Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 1832/16

In the matter between:

KAMBUKU SAFARI LODGE	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Respondent**
MR M N NONYANI (*NO*)	**Respondent**
SIBONGILE INNOCENTIA KHOZA	**Respondent**

Heard: 25 October 2017
Delivered: 27 October 2017
Summary: (Review – jurisdiction – constructive dismissal)

JUDGMENT

LAGRANGE J

Background

[1] On the previous occasion when this matter was enrolled on the unopposed role, the third respondent appeared and indicated her intention to oppose the application despite not filing an answering affidavit or a notice of opposition. She was given an opportunity to remedy her failure to oppose the review application earlier, but has not made use of the opportunity to do so. She did not appear at the postponed proceedings.

[2] The arbitrator in this matter had found amongst other things that the third respondent had been constructively dismissed and had not resigned but had been coerced to sign a resignation letter after being threatened with a disciplinary enquiry which could result in her having a bad employment record.

[3] The arbitrator awarded her eight months' salary as compensation amounting to R32,000-00 taking into account: the uncontested evidence that she had been a good performer; that she was told without warning that performance was suddenly sub-standard; that she was still unemployed, and the employer had used unsubstantiated performance issues as a pretext to get rid of her.

[4] In essence, the applicant has raised two grounds of review. Firstly, it contends that the arbitrator was wrong in finding that the third respondent was constructively dismissed instead of finding that she had resigned. Secondly, the applicant contends that the award of eight months' salary was not just and equitable in the circumstances.

Evaluation

[5] The principle factual error the applicant contends the arbitrator made was to assume that the mere threat of a disciplinary enquiry was sufficient justification for the third respondent to conclude that she had been constructively dismissed. It also claims that the arbitrator failed to consider that the complaint about her performance must have been a serious one given that she had previously impressed the employer with her good performance. It further contends that the arbitrator failed to consider the possibility that the third respondent had simply resigned to avoid the

embarrassment and possible humiliation of a disciplinary enquiry and not that she had no alternative but to resign, when she could have decided to defend herself in any ensuing enquiry. In addition, the applicant submits that there was no basis for concluding that merely because the resignation letter had been typed on the employer's letterhead that constituted an act of coercion. Lastly, it contends that the arbitrator failed to appreciate that the third respondent had been given an opportunity to consider the alternative of resignation before she accepted.

[6] When the owner of the lodge gave his evidence, none of which had been put to the third respondent under cross-examination, he claimed that he put to her the two routes that could be taken, viz: "[either] she goes the disciplinary route where the likelihood of dismissal is very good, or she resigns and I assist you in finding future employment" (emphasis added). He claimed that he gave her time to think about her options. Shortly after he left her to think about it, she approached him while he was in discussion with her line manager and asked to see her line manager. His evidence of the alleged serious and sudden decline in the third respondent's performance was very vague.

[7] The owner could not testify about the discussion held between the third respondent and her line manager when she signed the resignation letter, but he denied giving any instructions to the line manager whatsoever concerning the two 'options he had raised with third respondent, which seems highly improbable. The applicant testified that the line manager had presented her with a resignation letter to sign and would not allow her to type her own resignation letter. She also testified that the incident began when the owner had come to office and told her that she did not want her to work with him anymore and she must resign because she was not doing a great job, because somebody else was doing her job for the past two years. She also testified that he told her that they would pay a one month's salary and give her one month to find another job. Her line manager then typed the letter and told her that he was instructed she must sign the letter, that there was a car waiting outside her room to take her from the premises and she must go and pack her stuff. He also told her that someone was coming to replace. Under cross-examination, the employer's

version, namely that she had been offered the alternative of facing a disciplinary enquiry was never put to her.

[8] Considering her own evidence, which was not properly disputed through cross-examination, there was sufficient reason to believe that she was in effect told to resign because somebody else was in fact doing her job and she was superfluous that the employer intended to replace her with somebody else. This is so even if one disregards the hearsay component of the evidence relating to whether not her line manager was in fact instructed by the owner to tell her to sign the resignation letter, or whether he was told by the owner that she was being replaced. As her evidence stood, it remains the case that her line manager told her to sign the letter and told her she was being replaced, irrespective of whether or not that is something he was instructed to say by the owner. The employer could not contradict the third respondent's evidence that she was told that a vehicle was ready to take her off the premises and that she should pack her belongings. In the circumstances, I am satisfied that the third respondent established that her resignation was coerced and that in fact it was tantamount to a dismissal which.

[9] Even if I entertained the alternative version of events which was never tested with the third respondent under cross-examination, I would not be persuaded that this was simply a case where there was a neutral discussion of options which that the employer was considering and she was given an opportunity to reflect and consider her response to those options. Even on the owner's evidence, the third respondent, who had an undisputed good work record up to that point was unexpectedly confronted with the threat of a disciplinary enquiry, he told her it was very likely to lead to her dismissal and that the alternative was for her to resign.

[10] I am not satisfied, even on the employer's own version, that the options presented to the third respondent were as open-ended as those in the ***Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others***.[1] Rather, it was made clear to her that the disciplinary enquiry would most likely lead to her dismissal. It is difficult to avoid the inference that the third

[1] (2012) 33 ILJ 363 (LC)

respondent was effectively being told that dismissal was a near certainty in circumstances where it was not even obvious what she had done allegedly that was so serious to justify such an outcome. In other circumstances, such as where an employee has been confronted with an unauthorised possession of company property, which they are unable to explain, such a prediction about the outcome of a disciplinary enquiry might not be sufficient reason for an employee to rely on that as a basis for claiming constructive dismissal, because there is obviously an equally plausible explanation that the employee wishes to avoid an outcome which they know is likely because they have no defence to the charge of serious misconduct. In this case, the employer claims that it was her performance which was a problem but was threatening her with a disciplinary enquiry. Under such circumstances, it is perfectly understandable if she had interpreted the employer's prediction about the outcome of an enquiry as simply a threat of dismissal if she did not resign, because there was no explanation why her performance or conduct was such that it would most probably result in her dismissal. The coercive character of the owner's statement on his version is difficult to ignore. Unlike the *Asara* case, there was simply no plausible evidence, even on his own version to show that there was a *prima facie* case of misconduct or were performance for her to answer.

[11] The second ground of review concerns the quantum of the compensation awarded. In view of the high handed way in which the third respondent was dealt with and the absence of any meaningful evidence to suggest that she might have committed conduct warranting her dismissal, as well as the fact the primary remedy of reinstatement is almost never possible because of the nature of a constructive dismissal, I cannot say that the award of eight months' remuneration was beyond the bounds of what a reasonable arbitrator might have awarded.

<u>Order</u>

[1] The review application is dismissed and no order is made as to costs.

_____

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	D W de Villiers
RESPONDENT:	No appearance