

SOUTH AFRICA / JUDGMENT

Browns the Diamond Store (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR1091/22) [2023] ZALCJHB 189; [2023] 10 BLLR 1033 (LC); (2023) 44 ILJ 2528 (LC) (19 June 2023) [2023] ZALCJHB 189

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JR1091/22

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR1091/22

In the matter between:

BROWNS
THE DIAMOND STORE (PTY) LTD
Applicant
And
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
First
Respondent
COMMISSIONER
D A PRETORIUS N.O
Second
Respondent
BELINDA
MICHELLE DU BOIS
Third
Respondent
Heard: 01 June 2023
Delivered: 19 June
2023
Summary: Review
application – constructive dismissal – review test is
correctness – de novo determination of the CCMA

jurisdiction – intransigent conduct on the part of the employee and concession that the resignation was informed by the impending disciplinary enquiry is fatal to constructive dismissal claim.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] This is a review application in terms of section 145(1)(a) of the Labour Relations Act[1] (LRA). The applicant is challenging the arbitration award issued by the first respondent (Commissioner) dated 3 April 2022, under case number GAJB24064-20 and under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The Commissioner found that the third respondent was constructively dismissed and awarded compensation equivalent to six months' salary.
- [2] The review application is not opposed. Yet, the third respondent was in attendance at the hearing of the matter despite having filed a notice to abide by the Court's decision. Initially, through her erstwhile attorneys, the third respondent filed a notice of intention to oppose the review application which was subsequently withdrawn. After she was given an opportunity to reconsider her position, she agreed that the matter should proceed on an unopposed basis.

Factual background

- [3] The third respondent commenced employment with the applicant in March 2009 and held the position of a Sales Consultant at the Airside store, at OR Tambo International Airport. She resigned from her employment on 25 October 2020, claiming that she was subjected to intolerable conditions of employment.
- [4] It is common cause the Airside store was temporarily closed due to the COVID-19 national shutdown that commenced in March 2020. The third respondent and other staff members were laid off. The third respondent received monies in terms of the Unemployment Insurance Fund's (UIF) Temporary Employer-Employee Relief Scheme (TERS) from April to June 2020. At that time, the third respondent was 59 years old and about to turn 60 years on 20 November 2020.
- [5] In April 2020, the third respondent unsuccessfully applied for voluntary retrenchment. Even though her complaints seem to date back to July 2019, it is not in dispute that she was particularly aggrieved by the rejection of her application for voluntary retrenchment. She informally complained about the decision to turn down her application for voluntary retrenchment. The answer she received was that she was an important salesperson and had to be retained. Also, it was the applicant's policy not to retrench employees who were about

to retire.

- [6] Incensed by the response, the third respondent embarked on a bombardment of communication that was viewed by the applicant as insolent, malicious and hostile. On 14 May 2020, the third respondent was issued with a written warning for insolence. She conceded that she did not challenge this warning.
- [7] Nonetheless, the insolent tone of the third respondent's communication with the applicant's management did not change. Hereunder are the extracts from some of the third respondent's hostile emails that had been sent to the applicant up until the date she tendered her resignation:

7.1. "Is this because I have dared to question the omnipotence of Larry Brown, who continues to lack the courage to speak to me."

7.2. "Your [Lawrence Mamabolo] nonsense will no longer be tolerated. I have been and have tried at all times to be civil and courteous. This despite the subterfuge and lies I have been subjected to."

7.3. "at least one of the company's shops in London is engaging in false advertising and was and still is the case here."

7.4. "I am reliably informed that misrepresentation of an entity's BEE status is a criminal offence."

7.5. "I shall be making compliant against yourself and the company to the Jewish Board of Deputies [sic]. At least I shall expect your apologies and feel that the Jewish community in general should be made aware of your contempt towards them."

7.6. "I am disgusted at Larry Brown's lack of response to my greetings sent to him in good faith for Yom Kippur. He may well be a soulless individual so it seems, but he should be aware that manners maketh the man."

7.7. "I expect an apology from him [Brown] – as the person who makes all the decisions in the company his behaviour to me is disgusting and inexcusable".

7.8. "Perhaps he [Mr Brown] holds Jews in the same disdain as he appears to hold certain other groups."

