



REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no: PR 33/16

In the matter between:

BRUCE DESMOND NILAND

Applicant

and

GIVEN NTABENI N.O.

First respondent

CCMA

Second respondent

GREGORY ERNEST HARVEY

Third respondent

Heard: 21 February 2017

Delivered: 24 February 2017

SUMMARY: Review – constructive dismissal. LRA ss 145 and 186(1)(e). Employer had an affair with employee's wife. Employee failed to prove that employer made continued employment relationship intolerable.

JUDGMENT

STEENKAMP J

Introduction

- [1] This is a tale of white mischief in the farming community of the Eastern Cape. Bruce Niland is a professional hunter. He was employed by Greg Harvey (the third respondent) on the appropriately named Wildschutsberg¹. He got married to Guida. She had an affair with Greg. It lasted for some years. Niland eventually resigned. He claimed constructive dismissal and referred a dispute to the CCMA.² The arbitrator (the first respondent) found that Niland had failed to prove constructive dismissal. He then applied to this Court to have the award reviewed and set aside.

Background facts

- [2] Bruce Niland started working for Greg Harvey in 2003. He organised hunting trips, mainly for foreign hunters, on Wildschutsberg, where Harvey kept a number of exotic and indigenous species of game. He later (in 2010) obtained a 49% membership in Huntershill Safari cc (Harvey held the other 51%).
- [3] Niland got married to Guida in 2006. She moved in with him in the homestead at Quarrelbrook – an historic name that proved to be prophetic. Quarrelbrook is about 4 km from Wildschutsberg, where the Harveys lived. Harvey owns both farms.
- [4] The Nilands had twins in 2007. In 2009 Guida started doing some work for Harvey, doing brochures and marketing for Huntershill. She and Greg Harvey started an affair (it is not clear precisely when).
- [5] In 2012 Harvey brought another farm through Huntershill (the Bedford farm). He rented the farm out for hunting and grazing.
- [6] In April 2013 Ronel Harvey found out about the affair between her husband and Guida Niland. She told Bruce Niland about it. Harvey left Wildschutsberg for three weeks – ostensibly on a trip to Namibia, but in fact

¹ i.e. Game hunter's mountain.

² The Commission for Conciliation, Mediation and Arbitration (the second respondent).

in order to be treated for depression (induced by his wife confronting him about the affair).

- [7] Upon his return, Harvey asked Niland for forgiveness, telling him that he was “like a brother” to him. It appears that Niland forgave both him and Guida – but it later transpired that they continued to cuckold him for at least another two years. Ronel Harvey was less forgiving. She moved to Grahamstown and filed for divorce.
- [8] Although there was some talk about the Nilands moving to the Bedford farm, that didn’t happen. Guida and the twins moved from Quarrelbrook to Queenstown, where Harvey paid the rent. She returned to Quarrelbrook in September 2014.
- [9] In January 2015 one Debbie Bell moved into Harvey’s house at Wildschutsberg “to look after the rhinos”. Niland heard rumours that she was telling staff members that the affair between Guida and Harvey was still going on. He asked Harvey to discipline her (although she does not appear to have been an employee). Unbeknownst to Niland, his wife and Harvey were sending WhatsApp messages to each other. (Harvey testified that Guida had previously sent him naked pictures of herself – the later WhatsApp messages appear to have been somewhat more innocuous).
- [10] Harvey placed pressure on Guida to leave Quarrelbrook, threatening to expose the continuation of the affair. She stopped sending him messages and blocked him as a contact. He resorted to sending her messages from other employees’ phones. In the meantime, Niland was speaking to a Mr Osborne about alternative employment at Thaba Thala game reserve.
- [11] There is a dispute about an alleged verbal altercation between Niland and Harvey in April 2015. Niland says that both of them had been drinking and that Harvey taunted him, telling him that Guida would touch him when he (Niland) wasn’t looking, and asking him if he’d seen how Guida would look at him (Harvey). At the arbitration Harvey denied that he had said this. Both had been drinking, but he could recall what he had said. Either way, Niland did not take any further steps until three months later, on 14 July 2015.
- [12] On 14 July 2015 Niland asked to meet with Harvey. It was a short meeting. Niland told Harvey that the time had come for “a parting of the ways”. He

did not mention the affair. Harvey asked him to sign a resignation letter. Niland refused, as there was some disagreement about the ownership of two Toyotas – a Fortuner and a Land Cruiser. Niland left anyway but remained a member of Huntershill cc.

[13] Niland posted a message on Facebook saying that he had decided to “move on to greater thinking” [*sic*]. He and Guida left Quarrelbrook eight days later. He took up employment with Osborne and tried to poach some of Harvey’s hunting customers. Huntershill cc was wound up in October 2016.

[14] Niland referred a dispute to the CCMA, alleging a constructive dismissal as contemplated by s 186(1)(e) of the LRA. The arbitrator found that he had not discharged the onus to show that he had been dismissed.

Grounds of review

[15] The review application rests on two grounds:

15.1 The arbitrator failed to have regard to the applicant’s heads of argument.

15.2 The arbitrator wrongly concluded that Niland had failed to prove constructive dismissal. He should have found that Niland had been dismissed, and that the dismissal was unfair.

[16] The applicant further asks for declaratory relief in the following terms:

“2. Declaring that the applicant was constructively dismissed by the third respondent.

3. Declaring that the applicant is entitled to payment in the sum of R211 920, 00, together with interest at the legal rate from date of dismissal to date of final payment, together with the costs of the arbitration, such costs to be on the high court scale, including the travelling costs of the applicant’s legal representatives and accommodation costs in Queenstown”.

