IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA12/2022

In the matter between:

SANLAM LIFE INSURANCE LIMITED **Appellant**

and

NKOSINATHI MOGOMATSI **First Respondent**

LILIAN GOREDEMA N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **09 May 2023**

Delivered: **17 August 2023**

Coram: **Molahlehi ADJP *et* Musi JA *et* Savage AJA**

Summary: Constructive dismissal – objective two-stage test – employee must prove that employer dismissed them by making continued employment intolerable, once dismissal established, court must evaluate if dismissal was unfair – Constructive dismissal based on mental ill health – employee must prove that employer knew or ought to have known about employee's condition - Court *a quo* conflated dismissal for incapacity with that of constructive

dismissal – Employee did not lead evidence during arbitration proceedings relating to his mental ill health, evidence led for the first time in the review proceedings – court *a quo* misdirected itself by taking into consideration evidence that was not before the arbitrator – finding of constructive dismissal was incorrect – appeal succeeds.

JUDGMENT

MUSI JA

Introduction

[1] This is an appeal against an order of the Labour Court. It reviewed and set aside an arbitral award rendered by a commissioner, under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), who found that Mr Mogomatsi (employee) resigned and was consequently not constructively dismissed by Sanlam Life Insurance Limited (employer). The Labour Court, however, found that the employee was constructively dismissed by the employer and ordered the latter to pay the former compensation in an amount equal to four months' salary. The appeal is with the leave of the court a *quo*.

Background

[2] It is common cause that the employee was appointed on 1 June 2017 as a Senior Penetration Tester: IT Infrastructure Shared Services. He was one of the ethical hackers who regularly tested the information technology systems of the employer and allied companies for safety breaches in order to prevent them from being hacked. When any system was hacked he and his colleagues would identify and eradicate the problem. The employment relationship was terminated on 30 May 2019, and he referred a constructive

dismissal dispute to the CCMA. Conciliation was unsuccessful and the dispute was referred to arbitration.

Facts

[3] During the arbitration hearing the employee testified and the employer called two witnesses. The crux of the matter revolved around what transpired between December 2018 and May 2019. I now turn to consider the facts.

[4] The employee testified that he did not have any problems with his colleagues before December 2018. During December 2018, he submitted his request for vacation leave late, as a result, Mr Chris Vermeulen (Vermeulen), his manager, declined the request. He went on leave regardless of it not being approved. At the beginning of 2019, he was assessed in order to determine whether he met the Key Performance Indicators (KPI) for the year of assessment. Vermeulen said that his work was satisfactory but his timekeeping was poor (arriving at work late and leaving early). During the KPI session, he was informed about a disciplinary enquiry that was going to be held about the leave incident. On 17 January 2019 he was charged with unauthorised absence during December 2018 and the charges were dismissed because it was found that his colleagues, Kelvin Adams (his former team leader) and Vermeulen, were not candid.

[5] He testified that Vermeulen knew, during October 2018, that his mother was ill and that he consulted a psychologist as a result of the pressure and stress that her illness brought to bear on him. During December 2018, whilst on leave, Vermeulen requested him to send a doctor's certificate regarding his mother's illness, because he alleged that was the reason why he took leave. He failed to comply with the request *inter alia* because he did not want to send it via email which he regarded as an 'unsafe channel'.

[6] On 7 March 2019, he did not report for duty. The following day he reported for duty and informed Mr Bevan Lane (Lane) (new team leader) and Willem Smit (Smit) (his colleague) that he had gout. They accused him of lying about the

reason for his absence. He was summoned to the Human Resources Offices by Vermeulen, who also accused him of lying. Vermeulen referred to another employee who also had gout but always reported for duty.

[7] He wanted to attend a virtual course held in Mexico but was told by Lane that there were no finances for courses, but that he would speak to Vermeulen, who later confirmed that there was no money for courses. On 15 March 2019, Lane informed him that his CEH (Certified Ethical Hacker) certificate had expired. Lane informed him that the employer would reimburse him after he paid the fees for the certificate. After payment, Lane informed him that Vermeulen informed him that the employer would not reimburse him and that he will also not be granted study leave. Other colleagues were, normally, given two weeks' study leave.

[8] During March 2019, Smit told him that he (Smit) and Lane were going to attend a security conference in Las Vegas. He could not understand why he was not chosen to attend the conference.

[9] During April 2019 he was supposed to do something on a project relating to Santam – a sister company, but did not deliver on time. He apologized but was nevertheless charged with 'unprofessional behaviour that brings the Sanlam name, brand and reputation into disrepute'. He was found guilty of misconduct and given a final written warning.

[10] They (Lane, Smit and the employee) had a meeting with a client and his colleagues accused him of 'over promising' the client, because they thought his timelines were unrealistic. When he delivered as promised, no one congratulated him.

