REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Reportable
C560/2019

In the matter between:
NKOSINATHI MOGOMATSI

And

LILLIAN GOREDEMA N.O. **First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**
SANLAM LIFE INSURANCE **Third Respondent**

Date heard: 2 and 4 February 2022 by virtual hearing
Delivered: 4 May 2022
Summary: Review of an arbitration award in respect of a constructive dismissal claim. Employee suffering from depression and acute anxiety; the approach to be taken to the 'reasonable employee' standard in such matters discussed. Objective test should encompass the undisputed existence of an employee's mental ill-health, when an assessment is made as to whether the conduct of an employer rendered the continued employment relationship intolerable. Award reviewed and substituted.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number WECT11419-19. The first respondent, (the Commissioner), found that the applicant had resigned and was not constructively dismissed.

[2] The applicant was appointed by the third respondent (the Company) as a Senior Penetration Tester: IT Infrastructure Shared Services, on the 1 June 2017. The function he performed was as 'an ethical hacker' and his position was in the range of middle-management. The transcript of the arbitration reflects that his skills were scarce and highly regarded. The employment relationship terminated on the 30 May 2019, and the applicant referred a constructive dismissal dispute to the CCMA on the 18 June 2019.

[3] The applicant brought the review of the Award unassisted. In his pro-forma founding affidavit he stated *inter alia* the following:

> "In her analysis the Commissioner failed to realise the following:
>
> 1. The applicant was given an ultimatum to either apologise to Willem Smit or resign, three days before the applicant resigned.
>
> 2. The applicant was mentally ill at the time of his resignation."

[4] The test on review for constructive dismissal is whether the Arbitrator was correct on all the evidence before her.[1] In his evidence at arbitration, the applicant testified that his problems at work began in December 2018. He stated that he started debating with his colleagues about politics and "they kept talking about how politics are unqualified and how democracy, apartheid was okay, and I started. So I started debating that issues." He requested leave in December 2018 for 20 days. His leave request was late and he had a sick mother he wanted to visit. His request was declined by his manager Chris Vermeulen. The transcribed record reads as follows:

[1] Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd & others (2019) 40 ILJ 1539 (LAC)

"**MR MOGOMOTSI**: And actually now, I'm now doing - okay. Chris and Willem knew I went to ….Willem knew my mom was (indistinct). Chris knew I went to a psychologist a couple of months ago…"

[5] The applicant went on to testify that although his manager Chris Vermeulen declined permission for him to take leave, he went home anyway. In October 2018, he had been referred for medical treatment for acute anxiety. A doctor's referral note was in the bundle of documents before the Commissioner, dated the 29 October 2018. It states that he had acute depression and lowered mood and a lot of family and work stress. He testified that he was going through stress and was unable to cope and "they said it was acute depression". The Commissioner asked him if he was still under medication:

"**ARBITRATOR**: Let's stop there. But let me ask you something: are you still on medication?

MR MOGOMOTSI: Uhm, yes I was ….(intervention)

ARBITRATOR: I'm asking you because the way you are giving your evidence, it's disjointed and I want to make sure that you can handle this.

MR MOGOMOTSI: Ja, I think I can handle"

[6] The applicant went to recount that he was asked to submit his mother's medical certificate by no later than 12 December 2018. He did not comply with the request as he was wary of sending his mother's personal details "on unsafe channels". That his mother's condition was known to his manager was confirmed in Vermeulan's testimony. When the applicant got back to work after the leave, his access to work channels had been blocked but this was later revoked on the same day. The Award goes onto to record the following testimony by him:

> "13. He had a key performance meeting (KPA) meeting with the manager in March 2019, which he considered to be the worst since his employment He said that although he was told that his work was fine, his time keeping and

relationship with fellow employees was poor. He was also advised of a pending disciplinary hearing for the unauthorized absence in December.

14. A meeting was held at which his absence was discussed, and he said he was found not guilty because his then supervisor Kelvin Adams (Kelvin) and a colleague, Willem Smit had "lied about his absence".

