REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

the labour court of South Africa, cape town

judgment

case no: C 272/2010

In the matter between:

Asara wine estate & hotel (pty) ltd	Applicant
and	
jc van rooyen	First respondent
CCMA	Second respondent
TARIQ JAMODIEN N.O.	Third respondent

Heard: **10 August 2011**

Delivered: **24 August 2011**

Summary: **Review – constructive dismissal**

judgment

STEENKAMP J

Introduction

This case raises the question when an employer can be said to have made the employment relationship intolerable, ie when a constructive dismissal as contemplated in s 186(1)(e) of the LRA[1] can be said to have taken place.

The question arises in the context of a review application in terms of s 145 of the LRA. The arbitrator, Tariq Jamodien (the third respondent) found that the employee (the first respondent) had been constructively dismissed. He ordered the employer to pay the employee compensation equivalent to 12 months' remuneration, amounting to R269 640, 00; as well as the employee's costs. The employer seeks to have that award reviewed and set aside.

Background facts

The applicant, Asara Wine Estate and Hotel (Pty) Ltd, carries on business as a wine farm and upmarket hotel outside Stellenbosch. It sells its wines locally and internationally. Its flagship wine, the Bell Tower, is a five-way Bordeaux blend that is a regular prizewinner; the 2005 vintage was awarded four stars (out of a possible maximum of five) by the Platter South African Wine Guide. The current owner, Markus Rahmann, bought the property – dating back to 1691 – in 2001.

Jan van Rooyen, the first respondent, was employed by the applicant as its winemaker. He was responsible for the Bell Tower and other wines, including the Ebony range. He lived in a house on the estate.

In July 2009 the applicant's Rahmann received a complaint from an irate German customer that a container of Asara Ebony (amounting to about 12000 bottles) purchased from the applicant was oxidised.

Rahmann took the matter up with Van Rooyen. Various discussions took place between Rahmann and Van Rooyen over the next few days, on 15, 16, 20 and 21 July 2009, regarding what action was to be taken against Van Rooyen as a result.

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1 The Labour Relations Act, Act 66 of 1995.

On 22 July 2009, after Van Rooyen had taken legal advice, his then attorneys, Cluver Markotter, sent a letter to the applicant, care of its labour consultant, one Bertus du Toit of Danshaw Consulting. The letter stated that Rahmann had confronted Van Rooyen on 15 July 2009 about the oxidised batch of wine; and that:

"Our client [Van Rooyen] was given an ultimatum by Mr Rahmann to either accept a severance package equal to payment to the end of August 2009, or to face summary dismissal for gross misconduct and/or professional negligence".

On 23 July 2009 the applicant's attorneys, CK Friedlander, wrote to Van Rooyen's attorneys. They denied Van Rooyen's version of events, stating that Rahmann had told him that he could no longer trust him as the estate's winemaker; and that he had "discussed three alternatives" with Van Rooyen, viz:

"1. The Estate will follow a disciplinary procedure which may very well result in Mr van Rooyen's dismissal;

2. They schedule a pre-dismissal arbitration with the CCMA;

3. Alternatively to the above, Mr van Rooyen could submit a proposal to Mr Rahmann on how the issue should be resolved."

The letter further stated that Van Rooyen was suspended on full pay, pending an enquiry into his conduct and performance.

The letter was sent at 17:14. Cluver Markotter did not receive it on that day. Instead, the South African Police Services gave it to Van Rooyen at his house on the farm after midnight. This was after he had collected some documents from the cellar; the security guards had told him that he wasn't allowed to; and Rahmann had enlisted the services of the SAPS.

Together with this letter of 23 July, the applicant's attorneys sent Cluver Markotter (Van Rooyen's attorneys) another letter marked "without prejudice". However, that letter has been disclosed by the applicant and is an annexure to Rahmann's founding affidavit. In that letter, they say:

" 1. Our open letter of even date [sic] refers.

2. The settlement proposal contained in your without prejudice letter of the 22nd July 2009 addressed to Mr Bertus du Toit of Danshaw Consulting is rejected.

3. However, our client is prepared to allow your client to resign with immediate effect.

4. Our client will pay your client until the 31st August 2009 as well as any other amounts to which your client may legally be entitled. In addition your client will be allowed to occupy the house until the 31st August 2009."

On Saturday 25 July 2009, before formal disciplinary charges had been laid, Van Rooyen resigned. He did so by way of an email referring to the letter from CK Friedlander of 23 July 2009 and stating that he accepted the conditions in that letter.