7.9. "If you are unwilling or unable to confirm the above [report to the Special Investigations Unit] I will do so myself." "Not doing so is a criminal offence."

7.10. "[P]erhaps I should discuss this with the EFF central command and have them come along and demonstrate at the shops on my behalf? Actually that's a very good idea, now that I think about it! Especially as Larry [Mr Brown] wants to ignore me and will not meet with me – arrogance and cowardice come to mind!"

7.11. "Payment owed to me due, in my opinion to the mismanagement of my position by Browns... It is disgraceful and inexcusable."

7.12. "In my opinion the employer is uncaring, unprofessional and seemingly just downright dishonest and disrespectful."

7.13. "It certainly appears to be, then Larry's [Mr Browns] determination to avoid me can, in my opinion, only be because of extreme arrogance or abject cowardice!! Probably a combination of both."

7.14. "I consider your response to be unhelpful and very much in keeping with your recent behaviour. It is most peculiar in my opinion."

7.15. "How dare you insinuate and suggest such nonsense! This is disgraceful and dishonest behaviour to say the least. Do you think I am an idiot?"

7.16. "It is my intention to place you on notice that I am taking my 3-month paid sabbatical."

7.17. "I am extremely disappointed and shocked by you. The company's apparent subterfuge and under handedness... I will not put up with this continued nonsense. Your seemingly malevolent behaviour."

7.18. "Voluntary retrenchment was offered to me prior to 30th April. It was declined by Browns... the reason for the refusal of my request is clearly spurious and illegitimate and incorrect. Furthermore, I feel the take-it-or-leave-it option that was effectively presented to me, was no more than a veiled threat of sorts made to me by the company."

7.19. "I will not be waived aside with nonsense deceit and evasion by the company"

[8] The applicant constantly advised the third respondent to avail herself to the grievance procedure and favoured her with the extract from the Policy Handbook which contained the grievance procedure. Yet, she was intransigent. It is apparent from the evidence that the third respondent was inconsiderate and embellished simple facts in order to vilify the applicant.

[9] By way of example, the applicant refuted the third respondent's evidence that the meeting to collect the notice to attend the disciplinary was scheduled for 28 September 2020, the Jewish holiday of Yom Kippur, was deliberate and aimed at offending the third respondent as a Jew. Mr Mamabolo, the applicant's erstwhile IR Manager, testified that the meeting was moved to 29 September 2020 in order to accommodate the third respondent. This evidence was not negated. Also, the threat that the third respondent was going to involve the Economic Freedom Fighters (EFF), which is a political party, not a trade union, was a very serious affront to the applicant's reputation. Moreover, given the fact that she refused to avail herself to the grievance procedure.

- [10] Tellingly, the Commissioner rejected the third respondent's evidence that she was joking when she made the above statements and that they were mere cries for attention. The Commissioner correctly found them to be serious and that they negatively impacted the employment relationship. As such, the third respondent was the author of her misfortune.
- [11] In September 2020, the applicant decided to charge the third respondent for her insolent conduct. She refused to collect the charge sheet and instead submitted doctor's notes that booked her off sick due to work-related stress. It is common cause that the third respondent had been booked off sick from 17 September 2020 to 25 October 2020.
- [12] On 23 September 2020, the applicant held a meeting with the staff members about the re-opening of the Airside store. The third respondent was not invited to the meeting. The third respondent testified that she only became aware of the decision to reopen the Airside store on 22 October 2022 when she visited her colleague, Mr MacQueen, who informed her that Mr Brown was planning to dismiss her. As a result, the third respondent's name was not included in the October 2023 duty roster for the Airside store, so she was further informed.
- [13] On 25 October 2020, the third respondent tendered her resignation. The 11-page resignation letter was drafted by an attorney from one of the reputable law firms, Cliffe Dekker Hofmeyr, whom she had been consulting with for a period of two months prior to her resignation. The third respondent conceded that the decision to resign was triggered by the information she heard from Mr MacQueen.
- [14] The applicant on the other hand denied that it excluded the third respondent from the duty roster because it intended to dismiss her. However, she could not be allocated because she had been booked off sick. The applicant was also adamant that the third respondent's resignation was a ploy to circumvent the impending disciplinary enquiry.
- [15] Despite the uncontroverted evidence that was before the commissioner and her findings on pertinent issues, she found that the third respondent had been constructively dismissed. In these proceedings, the applicant takes issue with that finding on several grounds which I do not deem necessary to repeat; save to state that the crux of its attack is that the Commissioner erred as her conclusions are not supported by the evidence on record.

