REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 360/2012

In the matter between:

WESTERN CAPE EDUCATION DEPARTMENT	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
CRAIG BOSCH N.O.	**Second Respondent**
JULIAN JOHN GORDON	**Third Respondent**

Heard: **20 February 2013**
Delivered: **18 March 2013**
Summary: Review – constructive dismissal – whether order for reinstatement incompatible with constructive dismissal.

JUDGMENT

STEENKAMP J

Introduction

[1] Is an order for reinstatement incompatible with a finding of constructive dismissal?

[2] That is the fascinating conundrum that arises in this application for review.[1] The third respondent, Mr Julian Gordon (the employee) resigned. He claimed constructive dismissal. The arbitrator, Mr Craig Bosch (the second respondent) agreed. The arbitrator also found that the dismissal was unfair. But he went further – he ordered the applicant (the Department) to reinstate the employee. The Department seeks to have that award reviewed and set aside.

[3] The review application raises the question whether an order for reinstatement is competent, given that the employee resigned because "the employer made continued employment intolerable" for him in terms of s 186(1)(e) of the LRA; and section 193(2)(a) requires an arbitrator to reinstate an employee who has been unfairly dismissed unless "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable". It also raises a prior question: If the employee at arbitration seeks reinstatement, can it be said that his continued employment was intolerable in the first place, or does it beg the question?

Background facts

[4] The employee (Gordon) has been employed in the Public Service for more than 23 years since 1986. At the time relevant to this dispute he occupied the position of deputy director: personnel management in the Department.

[5] The employee had a heart attack in July 2006. He recovered, but was subsequently diagnosed with post-traumatic stress disorder and clinical depression. He was booked off sick from mid-February 2007 and was hospitalised on 27 March 2007. In June 2007 he applied for ill-health retirement. On 2 June 2007 he also applied for temporary incapacity leave. He gave the relevant documents to the then human resources

[1] In terms of s 145 of the Labour Relations Act 66 of 1995 (the LRA).

director, Mr Gerald Elliott, to whom he reported. There were no witnesses available and Elliott undertook that he (Elliott) and his secretary would sign as witnesses. They did not do so. Almost two years later, in May 2009, the Department told Gordon that his application for temporary incapacity leave had not been considered because it had not been signed by two witnesses.

[6] In the meantime, Mr Norman Daniels took over as HR director from Elliott. Gordon continued submitting medical certificates on a monthly basis between June 2007 and September 2008 while he was still recuperating at home. Daniels visited him at home in September 2008 and they discussed a possible return to work. Gordon indicated that he had not yet recovered fully and that he was still waiting to hear regarding his application for ill-health retirement.

[7] On 3 December 2008, the Department sent Gordon a letter informing him that his medical certificates did not cover his absence after September 2008 and that he would be regarded as having been away from work without authorisation as of 1 October 2008. The Department instructed him to report for duty immediately. Gordon did not do so, but he submitted medical certificates for the period October through December 2008. He also telephoned the Department and he was told that Elliott was handling his applications for ill-health retirement and temporary incapacity leave.

[8] On 19 December 2008 Gordon sent the Department a letter urging it to finalise his applications for ill-health retirement and temporary incapacity leave. The Department only responded on 8 February 2009, and then only to tell him that he would be considered as having 'absconded' as of 9 February 2009. He returned to work.

[9] In May 2009 Gordon received a letter from the Department advising him that his application for temporary incapacity leave (submitted in July 2007) had not been signed by two witnesses, and that he should resubmit it. He did so on 7 August 2009. (He ascribed the further delay on his part to the fact that he had not fully recovered and that the documents disappeared from his office. Someone pushed it under his door on or around 3 July 2009 again).

[10] In the meantime, on 26 June 2009, the Department sent Gordon a letter telling him that, because he had not responded to the request to resubmit his application for temporary incapacity leave, the Department would institute 'leave without pay' for the period between 31 July 2006 and 6 February 2009, when he was absent from the workplace. On 2 July 2009 the Department informed him that it would recover R 12 000 per month from his monthly salary of R 23 150, 48 , in order to recover an amount of R 753 352, 02 that had been paid to him in his absence. These deductions, ostensibly in terms of section 38 of the Public Service Act of 1994, would leave him with an income of R 2 159 per month.

[11] When he was informed of the deductions, Gordon contacted the Department and asked it to place a moratorium on the deductions pending his application for temporary incapacity leave. He did not get a response. He then tendered his resignation. He also filed a grievance and a grievance meeting was held on 3 July 2009 between him, Daniels and a Mr Faker. They gave him two options: he could proceed with his resignation; alternatively, he could retract his resignation and Daniels would assist him with his application for ill-health retirement and would approach the head of education regarding his unpaid leave and the deductions. Gordon elected to retract his resignation, and did so on 29 July 2009.