On Monday 27 July 2009, Van Rooyen's attorneys (Cluver Markotter) again wrote to the applicant's attorneys. They stated that "our instructions are to request that":

"(a) Our client's termination is dealt with as a retrenchment.

(b) Our client is furnished with a certificate of service reflecting the reason for termination being operational requirements.[2]

(c) A settlement agreement is reduced to writing in full and final settlement of any and all claims that the parties may have against each other."

The applicant rejected that request and its attorneys stated in a response dated

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2 This request, if acceded to, would have been based on a patently untrue premise. In argument, I put it to Van Rooyen's counsel that his then attorneys attempted to perpetrate a fraud on the South African Revenue Service whereby his client would have been able to secure a tax-free payment, based on a so-called retrenchment that had patently not occurred. But that is not part of the case before me and those attorneys are no longer representing Van Rooyen.

28 July 2009 that it had accepted Van Rooyen's resignation. It also stated that it would honour its offer, accepted by Van Rooyen, that he could stay on in the house on the farm until 31 August 2009.

Van Rooyen subsequently referred an alleged constructive dismissal dispute to the CCMA, claiming *inter alia* that:

"It was suggested to me that I resign or face charges."

Van Rooyen remained in occupation of the house on the farm until 31 August 2009.

The test on review

At the commencement of the argument of this matter, Mr *Leslie,* who appeared for the applicant, submitted that the well-known review test of unreasonableness as set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[3] does not apply in the review of an arbitration award concerning constructive dismissal. This is so, he argued, because the prior question is whether the employee was dismissed; if not, the CCMA had no jurisdiction, and the question whether the CCMA had jurisdiction is not to be decided on the grounds of reasonableness, but simply whether the commissioner was right or wrong. Mr *Duminy,* for the first respondent, did not take issue with this submission.

Authority for this proposition is to be found in the judgment of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others.*[4] Although the court in that case had to consider s 186(1)(b) of the LRA[5],

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3 (2007) 28 *ILJ* 2405 (CC).

4 (2008) 29 *ILJ* 2218 (LAC).

5 Section 186(1)(b) provides that dismissal means that – "an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

it dealt with it as a species of constructive dismissal and held as follows:[6]

“The issue that was before the Commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain a dispute in terms of section 191 of the Act.

The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.…

The question before the court a quo was whether on the facts of the case, a dismissal had taken place. The question was not whether the finding of the Commissioner that they had been a dismissal of three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction, irrespective of its findings to the contrary."

Section 192 of the LRA provides that:

"(1) . In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration – or on review by the Labour Court – is whether the dismissal was fair; and whether the finding of the arbitrator in this regard was reasonable.

In the case of an alleged constructive dismissal in terms of section 186 (1)(e),

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6 At paras [39] – [41].

though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the CCMA did not have jurisdiction in the first place, even though the Commissioner can only make that finding *ex post facto*.

Anomalous as this may seem, I am bound by the authority in *SA Rugby*.[7] This court also applied *SA Rugby* in *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others.*[8] In that case, dealing with a constructive dismissal, Basson J explicitly held that the question of whether a dismissal had taken place goes to jurisdiction and that the review test as laid down in *Sidumo* does not find application in reviewing a jurisdictional ruling.

The test I have to apply, therefore, is not whether the conclusion reached by the Commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in *Sidumo*[9], but whether the Commissioner correctly found that Van Rooyen had been dismissed.

The test for constructive dismissal

Section 186(1)(e) of the LRA defines a constructive dismissal. The section states that:

> "Dismissal means that –
>
> > (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".

The test for determining whether or not an employee was constructively

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7 *Supra*.

8 (2009) 30 *ILJ* 2093 (LC) para [6].

9 *Supra.*

dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots*[10]. Although that case was decided under the 1956 LRA, the principles remain the same. In *Loots,* the court held that

"the enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court's function is to look at the employer's conduct as a whole and determine whether…its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

The court held[11] further that when an employee resigns or terminates the contract of employment as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves that his/her fears were unfounded, then he has not been constructively dismissed and his/her conduct proves that he has in fact resigned.

The Constitutional Court recently remarked in *Strategic Liquor Services v Mvumbi NO & others*[12] that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.

