



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PR65/14

In the matter between

AFRICOLOGY SPA (PTY) LTD

Applicant

and

THERESA MALGAS N.O (cited in her capacity as

Commissioner of the Second Respondent)

First Respondent

THE NATIONAL BARGAINING COUNCIL FOR THE

HAIRDRESSING, COSMOTOLOGY, BEAUTY

AND SKINCARE INDUSTRY

Second Respondent

UASA OBO TAMARYN BAILEY

Third Respondent

Heard: 05 November 2015

Delivered: 13 November 2015

Summary: The first step of the test to determine whether an arbitration award that an employee was constructively dismissed should be reviewed and set aside is objective. It is whether the employee proved the existence of the

dismissal. Absent the proof of constructive dismissal, the bargaining council lacks jurisdiction to arbitrate the dispute.

JUDGMENT

LALLIE, J

Introduction

- [1] The applicant brought this application to review and set aside an arbitration award of the first respondent ("the arbitrator") in which she found that the individual third respondent, Ms Bailey ("Bailey") had proved that she had been constructively dismissed by the applicant. She awarded her an amount of R12 000.00 which is equivalent to her two months' salary. The application is opposed by the third respondent.

Material facts

- [2] The applicant employed Bailey as a therapist on 1 December 2012. It allowed her not to work on Saturdays because of her religious beliefs. On 26 August 2013, she filed a grievance against the applicant for requiring her to work on Saturdays. The applicant resolved the grievance on 29 August 2013 by restoring Bailey's privilege not to work on Saturdays. The following day Bailey confirmed that the grievance had been resolved. On 19 September 2013, Bailey lodged a second grievance in which she complained about a number of issues which included victimisation for testifying for one of the applicant's acting managers in a disciplinary enquiry. She again raised the issue of being required to work on Saturdays but acknowledged that the problem had been solved. She complained about being forced to work overtime which she was not paid for. She expressed the view that cameras which were ostensibly installed for security reasons were used to monitor employees including herself, putting them under unnecessary stress. She stated that the manner in which the new manager worked caused them to lose commission. Her further complaint against the new manager was that she had unlawfully reduced their lunchtime,

she lacked human resources skills, was extremely rude and caused unhappiness. Amongst the complaints was the applicant's failure to provide a facility for employees to enjoy their lunch and the unacceptable manner in which the applicant kept their cellular telephones during working hours. Her desired solution to the complaints was that they should come to an immediate stop or she would declare a dispute of constructive dismissal against the applicant. She informed the applicant that she would not meet with it alone as in terms of the Labour Relations Act, she was allowed to have her union official present during any discussion. Lastly, she stated that if her grievance was not resolved within seven days she would continue with the next process.

- [3] The applicant scheduled a grievance meeting for 27 September 2013 to which Bailey responded by demanding an external representative which was refused by the applicant based on its policy. On 26 September 2013, she submitted a medical certificate which declared her unfit for duty until 7 October 2013. The applicant reacted to the medical certificate by offering Bailey the assistance of a psychologist or a life coach. The offer was not accepted. On 7 October 2013, Bailey resigned and referred a constructive dismissal dispute to the second respondent where the arbitrator issued the award which forms the subject matter of this review application.

The award

- [4] In her award, the arbitrator found that Bailey's witness, Ms Joseph ("Joseph") drew attention to the strenuous or intolerable working relationship between Bailey and managers at the applicant. She noted the existence of management issues and problems at the applicant and that Bailey resigned after consulting a medical practitioner and after a number of grievances were lodged against the respondent. She expressed the view that in light of the above, Bailey resigned after the working relationship became intolerable. Her willingness to lodge many grievances proved her unhappiness at the applicant. The arbitrator found a *nexus* between the applicant's conduct and the circumstances which induced Bailey to resign. She concluded that Bailey had proved that she had been constructively dismissed and that the applicant had committed an unfair labour

practice. She awarded her an amount of R12 000. 00 which is equivalent to her two months' salary.

Grounds for review

- [5] The applicant submitted that the arbitrator's award is unreasonable and irregular as she failed to apply her mind to evidence tendered on behalf of the applicant. The omission led her to reach a wrong decision on whether Bailey had been constructively dismissed. She failed to evaluate the evidence. The evidence the arbitrator failed to take into account was that the applicant had a grievance procedure which Bailey was aware of. Bailey had filed a grievance which was resolved promptly. A hearing for the second grievance was scheduled immediately after it had been received. Bailey's failure to attend the grievance meeting was unreasonable and fatal to her claim. The complaints in the second grievance related to normal operational requirements and issues at the applicant which could not objectively have led Bailey to believe that her employment relationship was being made intolerable. The applicant also sought to rely on the arbitrator's failure to apply her mind to certain issues which was proved by her failure to apply the authority she referred to in reaching the conclusion that the applicant committed an unfair labour practice when the issue before her was constructive dismissal. A further attack on the award was that Bailey tendered no evidence to prove that the applicant had made employment so intolerable that no other option was reasonably available to her except for the termination of the employment relationship. In addition, the arbitrator failed to determine the fairness of the constructive dismissal.