15. In March 2019 he had asked his new supervisor "Bevan", to allow him to do two courses one in Mexico and the other on line with the company's funding, and he was advised that the manager had said that there was no money to finance the courses. He believed that this was not true.

16. In March 2019 he was also advised that his CEH certificate had expired He said he had to rewrite the exam as another employee had been dismissed for not having a valid certificate a month prior to this.

17. He said he paid the tuition fees after being told that the company would refund the tuition fees, but the manager declined to reimburse him the tuition fees and refused to approve two weeks study leave which he found to be unfair.

18. He heard that Bevan and Willem had been nominated to attend a security conference in Las Vegas leaving him out. He considered this to be a creation of intolerable conditions of employment.

19. On 7 March he had not been feeling well and advised the manager. On 8 March he was called to a meeting with "Vernacia" from the Human Resource Department and the manager to explain his absence He told them that he suffered from gout and the manager compared him to another employee who was known to suffer from gout but was always at work. He sent them an internet link on Gout as he felt unhappy to being compared to another employee.

20. He had told Bevan that he felt unfairly treated by the manager and asked him not to treat him unfairly

21. In April 2019 he had attended a meeting with a client with Bevan and Willem Smit. After the meeting they had accused him of over promising delivery to the client. He explained this was his way of putting pressure to deliver on himself He had delivered to the client, but no member of the team congratulated him which was the norm.

22. On 6 May he was charged with unprofessional behavior which brought Respondent's name, brand and reputation into disrepute for the way he communicated with a client. He was found guilty and the sanction was a final written warning. The chairperson had said he would get a warning signed by the manager's boss and this did not happen. He is unhappy that the final written warning is still valid although he never received the signed warning.

23. On 24 May 2019 there was a hacking incident at the Kenya Sanlam network. He had been working on a project but he had told his colleagues that he would help after he completed his project and at 01h35 on Saturday night he sent a message to his colleagues that he had found a solution to the problem and he was told that a discussion would be held on Monday morning. At that meeting he was told by the other team members that they had already found a coded script and told that if he was a team player he would have been aware of this.

24. He was summoned to the manager's office after the meeting and told to apologise to Willem for accusing him of lying or resign. He said that he had found that the team had found a plain script and not an encrypted as they had alleged so he accused them of lying.

25. He said that he felt that this was too much for him and he was stressed. On 28 May he advised the manager that he would not report for duty as he was not feeling well. The manager asked him to come for work for a few

minutes and he refused to do so. Thereafter he sent him an e-mail resigning and stating that he was doing so due to the intolerable environment at work.

[7] The transcribed record also reflects that the applicant tried to raise his mental health condition during cross-examination of Vermeulen, as follows:

"**MR MOGOMOTSI**: Did you, when I resigned, you received by doctor's note saying I was, I was, I was stressed and (indistinct not speaking clearly,) right? The one that I gave you.

ARBITRATOR: I want you to zero in on the issue or about leave. This doctor's note of leave and what, he never talked about that unless you want to say to him, 'on that day, I gave you a note'. But what has that got to do with what he said because he has agreed with you. . You said, 'he was forcing me to come when I was ill, when I was at home'.

MR MOGOMOTSI: Yes, yes.

ARBITATOR: And he said 'yes because I wanted to suspend you' but refused to come. So there is no issue there. What is the issue? Maybe you got an issue, but I've got that he said çome for 5 minutes, there's something I want to discuss with you, but he wanted to give you a suspension letter for being disruptive during a critical period of the Kenya whatever."

[8] The arbitrator then directed the cross-examination towards the applicant's gout and his absence from work when he was suffering from this ailment. The issue of the applicant's stress and anxiety was not disputed or mentioned by the company in its evidence. More surprisingly there is no mention of it in the Award itself. In the answering papers of the application before me, it appears that the company did not have proper regard to the transcribed record when it was averred inter alia that:

"….The applicant made no mention of the fact that he was "mentally ill" or that his state of mind was such that the alleged conduct of certain member of the third respondent rendered continued employment intolerable. Rather the evidence

regarding medical issues related solely to the question of the applicant's alleged suffering from gout."