In *Eagleton & Others v You Asked Services (Pty) Ltd*[13] this Court considered the

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10 (1997) 18 *ILJ* 981 (LAC) at page 985. See also *Woods v WM Car Services (Peterborough)* (1981) ILR 347 at 350.

11 (1997) 18 *ILJ* 981 (LAC) at page 984.

12 (2009) 30 *ILJ* 1526 (CC); [2009] 9 BLLR 847 (CC) at para [4]

13 (2009) 30 ILJ 320 (LC) at para 22.

three requirements that an employee must prove in order to claim constructive dismissal. These requirements are that:

1. the employee terminated the contract of employment;

2. continued employment had become intolerable for the employee; and

3. the employer must have made continued employment intolerable.

In *Chabeli v Commission for Conciliation, Mediation and Arbitration & others*[14] the court held that in order to prove a constructive dismissal, the employee has to show that the employer had made the continued employment relationship intolerable and that, objectively assessed, the conditions at the workplace has become so intolerable that he had no option but to terminate the employment relationship.[15] As I recently stated in *Value Logistics (Pty) Ltd v Basson & others*[16], I doubt that this strict test survives the formulation by the Constitutional Court in *Strategic Liquor Services (supra).*

The test remains, though, that the conduct of the employer must be judged objectively.[17]

Mr *Leslie*, for the applicant, further submitted that where a reasonable alternative to resignation exists, there can be no constructive dismissal.[18] Accordingly, where the employee has the option of facing a disciplinary hearing,

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14 (2010) 31 ILJ 1343 (LC).

15 (2010) 31 ILJ 1343 (LC) at para 17. See also *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 ILJ 1240 (LC) and *Secunda Supermarket CC t/a Secunda Spar & another v Dreyer NO & others* (1998) 19 ILJ 1584 (LC); [1998] 10 BLLR 1062 (LC).

16 Case no C1025/09 (Labour Court, Cape Town, 26 May 2011).

17 *Smithkline Beecham (Pty) Ltd v CCMA* (2000) 21 ILJ 988 (LC) 997B; *Kruger v CCMA & Another* [2002] 11 BLLR 1081 (LC) 1085D; *Lubbe v ABSA Bank Bpk* [1998] 12 BLLR 1224 (LAC) para 8; *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 49.1.

but resigns, there can be no talk of constructive dismissal.[19] This appears to me to be a correct statement of the law, unchanged by the *dictum* in *Strategic Liquor Services.*

I also have regard to the recent *dictum* of the Labour Appeal Court in *Jordaan v CCMA*[20], where the court cited with approval its earlier decision in *Old Mutual Group Schemes v Dreyer*[21] where Conradie JA said:

"Buitendien sou so 'n werknemer wat uit die bloute bedank dit gewoonlik moeilik vind om 'n hof te oortuig dat hy werklik konstruktief ontslaan is. Die bewyslas rus op die werknemer... Die bewyslas is nie 'n ligte een nie... Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgewer die voorsetting van sy diens onuithoudbaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld, maar hom nie aanstaan nie. Net soos ontslag is 'n gedwonge bedanking 'n allerlaaste opsie. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar nog ander uitweë is nie."

And Davis JA continued:

"This dictum represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these

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18 *Smithkline Beecham (supra)* 997D-E and 998D, wherein it was held that if the employee is too impatient to await the outcome of the employer's attempts to find a solution to the perceived intolerable solution, and resigns, then constructive dismissal is almost always out of the question. See also: *Lubbe (supra)* para 8; *Kruger (supra)* para 14; *Smith v Magnum Security* [1997] 3 BLLR 336 (CCMA) 341G

19 *Old Mutual Group Schemes v Dreyer & Another* (1999) 20 ILJ 2030 (LAC) para 18; *Tsupa v Security Officer's Board* [2002] 12 BALR 1376 (CCMA); *Nokonya v Weiner* [2003] 11 BALR 1294 (CCMA).

20 [2010] 12 BLLR 1235 (LAC) 1239 B-E.

21 (1999) 20 *ILJ* 2030 (LAC) 2036.

problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her."

Mr Leslie further submitted, after I had drawn his attention to *Strategic Liquor Services* and he had filed a supplementary note on argument, that the Constitutional Court's remarks in paragraph [4] of that judgment were obiter. In a footnote to these remarks, the court referred to *Murray v Minister of Defence*[22]. In turn, paragraph 12 of *Murray* cites a number of cases cited in this case, including *Jooste*, *Loots*, *Smithkline Beecham* and *Mafomane*.