[17] The amount in paragraph 3 of the notice of motion is calculated on the basis of 12 months’ remuneration; and the Queenstown costs relate to the arbitration that was held there.

Evaluation

[18] I shall deal first with the first ground of review, and then with the application for declaratory relief.

Failing to consider written submissions

[19] Mr *Grogan* readily conceded that the arbitrator's failure to consider the employee's submissions made the award reviewable. It must be set aside. But I agree with him that it would serve no purpose to remit the dispute to the CCMA. That would only lead to more costs and delays. The question whether there was a constructive dismissal is essentially a jurisdictional one. This Court is in as good a position as another arbitrator to consider it. All the evidence is before the Court. Both parties are represented by counsel and have made extensive submissions. The record comprises some 500 pages. And the relief sought on the second leg is in the nature of a declaratory order. It is in the interests of justice for this Court to resolve the matter finally.

Constructive dismissal

[20] In terms of s 186(1)(e) of the LRA, 'dismissal' means, amongst other things, that –

“an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”.

[21] The test, as set out in numerous decisions of this Court and of the Constitutional Court³, can be summarised as follows – Niland must show that:

21.1 He terminated the employment relationship (that much is common cause, even though he didn't sign a resignation letter);

21.2 when he did so, the employment relationship had become so intolerable that he could not reasonably be expected to put up with it;

³ Cf *Strategic Liquor Services v Mvumbi NO* [2009] 9 BLLR 847 (CC) par [4]; *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA) esp par [13]; *Jooste v Transnet Ltd* [1991] 5 BLLR 1 (LAC); *Value Logistics v Basson* [2011] 10 BLLR 1024 (LC); *Asara Wine Estate v Van Rooyen* (2012) 33 ILJ 363 (LC).

21.3 the conditions or events of which he complained were the main cause of his decision to terminate the relationship;

21.4 Harvey's conduct brought about the situation that made his continued employment intolerable;

21.5 Harvey was to blame for the conditions that drove Niland to terminate the relationship.

[22] The test is a two stage one. If the employee succeeds in showing that there was a dismissal, it remains for the employer to show that it was fair.

[23] The context in which Niland was employed and eventually left, is an unusual one. He and Harvey started out as friends. They were co-members of Huntershill. They lived in close proximity and their families were in close personal contact – some more so than others, as it transpired. And Guida was a willing participant in the affair.

[24] Niland found out about the affair in 2013. Yet he continued to work for Harvey and to maintain his membership in Huntershill. They had reconciled. He didn't know that the affair was continuing behind his back. But it is clear that, at that stage – and despite having found out about the affair – he did not consider the working relationship to be intolerable. What changed between then and July 2015, when he left?

[25] Niland argues that the verbal altercation in the bar in April 2015 was the last straw. But there are two problems with that argument. Firstly, he continued as Harvey's employee for three months after that (and as his co-member of the cc for a considerably longer period). Secondly, when Mr *Grogan* pertinently asked him about it in cross-examination, he replied that that "was not the trigger". And at no stage before 14 July 2015 did he confront Harvey with any specific complaints or ask him to rectify an "intolerable" situation. He certainly did not take the alleged "taunting" incident in the bar three months earlier any further.

[26] On the probabilities, uncomfortable as the relationship between the employer and his cuckolded erstwhile friend must have been, the true reason for Niland eventually leaving appears to be that he had decided to

go and work for Osborne. That is the “bigger thinking” he had in mind when he posted on Facebook on the evening of 14 July:⁴

“This is the hardest message I will ever have to decide to leave
huntershillsafari going on to bigger thinking with my family.”

[27] The very next day, Niland wrote to a Huntershill customer that Thaba Thala “is my new home”. A week later, he moved to Rooikraal (Osborne’s farm) and started working for him on 8 August 2015.

[28] Niland has not shown that the sole reason he left was because Harvey had made a continued employment relationship intolerable. He had another reason to leave – his “bigger thinking” with Thaba Thala. And Harvey was not solely responsible for the situation in which the protagonists found themselves – Niland’s wife was at least as blameworthy.

[29] Were it not for the affair, Niland says, he would have continued working for Harvey. But he knew about the affair in 2013 and continued the employment relationship for another two years. He had forgiven both Guida and Harvey. And when he left in July 2015 he did not mention the affair as a reason for the “parting of the ways”. Instead, he left only to take up employment with a competitor within a month.

[30] Niland has not shown that Harvey caused the employment relationship to become intolerable. Neither did he alert Harvey to that allegation. He simply left on 14 July 2015, only to take up employment with a competitor – something that he had arranged with Osborne some time before – within days.

Conclusion

[31] The employee was not constructively dismissed within the meaning of section 186(1)(e).

[32] With regard to costs, I take into account that the applicant has been successful in prayer 1 but unsuccessful in prayers 2 and 3 of his notice of motion. In law and fairness⁵ I do not think that a costs award is warranted.

⁴ Spelling and grammar verbatim.

⁵ LRA s 162.

Order

[33] I therefore make the following order:

33.1 The award of the first respondent, Commissioner Given Ntabeni, under case number ECEL 3051/15 dated 8 February 2016 is reviewed and set aside.

33.2 It is declared that the applicant, Bruce Niland, was not dismissed as contemplated by s 186(1)(e) of the LRA.

33.3 There is no order as to costs.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Willem van Aswegen
(Heads of argument prepared by Peter Kroon SC)

Instructed by Wheeldon Rushmere & Cole (Grahamstown).

THIRD RESPONDENT: John Grogan

Instructed by Bowes McDougall Inc (Queenstown).