[11] On Friday 24 May 2019, he was informed about a security breach in Kenya. At 01:35 he emailed Smit and told him that he would assist with the Kenya project. He prefers to work alone and his colleagues sent him a 'channel' which enabled him to work on the Kenyan project. On Sunday, 26 May 2019, he found a solution to the problem and sent an email to his colleagues

informing them. Vermeulen responded and intimated that they should talk the next day. On the Monday morning he was asked what is the solution that he had found. When he informed them, they responded by informing him that they had already found the solution by the time he claimed that he had found it. They accused him of not being a team player and he got the impression that they did not believe that he found the solution. He was of the view that they were lying when they claimed to have solved the case before he did. Vermeulen called him to his (Vermeulen's) office and in the presence of Lane requested him to apologize to Smit or resign. He did not apologize.

[12] He confronted Smit and asked him why he had lied. Smit denied that he had lied. He could not sleep on the Tuesday and called in sick on Wednesday, 28 May 2019. He made a doctor's appointment for Thursday, 29 May 2019. The doctor had booked him off sick until 30 May 2019. When he returned from the doctor he noticed that Vermeulen had phoned him. He returned the call and Vermeulen requested him to go to the office for five minutes. He refused because he was stressed and told Vermeulen that anything that the latter needed he could do remotely, whilst at home. He resigned on 30 May 2019 at 14:20 and referred a constructive dismissal dispute to the CCMA on 18 June 2019.

[13] Vermeulen testified and confirmed that the employee went on unauthorized leave. He personally informed the employee that his application for leave was late and that arrangements for the holiday season have already been made. The employee then informed him that his mother was sick and what her medical condition was. He confirmed that while the employee was on unauthorized leave he requested him to send a doctor's note confirming his mother's condition, and that he failed to do so. During January 2019, he had a meeting with the employee in the presence of Ms van Rooyen, from the human resources division. The employee alleged that the leave was approved by Mr Adams, his former team leader. After Adams was called, it was clear that there could have been a misunderstanding and that the employee might have thought that Adams approved the leave. No disciplinary proceedings

were instituted because he was of the view that there was insufficient evidence to institute disciplinary proceedings.

[14] Mr Adams left Sanlam's employment during January 2019 and he (Vermeulen) commenced managing the Group Cyber Security Centre. He spoke to the employee about reporting late for duty and his absenteeism. Thereafter, on a Monday, the employee did not report for duty. When he was asked about this he informed Vermeulen that he had gout. He showed him his inflamed foot. The employee later sent him a link that explained how painful gout can be.

[15] With regard to the Mexico online course, he testified that the course was not relevant for the employee's job. They wanted him to do the OSCP course, which is 'probably the best certificate' for ethical hackers. The employee's CEH certificate, which must be renewed annually, had expired. It was the employee's responsibility to renew his CEH certificate. He had to rewrite the CEH examination because he had failed to renew it timeously. The company pays for renewals and not for re-examinations.

[16] He testified that the plan was to send Lane and Smit to Las Vegas because Lane was the new manager of the Cyber Security Centre. He had to decide between the employee and Smit. He decided to nominate Smit because he could not nominate Smit and the employee.

[17] He confirmed that he was the initiator during the Santam disciplinary process and that the employee was found guilty and given a final written warning. The employee did not refer a dispute to the CCMA in connection with the verdict and sanction.

[18] He testified that the employee successfully hacked the system of Indie (a sister company). Although he was not there, he had heard that Smit congratulated the employee. They had a serious hacking incident at one of their Kenyan companies. The team, except the employee, worked non-stop from 6:00 to 21:00 over the weekend. The employee was indifferent and

worked on another project. The employee did not assist the team. On the Saturday evening he called Smit from Johannesburg and was told that the employee worked on the Kenya project from home and indicated to Smit that he had identified an issue in relation to the project. Smit could, however, not get hold of the employee.

[19] On the Sunday evening, the employee posted messages insinuating that the other team members did not know what they were doing. He responded to the messages and requested that they discuss the matter on the Monday morning. He knew that Smit had decoded the malware scripts on the Friday already. On the Monday, the employee said that the script should be decoded. When they told him that they had already done that the previous week, he accused them of lying. The other team members were upset because of the way the employee spoke to them and that he insulted Smit who worked hard to resolve the problem.

[20] Vermeulen, Lane and the employee had a meeting and he told the employee that he needs to change his attitude, go to Smit and apologize or they are again going to end up in a disciplinary process, which he should not be aiming for because he already has a final written warning or he has the option to resign. The employee was excused. The employee sent messages to Lane in which he informed him that he is part of the problem and noted that he had not congratulated the employee after he successfully hacked the Indie system. The employee sent Lane a message in which he told him that he is preparing to jump ship and that he is going to resign.

