REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN CAPE TOWN

JUDGMENT

Case no: C 735/2012

In the matter between:

LENTEGEUR FISHERIES CC t/a ROCKS FISHERIES	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
RICHARD HEATH (*N.O.*)	**Second Respondent**
R CLAASSEN	**Third Respondent**

Heard: 17 April 2013

Delivered: 10 November 2013

Summary: (Review – Unfair dismissal – constructive dismissal – conclusion that employee had no option but to resign not unreasonable in the circumstances of the matter – arbitrator's findings not unreasonable – application dismissed).

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter was enrolled as an unopposed application, but on the day of the hearing the third respondent, Ms R Claasen, attended court and was granted an indulgence to make oral representations in court, even though she had not filed an opposing affidavit.

[2] The third respondent, Ms R Claasen, was employed as a general worker on a fixed term contract starting in October 2011 and ending on 1 January 2013. She claimed that she was constructively dismissed when she was forced to resign on 12 January 2012. The arbitrator found that the employer had created circumstances which were intolerable in an attempt to encourage the third respondent to resign and that Claasen had no option but to do so. Consequently, the arbitrator found that the third respondent dismissal was unfair and ordered the employer to pay compensation calculated with reference to the unexpired portion of her fixed term contract.

[3] The undisputed evidence of the third respondent was that in June 2012 she had been diagnosed with severe arthritis and a severe skin condition on her hands for which she received hospital treatment roughly once a month. When Claasen showed her appointments to the manager at the fishery he expressed his unhappiness with her being off on a regular basis. He had actually asked her to obtain a letter from the hospital so she could be medically boarded. When Claasen responded that doctors did not just hand out letters like that he encouraged her to resign. He even went to the extent of phoning his lawyer in her presence and complaining that she did not want to resign but he was not going to fire her either. The lawyer then spoke to her and explained that the respondent had a problem with her sick leave because she had exhausted her paid sick leave entitlements already. He suggested that if she resigned they could indicate on a UIF form that her contract had expired so she could draw UIF benefits. Claasen said she would think about it.

[4] Subsequently, her manager then pressed her to give him a decision that she said she was not going to resign. His response was to allocate her with effect from the next day to work at the back peeling potatoes on a permanent basis. The following day Claasen did that the whole day without a break from approximately 9 a.m. to 7 p.m. she was also denied the opportunity to eat lunch provided by the shop. The following day she showed him her hands which were swollen and he told not to make her problem his problem and that was the only position he had for her. As a general worker her job was mainly serving customers but from time to time would help out at the back.

[5] Claasen said it was easier to work at the front of the shop because it is not necessary to bend her swollen fingers as much. Peeling potatoes exacerbated her skin condition. The owner's wife noticed this on Saturday 9 June, after the third respondent had been working at the back for two days and asked her why her hands looked like that. She explained to her that it was the effect of working in the cold water and operating the potato chopper. By Monday, her joints were so swollen Claasen could not move them and she phoned the manager to say she could not come in and went to the hospital on Tuesday after first going to the CCMA on Monday to find out what her rights were in that situation because she did not know how she was going to continue working under those conditions. At the CCMA Claasen was told that they could not advise people what to do and she would have to make her own decision. The doctor she saw wanted to book her off. She told him she could not take it and the doctor's nurse said she had to choose between her health and her job. Claasen did make enquiries about getting a letter so she could be medically boarded, but she was told that the hospital would have to issue such a letter because the doctor had referred her for treatment there.

[6] Claasen also testified that the owner's wife had said to her that if she could not work at the back or in the shop anymore then she must tell them. She took this to be another indication that they were hoping she would eventually resign. Claasen resigned because she could not bear the pain and because there was no other position they would put her in. If they had been prepared to rotate her work as they had done previously, it would

have been better. Two days after she handed in her resignation letter on Wednesday 12 June, the manager called her and asked to write on her letter that nobody was forcing her to resign but she refused to change the letter and told him that she was resigning because of her medical condition which he was fully aware of, he then tried to obtain an undertaking from her that she would not go to the CCMA.

[7] Under cross-examination, Claasen said that she did not think of going back to the manager because he had already made it clear to her that there was no other position for her to work in except working at the back with the potatoes. She claimed that when she gave him the resignation letter she had asked if there was nothing he could do, but he just started complaining about her letter. She had not approached him before handing in the resignation letter because when she had shown him her hands the previous Friday he had told her not to make her problem his problem and she did not see that he was going to say anything different two days later. Claasen agreed that she did not approach the owner's wife because she was aware of her condition but never tried to intercede with her husband to ameliorate her situation. When she had complained to her about her husband's swearing, his wife had effectively defended his behaviour. She also did not think of submitting a written grievance at that time because he had already asked her to resign.