Legal principles and application

- [16] Tritely, the review test in relation to constructive dismissal cases is correctness as opposed to reasonableness. The enquiry turns on the jurisdiction of the CCMA, a notion well explained in *Solid Doors (Pty) Ltd Commissioner Theron and Others*[2] (*Solid Doors*) where the Labour Appeal Court (LAC) held that:

‘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)

[17] That being the case, as stated in *HC Heat Exchangers (Pty) Ltd v Araujo and others*,[3]

"the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction on its own accord. In doing so, the Labour Court determines the issue de novo in order to decide whether the determination by the arbitrator is right or wrong".

[18] Likewise, the prerequisites to prove a case of constructive dismissal are well accepted and succinctly articulated in *Solid Doors*,[4] as follows:

18.1. First, the employee must have terminated the contract of employment;

18.2. Second, the reason for termination of the contract must be that continued employment has become intolerable for the employee; and

18.3. Third, the employer must have made continued employment intolerable.

[19] Notably, if one of the above requirements is absent, a claim for constructive dismissal must fail. By way of example:

'...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.'[5]

[20] In *National Health Laboratory Service v Yona and Others*,[6] the LAC defined the test for proving a constructive dismissal as an objective one. In essence, "[t]he conduct of the employer towards the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with it. Resignation must have been a reasonable step for the employee to take in the circumstances".[7] It is of no consequence that the employee should have had no choice but to resign to avail himself to a claim of constructive dismissal;

providing the resignation was a reasonable step to escape the intolerable working environment.
[8]

[21] In the present instance, it is common cause that the third respondent resigned whilst on sick leave for almost two months. In her own version, the incident that triggered her resignation was the information she had received from Mr MacQueen that she was excluded

from the duty roster because she was going to be dismissed. Instead of seeking clarity from the applicant on the turn of events, she resorted to seeking legal advice and acted, it would seem, on the basis on that advice. That is so despite the third respondent's concession that she was directed to use the grievance procedure at all material times but to no avail.

- [22] As mentioned elsewhere in this judgment, the Commissioner was spot on in her finding that the third respondent was the author of her misfortune. She ought to have been better advised about the consequences of her intransigent stance as she enjoyed legal counsel from a reputable law firm, Cliffe Dekker Hofmeyr.
- [23] Notwithstanding the above finding, the Commissioner strangely based her ultimate conclusion on the evidence that was patently irrelevant and/or seriously disputed. Worse still, it is regrettable that the award is not written with articulateness and logic.
- [24] The third respondent conceded that she resigned because she was afraid that the applicant was going to dismiss her. That was denied by Mr Govender, the applicant's HR Manager, who testified that the disciplinary process was going to be triggered once the applicant was no longer on sick leave, a fact accepted by the Commissioner. Even if the outcome of the third respondent's disciplinary enquiry was a dismissal, she could have challenged same in the same manner she did her constructive dismissal. Moreover, the alleged acts of misconduct the third respondent was accused of stemmed from the string of insolent and hostile emails she had been sending to the applicant. As mentioned above, the Commissioner found them to be serious and not light-hearted, contrary to the third respondent's evidence. Even so, nothing much turned on the details of the charges that were levelled against the third respondent.
- [25] The applicant argued that the award is replete with inconsistent and incongruent findings on the evidence. I concur. The typical instance is the Commissioner's finding that Mr MacQueen's evidence was not convincing and not the most probable version of what was said by Mr Brown about the third respondent during the meeting of 23 September 2020. Conversely, she later accepted the same evidence to find to that Mr Brown was vindictive by telling the other staff members not to contact the third respondent.
- [26] The commissioner also failed to take into account the undisputed evidence of the applicant that the third respondent was laid off due to the COVID-19 national shutdown and had already claimed the TERS relief like all affected employees. The third respondent refused to lodge a grievance to challenge the applicant's decision to retire her when she turned 60 years. Nonetheless, she had recourse to challenge her forced retirement as an automatically unfair dismissal at the CCMA or Labour Court. To show that she was aware of this recourse, she belatedly attempted to raise the issue of forced retirement at the CCMA but was unsuccessful. Thus, in my view, the dicta referred to by the Commissioner to support her findings are patently distinguishable.