[9] The Commissioner's analysis of the evidence before her included the following:

> "66. I accept the manager's and Mr Conradie's submission that the Applicant's issues began when the manager began to directly manage him and his colleagues after the resignation of Kelvin Adams. Although the Applicant denied coming to work late and the absenteeism I find the manager's evidence more probable and credible as this issue had been raised with him at the KPA meeting. I however fail to understand how this issue amounted to a creation of any intolerable condition for the Applicant. This was related to operations of the Department and cannot be objectively assessed as amounting to a creation of hostile working conditions by the manager. The Applicant on his own admission had gone on leave without approval and to (sic) support that the manager was not out to get him having given the Applicant the benefit of the doubt.
>
> 67. *From then on the Applicant began to imagine persecution by the manager*. I find that the issue of his attendance of courses and expiration of his certificate which he raised as issues of intolerability were not such. I accept the manager's evidence that the courses were not relevant as probable and credible as well as the fact that he had to renew his certificate and not write an examination. He did not challenge this although it was clear from his evidence that he assumed the manager wanted to dismiss him for this, which fact was not borne by evidence…..
>
> 69. The Applicant testified that he had complained about the unfair treatment he got from the manager to his supervisor but only to ask the supervisor not to treat him that way. However, the Applicant admitted to not lodging a grievance about the treatment admitting it was a mistake no to do so. *The Applicant must have known that not to do so would mean that he would*

wallow in assumptions and miss out an opportunity to address the issues with the manager….

70. I find that the Applicant failed to prove that the issue of his illness which he also raised as being part of intolerable conditions was not such. It was a situation where the manager felt that he was milking his illness with gout by being absent from work, as there was another employee suffering from gout who even walked with a limp but was always at work….

71. I find that the Kenya malware incident was blown out of proportion by the Applicant. He believed that he was working with the team, but the manager and other team members felt that he had not worked them (sic). He confirmed this partially when he said that he felt better working on his own and fighting about what solution he had found with the team does not contribute towards intolerable conditions but actually creates a hostile working environment among the team members and I find it commendable that the manager took the issue to his office with a view to resolving the issue rather than alienating the applicant I find that after this the Applicant had decided to resign even though the members of the team were asking him not to resign. A reading of the messages do not state what his problem was.

72. Whilst I find that the manager's conduct in asking him to come to work for a few minutes when he had reported sick is not acceptable, this did not render Applicant's employment intolerable I cannot ignore the fact that the intention was to serve him with a suspension letter. *Applicant would have been afforded an opportunity to state his case rather than ranting about the issues on the message platform.*" (Emphasis mine)

[10] In the Court's view, on the facts before her, it was incorrect for the Commissioner to ignore the issue of the applicant's stress and mental ill health, and in fact to steer him away from raising same when he cross-examined his manager. It is unclear as to the reason for omitting Applicant's undisputed evidence that he suffered from stress and acute depression and that his employer was aware of this.

This omission affects the manner in which the Commissioner examines the applicant's actions and state of mind during the material period leading up to his dismissal, and pressures on him, as is reflected in the paragraphs above, especially those phrases in italics that I have highlighted.