[8] Claasen acknowledged that another employee with arthritis had worked there for six years, but she explained that it was not the same kind of arthritis that she suffered from and it was not in her hands.

[9] Mr Schreuder, the manager of the shop, testified about the extent of Claasen's sick leave and absence from work. He had asked her to bring a letter from a doctor saying that she was medically unfit and not allowed to work but she refused and he told that, in that case she would have to come back to work, but then she handed in her letter of resignation. According to him Claasen said that she felt she could not work and did not want to speak to him. She would not work out what he referred to as her "probation period" because she had resigned and was 'finished'. She had also refused to sign a letter that she had not been forced to resign.

According to Schreuder, Claasen had never approached him to discuss her medical condition or told him that her particular working conditions were impossible for her.

[10] According to him he had put her on duty at the back because it would reduce the movement on her joints because she just stood in one place and peeled potatoes without having to walk up and down. This is what he had done in the case of another employee who was suffering from joint pain and she had been very happy to work at the back. When Claasen was cross-examining him he drew her into an argument about her sick leave entitlements. Although he conceded that he had phoned his lawyer, it was to see how she could be accommodated because she could not work and he had asked him to speak to her. According to him he had told the lawyer that she could not work but he could not tell her to resign. His lawyer had suggested that she get a letter from doctors saying that she was medically unfit and that the only way they could accommodate her would be with the UIF, presumably a reference to the reasons that would be stated for the termination of her services for UIF purposes.

[11] He admitted that he had told her to go and work with the potatoes but he could not say it would be permanent because he could not predict what would happen every day. It would depend on who reported for work each day. He said that he had sent her to the back because he needed her there on that day and to accommodate her. When the Commissioner asked him whether he thought it would be better for her hands to be working at the back making chips he said he 'would not know' and Claasen had never told him that she was suffering from doing that work. When he was asked why he said he did not know whether it would be better for her but on the other hand had said he was trying to accommodate Claasen by putting her in the back, he referred to the case of the other employee who had benefited from the arrangement. Schreuder also admitted that he had told her to carry on working with the potatoes when she had shown him her hands on the Friday in question. Later he denied that she had come to him and shown him her swollen hands. Schreuder did deny saying Claasen should not make her problem his problem.

[12] He did agree that he would sometimes make staff eat a concoction of fisherman's spice and peri-peri sauce but that was only if they swore in front of customers or if they had put too much spice on food and he wanted them to taste it themselves. He was adamant that this was never an alternative to payment of a 'fine' of R 30-00 as Claasen had claimed.

[13] It is apparent even from the transcript that Schreuder did not make it easy for Claasen to question him and the arbitrator had to intervene at times to get him to answer questions instead of being argumentative.

[14] The last witness called was Ms I Freeks, a supervisor of ten years' service with the applicant. According to her testimony, Claasen had come to resign because of her arthritis and Schreuder had asked if she did not want to work her notice, but she would not answer him, so she asked herself. Claasen had declined and said she had already resigned. Freeks was somewhat evasive in answering a direct question from the Commissioner about whether Claasen had ever complained about her painful hands, but ultimately denied that she had ever complained about it.

[15] Freeks related that she had visited Claasen at home in the evening of Saturday 9 June to see how things were going with her and found her in bed. She said that Claasen had told her that her whole body was painful. It was put to her by Claasen that in fact it was the previous Saturday before she had been sent to work at the back and that if Freeks had related to Schreuder that Claasen was lying in bed with swollen hands and that whole body was sore. Freeks did not deny this account but simply said she could not remember the dates when it occurred. Freeks did concede that she was aware of Claasen'sproblem with her hands but that she did not hear from her during the three days that Claasen was working at the back. She also claimed that Schreuder had sent Claasen to work at the back to see if it would help her.

[16] When questioned about the frequency with which workers at the front of the shop would be sent to work in the back, Freek conceded that it could be half a day and sometimes for a day. She also agreed that on a particular Monday when Claasen's hands were so swollen she had suggested to Schreuder that Claasen be given a half day off because of

her hands. However she said that Schreuder simply said she must go to the doctor, and not that she must wait for the next half day due to her as Claasen had claimed, though she did not dispute that Schreuder had refused to make a swap arrangement for the half day off. She also did not dispute Claasen's account of the heavy duty nature of the work involved with the potatoes.