[12] On 4 August 2009 Gordon sent an email to the Department asking whether a decision had been made regarding the repayment of the R 12 000 which had been deducted from his salary in July 2009. Surprisingly, he was told that he had to inform the Department which of the two options discussed in the grievance meeting of 3 July 2009 he had selected. As he had clearly elected to retract his resignation, as he had done on 29 July 2009, Gordon responded in an email dated 7 August 2009, in which he pointed out that it was obvious that that was the option he had elected. He added:

> "I believe that enough time has passed for the WCED to exercise its rights, either way, and to make a decision as to whether the monies deducted will be repaid or not. In our conversation last Friday afternoon, you indicated to

> me that this matter will be resolved within 72 hours (and that has long since passed)…
>
> In order for me to make further decisions around my relation with the WCED, I would urge you to conclude this matter by this coming Tuesday, failing which I will be forced to resign."

[13] There was another grievance meeting on 1 September 2009. Daniels and Faker gave Gordon an agreement he could sign in order for his superiors to get a mandate from the head of education. Daniels told him at the end of September that they still had no mandate from the head of education. Gordon resigned again in September 2009. Although his letter of resignation is dated 1 September 2009, the Department's Jason Fry states in his founding affidavit in these proceedings that Gordon submitted the letter of resignation on 30 September 2009.

[14] Gordon referred a constructive dismissal dispute to the Bargaining Council (the first respondent) on 30 October 2009. The arbitration award was handed down on 14 March 2012. The arbitrator found that Gordon had been constructively dismissed; that the dismissal was unfair; and that he should be reinstated.

Evaluation / Analysis

[15] I shall consider the application for review under the following headings:

15.1 the applicable test;

15.2 whether the employee was dismissed; and

15.3 if so, what was the appropriate remedy?

[16] At the hearing of this matter, I also ruled *in limine* that the late filing of the review application be condoned.

The applicable test

[17] As Ms *Golden* argued for the applicant, the appropriate test on review in considering whether a constructive dismissal occurred is that set out in *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others:*[2] it is not the

[2] (2012) 33 *ILJ* 363 (LC) para [30].

test set out in *Sidumo*[3], i.e. whether the conclusion reached by the Commissioner was so unreasonable that no Commissioner could have come to the same conclusion, but whether the Commissioner correctly found that the employee had been constructively dismissed.

[18] That is so because the question goes to jurisdiction, i.e. whether the employee was dismissed. However, once it has been found that there was a dismissal and that the dismissal was fair, it seems to me that the question of remedy remains to be assessed at the hand of the *Sidumo* test. Where the arbitrator came to the conclusion, as it did in this case, that the employee should be reinstated, the court on review will have to consider whether the conclusion was one that a reasonable Commissioner could have come to.

Was the employee dismissed?

[19] The first question to be considered, then, is whether the Commissioner correctly found that the employee had been dismissed.

[20] It is trite that the onus in this regard was on the employee. The Commissioner correctly summarised the applicable legal principles with reference to *Asara*[4]:

> "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*[5] that the test for constructive dismissal does not

[3] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

[4] *Supra* para [26] – [27].

[5] 2010 (2) 92 SA (CC) para [4].

require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable."

[21] The arbitrator took into account the following factors:

21.1 The employee submitted an application for temporary incapacity leave on 2 June 2007. He gave it to Elliott, who assured him that he (Elliott) and his secretary would sign as witnesses. Elliott did not fulfil this undertaking. Almost two years later, the documentation was returned to the employee, and it appeared that it had not been processed because the witnesses had not signed.

21.2 The documentation then disappeared from the employee's office only to be returned on 3 July 2009. He submitted his revised application in August 2009.

21.3 Prior to that (on 26 June 2009) the Department informed the employee that significant periods of his absence from work were to be regarded as unpaid leave and (on 2 July 2009) that he would have to repay the remuneration he had received for those periods. The unilateral deductions to be made by the Department would leave him with very little to survive on.

21.4 Nothing was done about the employee's application for temporary incapacity leave for almost two years. When the application was returned to him it was for reasons of a simple administrative nature that should have been detected very early on in the application process and could have been easily rectified.

21.5 The amount of the monthly deductions was excessive, despite the fact that section 38 of the Public Service Act gives the relevant official a discretion in this regard. There was no attempt to warn the employee of how much he would be paying each month, or to listen to any input he might have.

[22] The arbitrator came to the conclusion that the circumstances that the employee was placed in were objectively intolerable. He found that the intolerable situation was of the Department's making and likely to damage

or destroy the trust relationship; and that the Department was culpable[6] in that it could have resolved the application for temporary incapacity leave far quicker and could have provided for lower instalments. After the first meeting to resolve his grievance, Gordon clearly elected to retract his resignation in the belief that Daniels and Faker would take up the cudgels for him; Daniels's evidence that Gordon did not indicate which option he had elected, was patently untrue. And after Gordon had made this election, nothing happened.