[11] The prevalence of stress and mental ill-health in the workplace is a phenomenon that requires comprehension and acknowledgment and should not be stigmatized. As the authors of *'Excessive Stress and Eliminating Barriers to Decent Work'*[2] have stated:

> "The prevalence of excessive stress and stress-related psychological illness emanating from the workplace has become a societal concern. As alarming statistics are revealed across the globe, focus on the issue intensifies…….
>
> In ……. developed nations, policymakers, tripartite agencies, governments, employers and employees as well as academics have paid significant attention to issues of employee mental health and well-being. These foreign jurisdictions have for some time been addressing the problem with legislation and other methods.
>
> Turning to South Africa, a 2016 report indicated that workplace stress and depression, anxiety disorders and burnout cost the national economy some R40,6 billion per year, or 2,2% of gross domestic product (GDP). Reasons for high stress levels among South Africans abound, but include increased demands experienced both in and outside the workplace, and an inability to deal with these. South African jurisprudence is following in the footsteps of the developed jurisdictions mentioned above, particularly as more cases of excessive stress in the workplace emerge. In this regard, Landman argues that claims for mental or psychological harm or injury in the South African workplace may intensify in time as has been seen in other jurisdictions."

[2] (2020) 41 ILJ 779

[12] Our Labour Courts have dealt with this question in the context of an unfair discrimination claim[3], and in assessing whether mental health problems provide an adequate defence to charges of misconduct, or have been properly dealt with by an employer as 'incapacity'. The LAC has also dealt with a constructive dismissal claim where the depression of the employee was central in **National Health Laboratory Service v Yona & Others**[4]. In that case the LAC found that a constructive dismissal had taken place when an employer failed to assist an employee who resigned while suffering from chronic depression, even though the depression was not caused by the work-related situation. Using the reasonableness test as applied at that point of our jurisprudence, the LAC concluded as follows:

> "[41] In my view, the appellant, through its HR manager Mr Abraham, failed dismally to accord fair and compassionate treatment to Ms Yona at the time of desperate need — when she was suffering from a severe work-related mental illness and impecuniosity resultant from her denial by Mr Abraham of extended sick leave benefits. As if that was not enough, Mr Abraham, in his letters of 17 February and 19 April 2010, accused Ms Yona of failing to contact or communicate with the appellant, which was factually incorrect because the entire duration of her absence was covered by valid sick notes which were all submitted timeously to the appellant's HR department.
>
> [42] Again, during his evidence, Mr Abraham finally revealed, seemingly unconsciously, that the reason Ms Yona was not asked to apply for extended sick leave was because granting her the extended sick leave would have entailed what he described as 'fruitless expenditure' on the part of the appellant. How payment of legitimate extended sick leave under the present circumstances would have amounted to fruitless expenditure remains a mystery to me. The NHLS Act gives a clear mandate that 'all expenditure incurred by the Service under this Act must be defrayed from the funds of the Service'. It seems to me that this was just a manifestation of the extent of lack of care and compassion on the part of Mr Abraham towards Ms Yona at the time. It is common cause that this desperate situation culminated in Ms

[3] Legal Aid v Jansen (2020) 41 ILJ 2580 (LAC)
[4] (2015) 36 ILJ 2259 (LAC)

Yona being paid a paltry R1,000 or so as her nett salary for the month of May 2010, occasioned by 'leave without pay' deductions. I am venturing to imagine that the extent that Ms Yona was mistreated at the hands of Mr Abraham was such that she was 'subjected to a psychological and traumatic degradation of her human dignity', particularly given the fact that she held a senior managerial position and, therefore, was presumably well respected amongst the staff, generally — let alone those under her — in the workplace.

[43] …….

[44] I am inclined to conclude, on the facts and circumstances of this case, that Ms Yona's resignation was neither voluntary nor intended to terminate her employment relationship with the appellant. Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant (through Mr Abraham) towards her. Whether Mr Abraham intended to repudiate the appellant's employment contract with Ms Yona by his conduct is immaterial. Suffice to hold that the appellant's unfair conduct towards Ms Yona rendered her continued employment with the appellant intolerable."

[13] Dealing with an unfair discrimination claim, the LAC in **Legal Aid SA v Jansen**[5] had this to say:

"[40] The stresses and pressures of modern day life being what they are, depression is common in the workplace. Employers from time to time will need to manage the impact of depression on an individual employee's performance. The approach to be followed will depend on the circumstances.

