REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C846/08

In the matter between:

THE WESTERN CAPE DEPT OF	
TRANSPORT & PUBLIC WORKS	**Applicant**
and	
NAOMI FRITZ N.O.	**First respondent**
THE GENERAL PUBLIC SERVICE	
SECTORAL BARGAINING COUNCIL	**Second respondent**
SHIRLEY JANE DOUGLAS	**Third respondent**

Heard: **11 August 2011**

Delivered: **26 August 2011**

Summary: **Review – unfair labour practice and constructive dismissal.**

JUDGMENT

STEENKAMP J

Introduction

1]Ms Shirley Jane Douglas, the third respondent, was employed by the Western Cape Department of Transport and Public Works (the applicant) on a fixed term contract for two years as the Head of Branch: Community Based Public Works Programme (CBPWP). She resigned on 30 October 2006. She referred a constructive dismissal dispute in terms of s 186(1)(e) of the Labour Relations Act[1] to the General Public Service Sectoral Bargaining Council (GPSSBC), the second respondent. The arbitrator, Ms Naomi Fritz (the first respondent) found that the Department's "actions and conduct rendered continued employment intolerable" for the employee and that a constructive dismissal had taken place. She ordered the Department to pay Ms Douglas compensation equal to 14 months' remuneration.

2]Ms Douglas had also referred an unfair labour practice dispute to the GPSSBC arising from earlier alleged unfair disciplinary action in which she was given a final written warning. The arbitrator found that it was an unfair labour practice and ordered the Department to pay Ms Douglas a further three months' compensation.

3]The Department seeks to review both findings.

Background

4]Ms Douglas was employed on a fixed term contract for a period of two years

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1 Act 66 of 1995 ("the LRA").

in January 2006. It was due to terminate on 31 December 2007. She was employed at the level of Director and was responsible for programme management, implementation and coordination of the Expanded Public Works Programme (EPWP) in the Western Cape.

5]On Friday 23 June 2006, Ms Douglas had to go to Pretoria to attend a meeting for the Department. As she was due to attend another meeting in Gauteng on Monday 26 June 2006, she had not planned to return to Cape Town over the weekend. The Friday meeting finished at lunchtime. Douglas then rented a car at her own cost in order to drive to Magoebaskloof where she owns a smallholding. She phoned her secretary to tell her of her movements. On her way there, she received a telephone call from the office manager, who told her that the Head of Department, Mr Thami Manyathi, wanted her to attend a meeting in Cape Town on Saturday morning (24 June) at 0830. At this stage she was already some 350km from Pretoria.

6]Douglas phoned Polokwane airport to inquire about flights to Cape Town, but all flights were fully booked as the school holidays had just started. She also phoned Manyathi and explained that she was already in Magoebaskloof; that there were no flights available from Polokwane; that she was available at her virtual office at her home in Magoebaskloof to attend a conference call; and that she had arranged three of her staff members to be present at the meeting the next morning. The only alternative would be to drive back to Johannesburg in order to try and get a flight from OR Tambo airport, but that would entail another 3-4 hour drive; she had been up since 04:00 that morning; and she would endanger her own safety and that of other road users if she had to drive straight back to Johannesburg that night or at 02:00 the next morning. Manyathi nevertheless insisted that she get back to Cape Town for the Saturday morning meeting.

7]On Saturday morning, Douglas phoned Manyathi again, but he refused to take her calls. She remained in contact with her staff members who attended the meeting. They completed the MINMEC report – the purpose of the meeting – and emailed it to her. She made corrections and emailed it back.

8]On 27 June 2006 Douglas received a notice to attend a disciplinary hearing on a charge of gross insubordination because she had not attended the Saturday meeting. At the disciplinary hearing, she was found guilty of gross insubordination and the chairperson imposed a final written warning, coupled with a month's unpaid suspension. On appeal the MEC, Mr Marius Fransman,

removed the suspension and upheld a final written warning valid for six months. Ms Douglas then referred an unfair labour practice dispute to the GPSSBC in terms of s 186(2)(b) of the LRA.