Analysis

- [6] Section 192 of the Labour Relations Act 66 of 1995 as amended ("the LRA") places the onus of establishing the existence of a dismissal on employees. In *Pretoria Society for the Care of the Retarded v Loots*¹ it was held that the determination whether an employee was constructively dismissed starts with the employee proving that in resigning, the employee did not intend to terminate the employment relationship. If the employee did have the intention,

¹ (1997) 18 ILJ 981 (LAC)

the enquiry comes to an end. However, absent that intention, the onus is on the employee to establish that there was a constructive dismissal. The appropriate test for review therefore is the one laid down in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others*². It is that the issue whether an employee has been dismissed goes to the jurisdiction of the CCMA. If there is no dismissal, the CCMA has no jurisdiction to entertain the dispute in terms of section 191 of the LRA. In *Strategic Liquor Services v Mvumbi NO and Others*³, the court confirmed that the test for constructive dismissal is the one stated in section 186 (e) of the LRA, does not require an employee to be left with no choice but resign. It only requires that the employer should have made continued employment intolerable.

- [7] When arguing Bailey's case, the third respondent's representative sought to advance arguments which detracted from the third respondent's pleaded case. One of such arguments was the denial that Bailey raised only two grievances with the applicant. The approach is impermissible as the third respondent's case had to be foreshadowed in its pleadings. The third respondent denied that Bailey intended to terminate the employment relationship when she resigned and submitted that she resigned because the applicant made continued employment intolerable. The applicant denied having made employment intolerable. I will firstly determine whether the third respondent discharged the onus of proving that Bailey was dismissed.
- [8] The evidence which had a bearing on the applicant and Bailey's employment relationship reflects that when Bailey raised the first grievance against the applicant for taking away her privilege of not working on Saturdays for religious reasons, the applicant restored Bailey's privilege promptly. The grievance was raised on 26 August 2013. It wasn't resolved on 29 August 2013 and Bailey confirmed its resolution on 30 August 2013. Bailey raised a second grievance with a long list of complaints on 19 September 2013. The list included the complaint which formed the subject matter of the first grievance. Bailey however, acknowledged that when the second grievance was raised the complaint which formed the basis of the first grievance had been resolved. The

² (2008) 29 ILJ 2218

³ [2009] 9 BLLR 847 (CC)

first grievance was resolved within three days which is a fair reaction time considering the nature of the grievance. It therefore could not have made the employment relationship intolerable.

- [9] Bailey raised the second grievance on 19 September 2013 in which she threatened to continue with the next process if it was not resolved within seven days. By the following day, the applicant had responded to the grievance by seeking more and specific information from Bailey and advising her that the grievance enquiry would be held on 27 September 2013. A day before the enquiry set Bailey consulted a doctor who recommended that she be on sick leave and resume duties on 7 October 2013. Upon receipt of the medical certificate, the applicant offered Bailey the support of a professional psychologist or a life coach which she declined. Instead of reporting for duty in terms of the medical certificate on 7 October 2013, Bailey tendered her letter of resignation. The reason for her resignation, in a nutshell, was that the applicant had made the employment relationship intolerable, conduct which started after she had testified in a hearing of a former acting manager of the applicant.
- [10] The evidence before the arbitrator was that the applicant gave Bailey's second grievance immediate attention. She elected not to attend the grievance enquiry, a decision which was partially influenced by her fellow employee's unreasonable advice that it was a sham. By telling the applicant that she would take the next step should her grievance not be resolved within seven days, Bailey implied that the working relationship was tolerable and would become intolerable if the applicant rejected her ultimatum. Bailey denied the applicant of the opportunity of dealing with her second grievance partly on the unreasonable advice of a fellow employee. The arbitrator based her decision that Bailey had been constructively dismissed on her incorrect conclusion that Bailey resigned after a number of grievances were lodged against the respondent. Only two were lodged. One was resolved within reasonable time and she avoided attending the grievance enquiry for the other. The arbitrator's error on the number of grievances Bailey filled cannot be overlooked as it had an effect on her decision that Bailey was constructively dismissed.

[11] The arbitrator made a finding that Bailey's willingness to lodge so many grievances showed that she was unhappy. Unhappiness is insufficient to render a resignation a constructive dismissal. A further reason that the arbitrator relied on was that it was clear that management issues and problems existed within the applicant. Management issues and problems are inherent at the workplace. It was therefore necessary for the arbitrator to assess the problems and determine whether they fall in the category of problems which render continued employment intolerable. The arbitrator's decision that Bailey was dismissed is incorrect. The third respondent failed to establish, on a balance of probabilities, that the applicant constructively dismissed Bailey. The second respondent therefore lacked jurisdiction to arbitrate the dispute the third respondent had referred.

[12] The applicant sought an order substituting the arbitration award. For the reasons given above, the third respondent failed to discharge the onus of proving Bailey's constructive dismissal. As Bailey was not dismissed the second respondent lacked jurisdiction to arbitrate the dispute referred by the third respondent.

[13] In the premises, the following order is made:

13.1 The arbitration award issued by the first respondent under case number DIS/128/13 and dated 14 February 2014 is reviewed and set aside and substituted with the following:

13.2 The second respondent lacked jurisdiction to arbitrate the dispute referred by the third respondent.

Lallie, J

Judge of the Labour Court of South Africa

APPEARANCE

For the Applicant: Mr Posthuma of Snyman Attorneys

For the Respondent: Mr Manganyi of UASA

LABOUR COURT