[41] In the first instance, depression must be looked at as a form of ill health. As such, an incapacitating depression may be a legitimate reason for terminating the employment relationship, provided it is done fairly in accordance with a process akin to that envisaged in items 10 and 11 of the Code of Good Practice: Dismissal. If an employee is temporarily unable to

[5] [2020] JOL 47984 (LAC)

work for a sustained period due to depression, the employer must investigate and consider alternatives short of dismissal before resorting to dismissal. If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability. Dismissal of a depressed employee for incapacity without due regard and application of these principles will be substantively and/or procedurally unfair.

[42] Depression may also play a role in an employee's misconduct. It is not beyond possibility that depression might, in certain circumstance, negate an employee's capacity for wrongdoing. An employee may not be liable for misconduct on account of severe depression impacting on his state of mind (cognitive ability) and his will (conative ability) to the extent that he is unable to appreciate the wrongfulness of his conduct and/or is unable to conduct himself in accordance with an appreciation of wrongfulness. Should the evidence support such a conclusion, dismissal for misconduct would be inappropriate and substantively unfair, and the employer would need to approach the difficulty from an incapacity or operational requirements perspective. Alternatively, where the evidence shows that the cognitive and conative capacities of an employee have not been negated by depression, and he is able to appreciate the wrongfulness of his conduct and act accordingly, his culpability or blameworthiness may be diminished by reason of the depression. In which case, the employee's depression must be taken into account in determining an appropriate sanction. A failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness.

[43] Conative ability is a question of fact and an employee denying conative ability, as the respondent in effect does, bears an evidentiary burden to prove the factual basis of the defence. To hold otherwise would unduly undermine the managerial prerogative of discipline where misconduct is committed by employees suffering all manner of mental difficulties such as depression, anxiety, alcoholism, grief and the like. As explained, the fact that an employee was depressed, anxious, grieving or drunk at the time of the

misconduct (but not entirely incapacitated thereby) is most appropriately viewed as a potential mitigating factor diminishing culpability that may render dismissal for misconduct inappropriate or may require an incapacity investigation before dismissal. That much is trite.

[44] However, for an employee to succeed in an automatically unfair dismissal claim based on depression, the question is different. Here the enquiry is not confined to whether the employee was depressed and if his depression impacted on his cognitive and conative capacity or diminished his blameworthiness. Rather, it is directed at a narrower determination of whether the reason for his dismissal was his depression and if he was subjected to differential treatment on that basis. Here too, the employee bears the evidentiary burden to establish a credible possibility (approaching a probability) that the reason for dismissal was differential treatment on account of his being depressed and not because he misconducted himself."

[14] How should an adjudicator assessing a constructive dismissal claim approach the effect of mental health? The principles of determining a constructive dismissal *per se* and the review test to be used in such circumstances were set out by the LAC in **Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd & others (supra)** as follows:

"[39] As stated at the outset, the question for determination is whether the appellant was in fact dismissed. The existence of a 'dismissal' is a jurisdictional fact necessary for the CCMA to determine the dispute by way of arbitration. If the jurisdictional fact is absent, the CCMA is not entitled to arbitrate the matter. Section 186(1)(e) of the LRA essentially defines a constructive dismissal as an employee terminating his or her contract of employment because the employer made continued employment intolerable. The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance.

[39] The relevant principles were stated many years ago in *Pretoria Society for the Care of the Retarded v Loots* as follows:

'When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.'

[40] Thus, employment must objectively have been rendered intolerable in the sense that no reasonable employee could be expected to put up with the conduct of the employer. At the same time, the employee must subjectively have found the conduct to be intolerable……."

[41] In Albany Bakeries Ltd v Van Wyk & others this court emphasised the importance of an employee exhausting reasonable alternatives to resignation. It stated:

'How will an employee ever prove that [the employment had been made intolerable] if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.'"