9]The next significant occurrence was on 5 and 6 October 2006 when the Department held a strategic planning session in Gordon's Bay. Members of the senior management service, including Douglas, attended the session. Manyathi presented a new "macro structure" for the Department. The structure made no mention of Douglas's position.

10]On 16 October 2006, Manyathi told Douglas that an "interim structure" would be implemented in terms of the new macro structure; and that her position as head of branch of the CBPWP would be split into two, comprising the "implementation" and "strategic" functions. Douglas would henceforth concentrate on the strategic function only and a Ms L Ramncwana would take over the implementation function. The meeting lasted between 15 and 30 minutes.

11]On the same day, Manyathi called a briefing session with senior managers in the Department. He presented the "interim arrangement" – envisaged to be in force for about a year – in terms of which part of Douglas's functions would be removed to enable her to focus on strategic functions. She would remain on Director level and continue to receive the same salary and benefits though. The "interim structure" was confirmed in a departmental communiqué to all staff the next day, 17 October.

12]Douglas wrote to Manyathi on 17 October. She objected to what she perceived to be a unilateral change to her terms and conditions of employment. She requested a clear outline of what her new position would entail and the proposed terms and conditions of a new contract of employment. She said that she was confident that "...we can resolve this in a manner that is agreeable to both parties without a formal dispute process". Manyathi did not respond.

13]On 19 October 2006, Douglas wrote to Manyathi again, requesting an urgent response by Friday 20 October 2006. She received no such response.

14]Douglas then obtained legal advice. On 20 October 2006 her attorney, Mr

Wayne Field of Bernadt Vukic Potash & Getz, wrote to Manyathi. He set out the sequence of events and repeated the averment that her terms and conditions of employment had been changed unilaterally. He requested a response by 25 October 2006 but received none.

15]On 26 October Field wrote to Manyathi again, asking when he could expect a response. Manyathi still didn't respond, but on the same day – 26 October – the Acting Head of Department, Mr Darryl Jacobs, wrote to Douglas directly. He stated:

"The Employer does not wish to engage you on your interpretation of what transpired at the various meetings you refer to, although this should not be construed as acceptance that your interpretation is correct. Please note that par 1.2.1 of your contract clearly states that you shall serve the employer in the CBPWP Branch at such place as may from time to time be directed by the Employer.

Your high level, specialised focus as consulted and communicated with you is not outside the duties as listed in par 5.2 of your contract. While the responsibilities are reduced, this is to allow you to focus your efforts at a strategic level to break the poverty cycle afflicting too many in or community."

16]Jacobs sent a copy of the letter to Field the next day, 27 October 2006.

17]On 30 October 2006, Douglas tendered her resignation in writing to Manyathi. She stated that she regarded herself "as having been left with no option than to resign" for a number of reasons, primarily because she considered her terms and conditions of employment to have been changed unilaterally. She also referred to the unfair labour practice arising from the final written warning imposed on her for gross insubordination.

18]Douglas then referred a dispute to the GPSSBC alleging constructive dismissal. This dispute was consolidated with the unfair labour practice dispute and the two were heard together.

The arbitration award

19]The arbitrator first dealt with the unfair labour practice claim. She had regard to the test for insubordination formulated in *CCAWUSA & another v Wooltru Ltd*

t/a Woolworths (Randburg)[2], ie: “When the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilful disobedience), or when the employee’s conduct poses a deliberate (wilful) and serious challenge to the employer’s authority.”

20]The arbitrator took into account that Douglas attempted to get a flight. She arranged for staff members to be present; she set up and created a "virtual office" by availing herself telephonically and electronically; and it was physically impossible for her to get back to Cape Town in time to attend the meeting. The arbitrator found that it was unreasonable to expect her to execute the instruction under those circumstances. She found that Douglas's actions could not be regarded as insubordinate and that she displayed no wilful disobedience.