[23] On the facts of this case, I must agree with the arbitrator that the employee's resignation does amount to a constructive dismissal. The culmination of events is analogous to the situation in *Murray*[7]*.* The employee did his part to address the issues confronting him, but was met with inaction or a downright obtuse attitude at every turn (such as the Department not processing his claim for two years because its own official had not procured the signatures of witnesses as he had undertaken to do). The employee resigned as a last resort; and even when he did so, and at arbitration, he made it clear that he would have continued working for the Department but for the unbearable situation it had created.[8]

[24] It does seem anomalous that the employee seeks reinstatement when he claims that the Department had made the working relationship intolerable; as the arbitrator pointed out, this is, on the face of it, destructive of a claim for unfair dismissal.

[25] Section 186(1)(e) of the LRA defines a constructive dismissal thus:

> "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."
>
> And section 193(2)(b) requires an arbitrator to reinstate and unfairly dismissed employee unless –

[6] Thus satisfying the test formulated in *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA) para [13].

[7] *Supra*.

[8] Cf *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at 984.

> "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable."

[26] These two provisions appear to be mutually exclusive. How can an employee claim that his continued employment was intolerable, yet ask to be reinstated into that very position? As I said at the outset, it appears to beg the question.

[27] However, the arbitrator – after having debated this issue at some length with Gordon, as is apparent from the record – had to accept Gordon's evidence that he would not be subjected to the same circumstances that prevailed before he resigned. Gordon testified that he would, upon his return, either not be subjected to deductions; or if he was, he would be able to repay a reasonable monthly amount. He has also recovered psychologically and is thus far better equipped to work than he was previously.

[28] Although the employee did not establish a clear basis for this evidence, the problem facing the arbitrator and this court is that the Department's witnesses did nothing to refute it. On that basis, the arbitrator applied his mind to the uncontradicted evidence before him and came to the conclusion that the employment circumstances had become intolerable at the time of the employee's resignation in September 2009; but that they were no longer intolerable at the time that he sought reinstatement in March 2012.

[29] Based on the evidence before the arbitrator, I must agree with him. The evidence established that the Department had, objectively speaking, made a continued working relationship intolerable for the employee at the time of his resignation; and his desire to be reinstated some 2 ½ years later is not destructive of that finding.

Was the dismissal unfair?

[30] The arbitrator correctly pointed out that he still needed to enquire whether the dismissal was nevertheless unfair.[9]

[9] *Asara (supra)* para [37]; *Eagleton v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) para [35].

[31] The arbitrator found that the Department had not established any fair reason for the dismissal, whether for misconduct, incapacity or operational requirements. In those circumstances, I cannot interfere with his finding that the dismissal was unfair.

The appropriate remedy

[32] As I have set out in the preliminary discussion of the appropriate test, it appears to me that, once an unfair dismissal has been established, the appropriate remedy imposed by the arbitrator is still subject to the review test set out in *Sidumo*.

[33] The arbitrator has a wide discretion in this regard. It is the arbitrator's sense of fairness that must prevail. In this case, the arbitrator correctly pointed out that section 193 of the LRA prescribes reinstatement as the primary remedy for unfair dismissal. He considered the effect of section 193(2)(b) and stressed the reference in that subsection to "the circumstances surrounding the dismissal." He came to the conclusion that those circumstances at the time of the arbitration were not the same as the circumstances that led to the employee's resignation in September 2009. Those were not the same circumstances (on the employee's evidence) into which he would be reinstated; therefore, the arbitrator found, retrospective reinstatement remained the appropriate remedy.

[34] Based on the uncontested evidence before him, that finding by the arbitrator was not unreasonable. He carefully considered the implications of sections 193(2)(b) and 186(1)(e). On the facts of the case before him, the apparent contradiction occasioned by an order for reinstatement disappeared.

<u>Conclusion</u>

[35] The arbitrator's eventual conclusion was not so unreasonable that no reasonable arbitrator could have come to the same conclusion. It is not open to review. Neither is his initial finding that the employee had been constructively dismissed. On the evidence before him, that was the correct finding.

[36] The conclusion that I have arrived at is limited to the very specific and unusual circumstances of this case. It is due, mainly, to the Department's failure to gainsay the evidence of the employee that the circumstances at the workplace had changed and that, should he be reinstated, the circumstances would no longer be intolerable. The arbitrator was faced with only the employee's version in this regard. In the absence of any evidence to the contrary, the conclusion he arrived at was a reasonable one. It would only be in highly unusual circumstances that a similar conclusion and remedy would be justified.

[37] The employee represented himself. A costs order is not appropriate.

Order

The application is dismissed.

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Steenkamp J

APPEARANCES

APPLICANT:	T J Golden Instructed by the State Attorney.
THIRD RESPONDENT:	In person.