[15] It is striking that the 'objective' test used is *inter alia*, that no 'reasonable' employee could be expected to put up with an intolerable situation. The legal meaning of a reasonable person is well defined in *Merriam Webster* as "a fictional person with an ordinary degree of reason, prudence, care, foresight or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an objective standard to measure or determine something." The reasonable employee test is derived from our law of delict.

[16] It should be noted that in South African law the reasonable person test is flexible depending on the circumstances of each case[6]. It is trite that at times an adjudicator may raise the standard when a party has expertise in a particular field – i.e. when assessing negligence of an expert. The standard may be lowered in a person without full legal capacity. In my view, in constructive dismissal disputes in a matter such as this one, the application of the reasonable employee standard must be applied flexibly, taking into account the impact of an employer's conduct on an employee suffering from a mental health condition.

[17] In effect, in the circumstances of this case, an 'objective test' is called for which encompasses the undisputed existence of an employee's mental ill-health, when an assessment is made as to whether the conduct of an employer rendered the continued employment relationship intolerable. In the arbitration proceedings, the evidence of the employer was geared to establishing how the conduct of the applicant, since October 2018, was unacceptable and damaged the employment relationship. No mention was made of the employee's anxiety and depression. The employer's evidence as to the options facing the applicant when the matter came to a head, were dealt with by Vermeulen as follows:

"So, I told him that he is in dangerous territory. I told him that he either needs to change his attitude, go back to Willem and apologise or we're going to end up again with a disciplinary process, which he shouldn't be aiming for because he's already on a final written warning, or he has the option to resign. Those are the three options, so he needs to make his choice…"

[6] Ahmed R "The standard of the Reasonable Person in Determining Negligence – Comparative conclusions" PER/PEJ 2021 (24) T p14

[18] The decision to draft a document suspending the applicant followed accusatory messages sent by the applicant to his colleagues (described by the Commissioner as "ranting"), which also stated that he was going to resign. Vermeulen explained:

"Now at that stage, I was concerned that he was clearly a disgruntled employee with a lot of privileged access in the middle of a crisis. So I wanted to start a formal disciplinary process…"

[19] There was no evidence that the Company considered an incapacity/ill health process rather than a disciplinary process in the run up to the applicant's resignation.[7] The approach of denying a common cause fact i.e. the applicant's mental ill-health, and of sweeping it under the carpet so to speak, continued at arbitration. In the Court's view, an assessment of the applicant's claim correctly made, should have incorporated the common cause mental ill health suffered by him during the material period. This approach would view the series of incidents the applicant iterated in his explanation of what led up to his resignation, and his employer's reaction thereto, in a different light. It would take into account that in ignoring the mental health issues of an employee, conduct of an employer can be rendered unfair. While it may be considered onerous for an employer to be capacitated to meet these challenges, it can be accepted to be a necessary requirement in this day and age.

[20] I find therefore that on the evidence before the Commissioner, the applicant did prove that the employment relationship became intolerable, and that the termination of the employment relationship in this case should, on a correct assessment, have been found to be a constructive dismissal.

[21] The applicant was employed by the applicant for some two years and any solatium paid to him as compensation should take the relatively short employment period into account. As the Commissioner explained to the applicant, 12 months'

[7] I note that had the employer dismissed the applicant for misconduct, its failure to take into account his incapacity may well have been found to be an unfair dismissal.

salary is the ceiling in such a claim. I am of the view that an amount equivalent to four months' salary would be equitable in this case. I make the following order.

Order

1. The Award under case number WECT11419-19 is reviewed an set aside and substituted as follows:

1.1 The applicant was constructively dismissed;

1.2 The third respondent is ordered to pay the applicant compensation in an amount equivalent to four months of his salary calculated as at the time of his dismissal, being 4 x R74 392.50 = R297 570 (Two hundred and ninety-seven thousand, five hundred and seventy Rand only) .

2. The said compensation is to be paid within 20 court days of receipt of this judgment.

H. Rabkin-Naicker
Judge of the Labour Court of South Africa

Appearances:
Applicant: In person
Third Respondent: Grant Marinus Attorneys