21]On the aspect of a constructive dismissal, the arbitrator considered four points:

(a)Douglas testified that the MEC has said that he wanted her "out". However, Manyathi denied that. He did say that the MEC expressed a sense of frustration as he did not believe that Douglas bought into the "Learnership 1000" program. The arbitrator expressed the view that the MEC doubted Douglas's commitment to the programme.

(b)There was not sufficient guidance and support for Douglas.

(c)The disciplinary hearing, leading to a final written warning, was unfair.

(d)The Department had changed Douglas’s terms and conditions of employment. She received no response to her letters and her concerns were not addressed.

22]The arbitrator found that Douglas terminated the contract because she found continued employment intolerable "...in that she did not know where the next blow was going to come from". The arbitrator also found that there was no proper consultation with Douglas with regard to the restructuring and the impact on her post.

23]With regard to the argument that Douglas should have lodged a formal

2 (1989) 10 *ILJ* 311 (IC) 314 I.

grievance, the arbitrator considered that Douglas was on medication for anxiety, and that she could not have been expected to lodge a grievance "that exposed herself to further continued intolerable conditions".

24]The arbitrator found that there was a constructive dismissal and ordered the Department to compensate Douglas in an amount equivalent to the balance of her fixed term contract, i.e. 14 months' salary.

The test on review

25]In considering whether the arbitrator's finding on the unfair labour practice is reviewable, I need to apply the test as set out in *Sidumo v Rustenburg Platinum Mines Ltd*[3], i.e. whether the conclusion reached by the arbitrator was so unreasonable that no other reasonable arbitrator could have come to the same conclusion.

26]With regard to the finding on constructive dismissal, though, the test is more nuanced. The parties were *ad idem* that the Commissioner exceeded her powers by awarding compensation equivalent to 14 months' remuneration. Ms Douglas submitted that this part of the award should be substituted with a compensation award equivalent to 12 months' remuneration.

27]The first question to consider in a constructive dismissal dispute, though, is whether there was a dismissal at all. This is a jurisdictional question.

28]I had occasion to consider this question in *Asara Wine Estate & Hotel (Pty) Ltd v JC van Rooyen & others*[4], a matter that was argued a day before this one. In that case, I considered the *dictum* of the Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others.*[5] Although the court in that case had to consider s 186(1)(b) of the LRA[6], it dealt with it as a species

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

4 Case no C272/2010 (unreported, Labour Court, Cape Town, 24 August 2011).

5 (2008) 29 *ILJ* 2218 (LAC).

6 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."

of constructive dismissal and held as follows:[7]

“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."

29]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."

30]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.

31]In the case of an alleged constructive dismissal in terms of section 186 (1) (e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that her 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

7 At paras [39] – [41].

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*.

32]As I pointed out in *Asara*, I am bound by the authority in *SA Rugby*.[8] This court also applied the dictum in *SA Rugby* in the subsequent case – heard post *Sidumo* -- of *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others.*[9] 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.

33]The test I have to apply in dealing with the review of the constructive dismissal aspect of the award, 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*, but whether the Commissioner correctly found that Ms Douglas had been dismissed.

Unfair labour practice

34]The arbitrator's finding on the on the unfair labour practice claim cannot be said to have been unreasonable. Ms Douglas did not display any wilful disobedience. It was physically impossible for her to attend a Saturday morning meeting in Cape Town at short notice. She did everything possible to make herself available and to assist the Department. Manyathi's insistence that she physically attended the meeting in these circumstances was unreasonable. I agree with the arbitrator that there was no wilful disobedience of the instruction. Having made respondent, the award of compensation equal to 3 months' salary on this aspect was not so unreasonable that no reasonable arbitrator could have ordered the same compensation. This leg of the review application must fail.

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8 *Supra*.

9 (2009) 30 *ILJ* 2093 (LC) para [6].

Constructive dismissal

35]As I have mentioned, the parties are at idem that the Commissioner exceeded her powers by awarding 14 months' compensation on constructive dismissal claim. However, this only becomes relevant if the Commissioner correctly found that there was a dismissal.

