnesses, the applicant had confirmed and supported a case for constructive dismissal. In particular, he referred to the criticism of the process of investigation, the distress and the harassment suffered by the employee. Further, in his reference to statements made by the applicant's Chief Executive Officer in his attempts to persuade the employee to remain in the applicant's employ, he regarded these as 'the final nail in the Respondent's case'. The arbitrator came to the following conclusions:

> 5.55 it is against this background that I find that the respondent subject to the applicant unfair conduct which conduct made continued employment intolerable culminating in the applicant throwing in the towel, as it were.
>
> 5.56 the excuse that the affidavits are fashioned by the respondent was for the applicant's own protection lacks merit. It does not even begin to suggest that the applicant would have been a key witness in the criminal case when the applicant infected no evidence to further the case if any.
>
> 5.57 as the applicant has stated countless times and even though the respondent concedes that the applicant had no role to play in the episode, the pressure for a compliant affidavit of the respondent's own making mounted relentlessly.
>
> 5.58 the applicant needed no one's protection. The applicant was in no danger of facing a criminal prosecution in the absence of any evidence to link her

to criminal activity. This was simply a scare tactic to get the applicant to sign an employer designed affidavit under false pretence.

5.59 it is unheard of that someone would sign an affidavit on interstate the negative, meaning that the affidavit would not advance the case of the party seeking an affidavit.

5.60 it was uncalled for the respondent to repeatedly jostle the applicant to agree to sign an affidavit outside the scope of their personal knowledge.

5.61 The last episode, namely advising that the decision pertaining to the contents of the affidavit lied with the applicant after the applicant's affidavit was not accepted and two years of going forward and backward about the proposed affidavit could not undo the respondent's persistence that the applicant signed its designed affidavit. The truth of the matter is that this was too little too late as the applicant's tolerance levels that run very thin at this point.

5.62 The pain-and-suffering caused by the harassment through and ending investigations, false allegations and persistent calls for the applicant to sign an otherwise irregular affidavit were calls for intolerable ability of continued employment…

[16] The arbitrator went on to find '*There was a constructive dismissal'*, and made the award of compensation referred to above.

The grounds for review

[17] The applicant submits that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings in that his finding that the employee had satisfied the requirements for constructive dismissal, that there was a constructive dismissal, viewed objectively, incorrect. Further, the applicant contends that the arbitrator misconstrued the evidence, took into account evidence that was irrelevant, failed to take into account relevant evidence, misconceived the nature of the inquiry before him and his duties in connection with that inquiry.

Applicable legal principles

[18] The existence of a dismissal is a matter that requires the determination of jurisdictional facts. The test to be applied therefore is not a reasonableness threshold; rather, the test is one of correctness – the review court must determine objectively the existence of facts which would give the CCMA jurisdiction to entertain the dispute referred to it (see *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 *ILJ* 2218 (LAC) and more recently, *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 *ILJ* 1427 (LAC).) The court must thus determine the correctness of the arbitrator's decision, with reference to the grounds of review.

[19] In so far as the test for the existence of a constructive dismissal is concerned, the *locus classicus* remains *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) where the court said the following:

> When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicate 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.

[20] It is also well-established that the test for proving a constructive dismissal is an objective one. The conduct of the employer must be such that viewed objectively, the employee could not reasonably be expected to continue in employment.

Analysis

[21] I deal first with the applicant's submission that the arbitrator committed a gross irregularity in that he made a finding of a 'constructive dismissal' in circumstances where he failed to engage in a two-stage inquiry, the first being the existence of a dismissal, the second being the fairness of any dismissal found to exist.

[22] It should be recalled that what is commonly referred to as a 'constructive dismissal' is established by section 186(1)(e). The heading to that section reads 'Meaning of dismissal and unfair labour practice'. In other words, once the requirements set out in paragraph (e) are met, it means no more than that the applicant has succeeded in establishing the existence of a dismissal. For an unfair dismissal to be established, it remains for the employer to discharge the onus that the dismissal was fair. These are discreet enquiries, and while in theory there may not be much scope for an employer to establish that a dismissal in the circumstances described in paragraph (e) is fair, the prospect of a fair dismissal should not be disregarded. For example, in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 *ILJ* 361 (LAC), the LAC held that an employee who resigns in circumstances that amount to a constructive dismissal may nonetheless be fairly dismissed.

[23] In the present instance, as I have indicated, the arbitrator tersely concluded '*There was constructive dismissal*' and went on to make an award of compensation. In doing so, the arbitrator failed to engage with the second leg of the enquiry, and interrogate the fairness of the dismissal that he found to have been established. In doing so, the arbitrator misconceived the nature of the enquiry and his award stands to be reviewed and set aside on this basis alone. Despite the submission made on the employee's behalf that a finding of unfairness is to be inferred from the arbitrator's findings, I am not satisfied that the arbitrator gave sufficient consideration (if any) to the fairness of the dismissal itself. He appears to have conflated the enquiries into the existence of a dismissal and the fairness of the dismissal found to exist. As I have indicated, this is in itself a reviewable irregularity.

[24] In any event, in my view, the arbitrator came to an incorrect conclusion. The evidence does not disclose that objectively, and despite the employee's subjective belief to the contrary, the applicant had no intention of recognising and addressing the concerns raised by the employee. In these circumstances, it cannot be said that the applicant made continued employment intolerable for the employee.