The authorities referred to above seem to me to establish that, where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee. By referring to these authorities, the Constitutional Court appears to have affirmed this principle, while at the same time pointing out that the employee need not establish that he or she had no choice whatsoever but to resign. The emphasis is on whether a reasonable alternative exists.

In *Murray v Minister of Defence*[23] -- cited with approval by the Constitutional Court in *Strategic Liquor Services* -- the Supreme Court of Appeal emphasised that "the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonable do that make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked 'reasonable and proper cause'.

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22 (2008) 29 ILJ 1369 (SCA) paras 12 and 67.

23 (2008) 29 ILJ 1369 (SCA) at para 13. The position of the SCA was confirmed in the case of *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 ILJ 575 (LC) at paras 27 and 40.

The Labour Court, in *Eagleton & Others v You Asked Services (Pty) Ltd,* noted that in terms of section 192(1) of the LRA, the employee bears the onus to prove a 'dismissal'.[24] Only once this is done does the employer bear the onus to prove that the dismissal was fair.[25] In particular, in a constructive dismissal, the court held that it was essential that the employee should make a factual allegation that he had resigned.[26] Thus, a constructive dismissal is a two stage enquiry.

In the same case, the court considered whether an employee was automatically entitled to the relief provided for in the LRA once constructive dismissal had been proved.[27] The court held that *"proving a constructive dismissal merely proves that there has been a 'dismissal' as contemplated by s 186 of the LRA. Once a dismissal has been proven the enquiry will proceed to the second stage which is a consideration of the 'fairness' of the dismissal."* As such, the court found that an applicant is not entitled to claim compensation once he has established the existence of a 'dismissal'.[28] Rather, an employee will only be entitled to compensation once it is found that the constructive dismissal was also unfair.[29] Resignation in the face of poor performance management does not give rise to a constructive dismissal claim.

Applying the law to the facts

As I mentioned above, it was held in *You Asked Services (supra)* that resignation in the face of poor performance management does not give rise to a constructive dismissal claim. What about resignation in the face of possible

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24 (2009) 30 *ILJ* 320 (LC) at para 25. See also *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at 983.

25 *supra* at para 25.

26 *supra* at para 25.

27 *supra* at para 34.

28 *supra* at para 35.

29 *supra* at para 35.

dismissal following a disciplinary hearing? In terms of the *dictum* in *Smithkline Beecham*[30], an applicant who resigns pending a disciplinary hearing would have a hard case to meet in order to prove constructive dismissal. And was the employer culpably responsible for Van Rooyen's resignation, as required by the Supreme Court of Appeal in *Murray*[31]?

From his own referral document before the CCMA, it is clear that Van Rooyen was aware that he had an alternative to resignation – he could have faced disciplinary charges.

There is a dispute of fact as to precisely what transpired in the discussions between Rahmann and Van Rooyen. Van Rooyen claims that he was told to either resign or "to let legal action take its course".

Rahmann testified that he presented Van Rooyen with three options, namely: (a) an investigation into the affair; (b) pre-dismissal arbitration before the CCMA; or (c) Van Rooyen could propose an alternative solution.

Even though the employer could have stated it more clearly – possibly by advising Van Rooyen in terms of a date for a disciplinary hearing to be held -- on either version a disciplinary hearing was one of the options. The employer was still busy with an investigation and its attorneys told Van Rooyen so, at the latest on 23 July 2009. There could have been no doubt in his mind that, should that investigation point to culpability on his side, he would be able to contest the allegations in a disciplinary hearing or, if he preferred, a pre-dismissal arbitration in terms of s 188A of the LRA. This option would have removed any fear on the side of Van Rooyen that an internal hearing would have been prejudged.

Instead, Van Rooyen elected to resign on 25 July 2009. At the same time, he accepted the applicant's offer (which had accompanied the 23 July letter) that he be paid until the end of August and that he remain on the farm until 31 August 2009.

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30 *Supra* at para 45.

31 Supra.

Van Rooyen's attorneys subsequently sought to sweeten the deal – and to mislead the fiscus – by requesting that his resignation be treated as a dismissal for operational requirements, and that such agreement be in full and final settlement of all claims between the parties. This was not acceptable to the applicant.

Since there was a reasonable alternative available to Van Rooyen, his resignation was premature and could not be construed as a constructive dismissal.