36]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".

37]The test for determining whether or not an employee was constructively 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".

38]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

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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.

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.

39]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.

40]In *Eagleton & Others v You Asked Services (Pty) Ltd*[13] this Court considered the three requirements that an employee must prove in order to claim constructive dismissal. These requirements are that:

22.1the employee terminated the contract of employment;
22.2continued employment had become intolerable for the employee; and
22.3the employer must have made continued employment intolerable.

41]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).*

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

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

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

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

43]I also have regard to the recent *dictum* of the Labour Appeal Court in *Jordaan v CCMA*[18], where the court cited with approval its earlier decision in *Old Mutual Group Schemes v Dreyer*[19] 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 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."

44]In *Murray v Minister of Defence*[20] -- 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

(LAC) para 8; *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) para 49.1.

18 [2010] 12 BLLR 1235 (LAC) 1239 B-E.

19 (1999) 20 *ILJ* 2030 (LAC) 2036.

20 (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.

'reasonable and proper cause'."

45]In the present case, Ms Douglas may well have felt that her employment had become intolerable. Some crucial responsibilities had been taken away from her without proper consultation. She was, as she explained in her very able oral argument, a passionate civil servant who wished to fulfil the duties assigned to her during her fixed term period of employment over two years.

46]I agree that there was not sufficient consultation with Ms Douglas before her position was restructured. On the other hand, though, she was a senior employee at director level. Both the level of employment and her salary remained unchanged. This was not a case where, as in *Riverview Manor (Pty) Ltd v CCMA & others*[21], the employer unilaterally reduced the employee's salary. I do not consider her diminished responsibilities to equate to a demotion. Even if it were, she had another option open to her, i.e. to refer another unfair labour practice claim to the Bargaining Council. She had already availed herself of this remedy before, and it was known to her.

47] Nor do I agree that the change in her responsibilities amounted to a repudiation of her contract of employment. In terms of clause 1.2.1 of her contract of employment:

"The employee shall serve the employer in the Community Based Public Works Programme branch at such place as may from time to time be directed by the employer or any other officer duly authorised thereto in this respect; "

and in terms of clause 1.2.3:

"The employee may be required perform other duties or to work at other places that may reasonably be required by the employer."

48]As a senior employee, some flexibility was required of the employee. The restructuring was not arbitrary or irrational and would impact on her for an interim period only – at most for a year. It is so that this would comprise a major part of her fixed term period of employment. She was clearly frustrated because of the fact that her responsibilities had been diminished. However, there was no real prejudice to her. The test for constructive dismissal remains an objective

21 [2004] 2 BLLR 177 (LC).

one. Objectively speaking, the actions of the employer were not sufficiently serious to make continued employment intolerable. The Department explained the rationale for the interim restructure. It did not sufficiently consult with Ms Douglas, but it cannot be said to have been culpably responsible for her resignation.

49]The failure of the Department, and specifically Mr Manyathi, to respond to Ms Douglas's conciliatory attempts to resolve the matter by way of correspondence or a meeting, is deplorable. Nevertheless, she did have further options open to her before deciding to resign. She could have followed the formal grievance procedure, of which she was aware. She could also have referred an unfair labour practice dispute to the Bargaining Council. Her decision to resign was premature.

Conclusion

50]I find that Ms Douglas's resignation did not amount to a constructive dismissal. The contrary finding of the arbitrator in this regard must be reviewed and set aside.

Costs

51]Both parties have been partly successful. In law and fairness, there should be no order as to costs.

Order

52]The application to review the arbitrator's award concerning an unfair labour practice and the award of compensation equal to three months' remuneration is dismissed.

53]The arbitration award concerning the finding of constructive dismissal is reviewed and set aside.

54]There is no order as to costs.

A J Steenkamp

Judge

APPEARANCES

APPLICANT: MC Solomon

Instructed by the State Attorney.

SECOND RESPONDENT: In person.