Grounds of review

[17] The review application has two legs. Firstly the applicant claims the Commissioner failed to apply his mind to the principles applicable to a constructive dismissal dispute. Secondly, the applicant claims that the arbitrator acted unreasonably in his handling of the evidence presented at the arbitration and when considering the burden of proof in a case of constructive dismissal. In characterising the test for constructive dismissal, the applicant stated that the employee must prove that the circumstances had become so unbearable that Claasen could no longer be expected to endure them and that there was no reasonable alternative way of escaping those circumstances except by resigning.

[18] The applicant contends that the third respondent effectively did not give the applicant an opportunity to remedy the situation which she found intolerable but simply resigned after working for two days in the back section of the premises. It also argued that before resigning the applicant should have approached the manager's wife, who owned the business.

[19] Essentially, it was the third respondent's claim that she found the working conditions at the back of the premises unbearable given that she was suffering from rheumatoid arthritis. The employer argues that it was not the cause of her condition and it could not be said that it made her working conditions intolerable. Further, as she had in fact only worked at the back of the premises for two days before she resigned and because her condition was one that existed before she was told to work there, the employer suggested that it was merely because she didn't like working at the back that she resigned and not because it was intolerable from an objective point of view.

[20] Moreover, the third respondent had not approached her employer with the problem before she resigned. It was also said that it was uncontested that the employer's intention of placing her at the back of the premises was to assist her, that the move was not permanent and that there was evidence of another employee with a rheumatic condition who had benefited from working at the back of the premises. It was also said that there was evidence that the third respondent had worked at the back many times before. According to the employer, the arbitrator should also have realised that the employer was in the process of investigating the possibility of medically boarding the third respondent, which it was entitled to do if she was incapable of performing her job.

[21] For all the reasons mentioned, *Mr Jacobs*, who appeared for the applicant, contended that the arbitrator's conclusion that the third respondent's resignation was a "reasonable last resort" was not a decision that a reasonable Commissioner would have reached. Taking issue with the arbitrator's legal reasoning, the employer claims that the arbitrator's finding that the employer had failed to prove that the constructive dismissal was fair was an unreasonable finding and indicated a failure to apply the proper legal principles.

The burden of proof

[22] The applicant submits that the arbitrator was faced with two opposing versions of events and had to choose the one which was most probable. In determining whether or not the third respondent had proven her case that she was constructively dismissed, the arbitrator ought to have made credibility findings before preferring one version over the other. It argued that the third respondent's version was clearly improbable and the employer's version had been confirmed by Freeks, but the Commissioner had dismissed her reliable and uncontested evidence on the basis that "it did not take the matter further". In the alternative, the applicant submitted that, at best for the third respondent, the versions were equally probable, in which case the employer ought to have succeeded. For these reasons, the employer contends that the arbitrator acted unreasonably.

Evaluation

The test applied by the arbitrator

[23] Although the applicant contends that the arbitrator misunderstood the test for constructive dismissal, it seems plain that the arbitrator accepted that the employee had to prove that she was constructively dismissed and that it was then for the employer to prove that such dismissal was not unfair. The real thrust of the review application is the supposed unreasonableness of the arbitrator's analysis of the evidence and evaluation of the conflicting versions.

[24] In relation to the two-stage test as characterised by the applicant, the arbitrator plainly did apply it. Firstly, the arbitrator found that the employer had created intolerable circumstances. Secondly, he found that the applicant had no option but to resign. Whether or not these conclusions were ones that no reasonable arbitrator could have reached is considered below.

Was the arbitrator unreasonable in concluding that the applicant had no option but to resign?

[25] The applicant claims that the arbitrator unreasonably accepted that the Claasen had reached the point where she had no alternative but to leave. It bases this contention on the fact that the applicant only worked two days at the back of the premises and allegedly never raised the issue with the owner.

[26] Firstly it should be mentioned that, Claasen's evidence that she did work at the back on the Saturday as well and that day she showed the manager's wife her hands was not disputed. Secondly, Schreuder had made it clear that there was no other position for her and when she did tender her resignation but asked him if there was nothing that could be done, he did not engage with her on her situation.