The commissioner, in finding that Van Rooyen had done all that could have been expected of him short of resignation, failed to consider the obvious "alternative" of simply attending his disciplinary hearing or, had he been apprehensive about an internal hearing, a pre-dismissal arbitration in terms of s 188A of the LRA. This was a gross misdirection.

The commissioner proceeded to find that Van Rooyen was not guilty of misconduct. This illustrates that the commissioner misconceived the nature of the enquiry before him. Van Rooyen had resigned before a disciplinary enquiry could be held. In the arbitration proceedings, it was not incumbent on the applicant to prove its case on misconduct. In line with the authorities cited above, it was sufficient to illustrate *prima facie* that there was a case for Van Rooyen to answer, and accordingly that it was reasonable to take disciplinary action against him.

It was not unreasonable for the employer to believe that, at least *prima facie*, there were grounds to suspend Van Rooyen pending a disciplinary hearing. By apparently requiring the applicant to prove the charges against Van Rooyen on a balance of probabilities, the commissioner exceeded his powers by asking himself the wrong question.

Much is made in the award of the fact that Van Rooyen allegedly felt threatened by the police attending at his house (which was on the farm) in the night of 23 July 2009. The applicant's, and specifically Mr Rahmann's actions, are certainly open to criticism. To enlist the services of the SAPS – who have their hands full with serious crime – to confront the senior winemaker, with whom Rahmann

worked closely, in the middle of the night in order to retrieve documents, borders on the bloody-minded. It is also an abuse of public resources. Yet that in itself is not enough to make the employment relationship intolerable.

Van Rooyen was not physically threatened by the police. He testified only that one of the policemen had “threatened” to obtain a search warrant of the house that he was occupying. His claim that he and his family feared for their safety is further belied by the fact that he was content to remain in the house on the farm until 31 August 2009. Unnecessary as Rahmann’s actions were to call in the SAPS, Van Rooyen’s allegation in this regard appears to me to be gilding the lily and does not make the employer culpably responsible for his resignation. Yet the commissioner accorded the aspect of Van Rooyen feeling unsafe a great deal of weight in the award. This was unjustified and irrational.

In light of the aforegoing, the finding that Van Rooyen was constructively dismissed is unsustainable.

Conclusion

It may be that Van Rooyen subjectively felt that his continued employment had become intolerable. Rahmann had lost trust in him and said so. He had been suspended. Rahmann over-reacted by sending the SAPS to his house to recover the documents he had removed from the cellar. But I do not think that these actions by the employer, objectively speaking, were enough to make it culpably responsible for the termination of the employment relationship. The test remains an objective one. To use a winemaker’s analogy, the court cannot consider whether, subjectively speaking, an employee with a thin skin like the Pinot Noir grape may have found employment intolerable. It has to look at the situation objectively, and an employee has to be somewhat more robust and vigorous when there are still options open to him – more like the Cabernet Sauvignon cultivar.

On 24 July 2009, armed with the letter from the applicant’s attorneys, there could have been no doubt in Van Rooyen’s mind that the one option open to him was to have the applicant’s view – ie that he had committed misconduct or had been grossly negligent – tested in an internal disciplinary hearing or a pre-

dismissal arbitration. He had engaged the services of attorneys and could take advice on these options. Yet he chose to offer his resignation in writing the next day, coupled to the condition that he be allowed to remain on the farm until 31 August. Only afterwards did he, through his attorneys, attempt to extract a more favourable deal by structuring his termination as a retrenchment; and it is only after the employer rejected that request that he referred a constructive dismissal dispute to the CCMA.

I find that Van Rooyen was not dismissed, but resigned voluntarily. The arbitration award falls to be reviewed and set aside.

Costs

The applicant has been successful in having the arbitration award reviewed and set aside. Yet I have to consider both law and fairness, in terms of s162 of the LRA. Van Rooyen was armed with an arbitration award in his favour. When the applicant took it on review, he had little choice but to oppose it in these proceedings. In doing so, he had to incur further legal costs in circumstances where he no longer had the security of income or residence on the estate. In fairness, he should not be held liable for the applicant's costs.

Ruling

The arbitration award of the third respondent dated16 February 2010 is reviewed and set aside.

There is no order as to costs.

Anton Steenkamp
Judge

APPEARANCES

APPLICANT:	G A Leslie Instructed by CK Friedlander Shandling Volks Inc., Cape Town
FIRST RESPONDENT:	W Duminy SC Instructed by Laubscher & associates, Bellville.