- [27] When it comes to the health of the third respondent, the third respondent never afforded the applicant an opportunity to respond to the allegations that it was the source of her stress. Instead, she decided to adopt an eccentric move of affronts and hostility. Moreover, the doctor's notes submitted by the third respondent were not supported by any medical expert evidence and the admission thereof was not contextualised. Thus, the Commissioner's finding in this regard is notional.
- [28] The Commissioner's finding that there was no evidence to show that the third respondent resigned in order to avoid the disciplinary enquiry is irrational. The third respondent conceded that she was informed in September 2010 that she had to collect a notice to attend a disciplinary enquiry but refused because she was off sick. Pertinently, it is undisputed that she resigned because she was afraid that she was going to be dismissed.
- [29] Finally, I find it strange that the Commissioner confidently pronounced on the events that had happened after the third respondent had resigned to support her finding that the conditions of employment were intolerable. For instance, the Commissioner misdirected herself by making findings on the restraint of trade agreement that the applicant sought to enforce post termination of the third respondent's employment contract. That was purely a mere contractual issue that she had no jurisdiction to deal with; nor could have assisted the third respondent's constructive dismissal claim.
- [30] In *Gold One Limited v Madalani and Others*,^[9] this Court sanctioned a well-established principle that "...intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly. Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point". This principle was recently concretised by the Constitutional Court, albeit in a context of reinstatement, in *Booi v Amathole District Municipality and others*,^[10] where it was stated that:

'It is accordingly no surprise that the language, context and purpose of s 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must

surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in s 193(2), which is to protect substantively unfairly dismissed employees by restoring the employment contract and putting them in the position they would have been in but for the unfair dismissal. And, my approach to s 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.' (Emphasis added)

[31] By parity of reasoning, intolerability should not be easily reached in a case of constructive dismissal. As such, it was incumbent upon the third respondent to provide a substantial explanation that is supported by cogent evidence to prove the intolerability that led to her resignation. She sadly failed to meet this threshold. It follows that the Commissioner's finding that the third respondent was dismissed is untenable.

Conclusion

[32] In all the circumstances, I am satisfied that the Commissioner misconstrued the nature of the enquiry and incorrectly donned herself with the jurisdiction she did not have. The award accordingly stands to be reviewed and set aside.

[33] There is no need to remit the matter back to the CCMA given the conclusion that I have arrived at. As such, the award stands to be reviewed and set aside and to be substituted with an order that the third respondent failed to prove that she was dismissed as contemplated in terms of section 186(1)(e) of the LRA and, consequently, the CCMA had no jurisdiction to entertain the dispute.

Costs

[34] The issue of costs did not arise as the matter is unopposed.

[35] In the premises, I make the following order:

Order

1. The arbitration award issued by the Commissioner under case number GAJB24064-22 and dated 3 April 2022 is reviewed and set aside and replaced with the following order:

"1.1 Third respondent failed to prove that he was dismissed as contemplated in terms of section 186(1)(e) of the LRA.

1.2 The CCMA has no jurisdiction to entertain the dispute."

2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J Du Randt from Du Randt Du Toit Pelser Attorneys

[1] Act 66 of 1995, as amended.

[2]

(2004) 25 ILJ 2337 (LAC) at para 29.

[3]

[2007] ZALC 72; [2020] 3 BLLR 280 (LC) at para 37.

[4] Solid Doors supra at para 28.

[5] Solid Doors 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 - 9.

[6]

(2015) 36 ILJ 2259 (LAC) (National Health Laboratory Service) 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 - 16.

[7] National Health Laboratory Service supra at para 30.

[8] See *Strategic Liquor Services v Mvumbi NO and others*

(2009) 30 ILJ 1526 (CC) at para 4.

[9]

[2020] ZALCJHB 180; (2020) 41 ILJ 2832 (LC); [2021] 2 BLLR 198 (LC) at para 46.

[10]

(2022) 43 ILJ 91 (CC) at para 40.

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Prepared on 12 October 2026 · Esheria