[27] It is also apparent from the evidence that the decision to send her to work at the back on a prolonged basis followed immediately after she claimed that Schreuder had pressed her for a decision on whether or not she was

resigning and she told him she had declined. The applicant did try to portray this move as a benign one intended to assist her because of her condition, ostensibly on the basis of another employee with arthritis who had been given the same duties, but Schreuder could not really explain why it would have assisted Claasen, whose arthritis was in her hands. There was also Claasen's evidence that she had approached Schreuder but his response was that her condition was not his problem, though it is true he denied having said this. Nevertheless, he did agree that she had shown him in her hands and he voluntarily testified that he had told her to go back and peel potatoes. He knew full well about her condition because of his frequent and intense interaction with her over her medical certificate and her absences from work on account of it. He also did not dispute that he encouraged Claasen to obtain a medical certificate stating that she could not work.

[28] Claasen had indicated that Schreuder was not an easy person to approach to have a discussion with. His behaviour as a witness, even from what appears on the transcript, would seem to bear this out. Essentially, Claasen decided to resign because she could see no prospect of successfully engaging Schreuder on the issue and given that she had been placed for a prolonged period in the potato preparation section, which was longer than usual, following her report to him that she had decided not to resign. In the circumstances, it was not unreasonable to view her assignment to the potato section as a reaction to her decision, and not as a benign measure on the part of Schreuder. I cannot say that on all the evidence, the commissioner unreasonably held that Claasen had no real option other than to resign. Schreuder's own admission that he told her to return to her duties when she did show him her swollen hands was indicative that her view that it would be pointless to complain further was not unfounded, especially when he had been encouraging her to obtain medical validation of her incapacity solely for the purposes of terminating work.

Evaluation of the evidence

[29] The applicant suggests the arbitrator had to make credibility findings because the two versions were equally probable. I do not agree. If anything, Claasen's version is more probable as it was more consistent with facts that were not disputed. For example, the applicant did not dispute its efforts to get her to resign in exchange for not prejudicing her UIF claim by giving a different reason for the termination. Equally, it was clear that Schreuder was irritated with Claasen's absence on account of her illness. The inference that the allocation of potato duties was not benign but punitive, was consistent with Schreuder's readiness to subject his employees to physical discomfort as a corrective measure. Schreuder's evidence that he did not know whether working in the cold water would be beneficial for Claasen's condition and his admitted reaction when she showed him his hands after doing that work is not consistent with an explanation that it was out of a desire to help that she was assigned those duties. On the other hand it is far more consistent with Claasen's version that in fact the attitude of management was one of indifference, at best, to her plight. In my view the inherent probabilities of the versions based on the available evidence did not require the arbitrator to make credibility findings. It must also be remembered that the applicant's representative did not really put a full version of the evidence of Schreuder and Freeks to Claasen under cross-examination, which also affects the weight to be attached to their evidence.

[30] It is true the arbitrator paid little heed to Freeks's evidence, but all she could really say of value is that Schreuder had said he would see how he could help Claasen, but she was not present when Claasen was told she would working at the back. She could not comment on what transpired during the three days Claasen was working at the back and her evidence of what happened when Claasen handed in her resignation, did not add anything significant. Freeks did not contradict Claasen's evidence that when she resigned she had still asked Schreuder if nothing could be done. Moreover, she did not dispute that Schreuder had been unwilling to let Claasen take a half-day off when her hands were visibly swollen, and she

confirmed the arduous nature of duties when working with the potatoes. It is not clear to me that if the arbitrator had paid more heed to her evidence it would have tipped the scales in the applicant's favour, even if he had erred in saying it took matters no further. Since the SCA judgment in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*** [1] the arbitrator's own reasoning is merely indicative of a flawed award, and the award will still stand if the outcome arrived at by the arbitrator is one that could reasonably be reached on the evidence before the arbitrator.[2]

Conclusion

[31] In light of the reasoning above, I do not think the applicant's grounds of review warrant reviewing and setting aside the award.

[32] As the third respondent did not incur legal costs, no cost award is necessary.

Order

[33] The review application is dismissed, with no order as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

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[1] (2013) 34 ILJ 2795 (SCA)

[2] *Herholdt at 2802, para [12], where the SCA characterised the reasonableness standard of review of arbitration awards in the following way: "The test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. 17 On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."*

APPEARANCES

APPLICANT: W Jacobs of Willem Jacobs & Associates

THIRD RESPONDENT: In person