[25] The evidence establishes that on 20 April 2020, the employer lodged a grievance relating to what she termed 'continuous investigations' and the 'BDO Report and the incorrect statements'. She requested an outcome in terms of which she would be entitled to participate in the BDO review and requested an apology for the false and defamatory statements that be made about her; she requested an apology in writing for how she had been treated over the past '+2 years; she required confirmation from the applicant that the BDO review is the final contribution that she would make and that she would not be required to participate in any further investigations relating to either the BB project or the ESD project; and finally, confirmation from the applicant that she would receive the full BDO report and be granted an opportunity to provide input prior to its finalization. Janzen's evidence was that she chaired the grievance hearing which extended over two days. Statements were provided by the employee, the chief executive officer of Hollard, the chief risk officer at Hollard and Mr Naiker. The outcome was issued on the 20 May 2020, in which Janzen made the following recommendations:

(i) that management, and specifically Ruele, would provide a written apology to the employee for the confidentiality breach that had occurred and inadvertently caused the employee emotional distress;

(ii) that only components of the BDO report that related to the employee would be shared with her;

(iii) that the full report cannot be shared with the employee for reasons related to confidentiality;

(iv) Luus was to meet with the employee to ventilator bad experience;

(v) the employee could not be absolved or accused from any possible future reviews regarding the projects on any blanket basis on account of the duty that her role attracted; and

(vi) that the applicant acknowledges its reciprocal accountability to uphold a constructive environment to support the employee in future should the occasion present itself.

[26] On 22 May 2020, the employee sent an email to the HR manager at Hollard Insurance objecting to the grievance outcome. On 25 May 2020, the applicant addressed a further email in which he further objected to the grievance outcome. On 27 May 2020, in the morning, the employee received a letter of apology, dated 26 May 2020, from Ruele, and on the same afternoon, the employee tendered her resignation in writing. On 28th to May 2020, the employee received a second letter of apology from Ruele, and on 30 May 2020, Luus addressed a letter of apology to the employee.

[27] It was also not in dispute that the employee resigned in December 2019 because of the investigations and that she ultimately retracted her resignation and continued to work for the applicant for the period December 2019 to May 2020. I fail to appreciate how it can be said that the withdrawal of the employee's resignation in December 2019, followed by a period of employment of some 6 to 7 months, is consistent with the employee's claim that her employment had become intolerable in December 2019 as a consequence of the investigations and remained so thereafter. In any event, the investigations had been completed by the time that the employee resigned and retracted her resignation in December 2019. They could therefore not have had any relevance to her resignation in May 2020.

[28] Viewed objectively, at the time of her resignation, the employee was a member of the applicant's senior management. She owed fiduciary duties

to the applicant and was obliged to act in the applicant's best interests. The employee was duty-bound to cooperate with and assist the applicant in relation to investigations and reviews that it undertook from time to time. It is not in dispute that the investigations that were conducted, and the BDO review, as well as the criminal complaints lodged by the applicant were and in the circumstances, it is difficult to appreciate how the applicant's requirement that the employee assist the applicant in these processes could be considered to amount to a situation where further employment became intolerable. No adverse findings against the employee were made in the course of any of the investigations. The totality of the FCRM investigation was insofar as the employee was concerned related to the provision of an affidavit, something about which the employee could not reasonably have objected, particularly given the fact that the employee was never forced to sign the affidavit, something which she never did, without any disadvantage or prejudice to her in consequence.

[29] The arbitrator further overlooked the significance of the grievance hearing and the recommendations made by Janzen. The outcome of the hearing substantially addressed the employee's concerns, and it is difficult to appreciate what more the applicant could have done in the circumstances. The employee could offer no cogent reasons for her dissatisfaction with the outcome of the grievance hearing, at least not to the extent that the outcome rendered continued employment intolerable. Finally, even after the employee resigned, the applicant's CEO met with her and begged her to reconsider her resignation and to remain in the applicant's employ. There is no evidence to suggest that this approach was not genuine. All of this indicates that the applicant was prepared to go the extra mile to accommodate the employee, an effort that for reasons that are not clear, she rebuffed.

[30] Had the arbitrator taken into account the totality of the evidence, he would have come to the conclusion that the applicant's conduct, at all material times, was driven by reasonable and proper cause and that the applicant did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. It also cannot be said that the employee was put in a situation that had become so unbearable that she could not fulfil her work. No reasonable person in the employee's position would have considered her working environment to have been so intolerable that continued employment was no longer possible.

[31] It follows that the arbitrator's award stands to be reviewed and set aside. The applicant sought the remedy of substitution. The record is substantial. All of the relevant papers are before the court and little purpose would be served in remitting the matter for rehearing. Further, the demands of expeditious dispute resolution are best satisfied by substitution. In these circumstances, the award ought properly to be substituted with a ruling to the effect that the employee's referral is dismissed.

[32] The applicant did not pursue an order for costs and none will be granted.

I make the following order:

1. The arbitration award issued by the third respondent on 29 April 2021 under case number GAJB 210458-20 is reviewed and set aside.
2. The award is substituted by the following:
    i. The referral is dismissed.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances

For the applicant: Mr Gwaunza ENS Africa Inc

For the first respondent: Malongete Attorneys