[21] On 28 May 2019 the employee did not report for duty. He called in sick, and when Vermeulen asked him what was wrong, he told him that he had flu. He had already decided to serve the employee with a suspension letter pending a disciplinary hearing relating to his conduct in the middle of the Kenyan crises. He requested the employee to meet him at the office for half an hour. The employee did not comply with the request, instead, he sent his resignation letter on Thursday, 29 May 2019.

[22] Smit testified that he is a senior pentester and confirmed that the employee was his colleague. He essentially testified about the Kenyan incident. He confirmed that they had a serious issue in Kenya and that the team, except the appellant, had worked full steam in an attempt to resolve the problem. The employee sent him a text message informing him that he had identified something useful to resolve the Kenyan problem. They agreed that he would arrange with the Kenyan team to connect the employee to the Kenyan system at 06:00 on the Saturday morning (24 May 2019), because they were working from early morning to late at night. At 06:00 everyone waited for the employee to login. At 08:00 the employee informed him that he overslept and that he would join at 10:00. The employee called him at 23:00, but he did not answer. The employee posted messages on the group channel to the effect that he found something but he cannot get hold of Smit because Smit is dead or words to that effect.

[23] The preceding Thursday and Friday they found the code, decrypted it and sent it to the other team members. On Monday morning, 26 May 2019, morning the employee gleefully informed them that he found the power shell and gave them a half-decrypted power shell. He then informed the employee that they had found the power shell the previous Thursday and if he had worked with the team he would have known. The employee accused him of lying about having found the power shell code, which he denied. He later received a text message from the employee stating *'I am probably going to resign'*. He responded by imploring the employee not to resign and informed him that *'we don't want you to resign, we want you to work with us as a team'.*

[24] During cross-examination, the employee put it to Smit that he found the code before them and that he had invited Smit to inspect his laptop so that he could see that he (the employee) had found and decrypted the code. Smit answered that the code was found the previous Thursday and fully decrypted. That was the sum total of all the evidence presented during the arbitration.

Arbitration

[25] The commissioner had regard to all the incidents that the employee had referenced as the reason why he was of the view that the employer made continued employment intolerable. She found that the employee failed to prove that he was constructively dismissed and found that he had resigned. She therefore dismissed the case.

Labour Court

[26] Aggrieved by this finding, the employee launched a review application. In his founding affidavit, he alleged that the commissioner failed to consider relevant evidence. He stated that she failed to consider that he was given an ultimatum to apologize to his colleague or resign and that he was mentally ill at the time of his resignation.

[27] The court a *quo*, found that no weight was given to the employee's mental health during the arbitration. It found that although the employer attempted to show that the employee's conduct was unacceptable since October 2018, no mention was made of the employee's anxiety and depression. It further found that:

> '[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. 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.'

[28] This led to the court a *quo's* conclusion 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.'* It ordered the employer to pay the employee an amount equivalent to four month's salary as compensation.

Issues

[29] Dissatisfied with the order, the employer approached this court. In this Court, the employer argued that the employee's mental health issue was not before the commissioner and that the court a *quo* therefore erred in deciding the matter on this basis. It also contended that the employer was never called upon to meet a case of constructive dismissal based on the employer having made the employment relationship intolerable by not treating the employee with the necessary sensitivity. It further contended that the court a *quo* was called upon to decide whether the commissioner's conclusion was correct based on the case and the totality of the evidence before her.

[30] The employee contended that the court a *quo* decided the matter on the correct bases. He pointed out that he submitted a medical certificate, after his resignation, which stated that he resigned because he had stress. He therefore supported the reasoning and conclusion of the court a *quo*.

Analysis

[31] A constructive dismissal or an employer-instigated dismissal arises when an employee terminates employment because the employer made continued employment intolerable.[1] In *Murray v Minister of Defence*,[2] it was stated that:

[1] See section 186(1)(f) of the Labour Relations Act 66 of 1995, as amended, which states that: 'Dismissal means that an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee'.
[2] *Murray v Minister of Defence* [2008] ZASCA 44; 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA).

> 'It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances 'must have been of the employer's making'. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.'[3]

[32] In constructive dismissal disputes, a two stage approach is normally followed. First, the employee must prove that the employer effectively dismissed him or her by making her or his continued employment intolerable. It is an objective test. The employee need not prove that he had no choice but to resign, all that is required is to prove that the employer made continued employment intolerable.[4] The conduct of the employer towards the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with it.[5] Second, after the dismissal had been established, the court will then evaluate whether the dismissal was unfair.[6] The two stages may overlap and be interrelated.

[33] I agree with the court *a quo* that mental ill health may be a justifiable reason to terminate an employment relationship, provided it is done fairly. However, that is irrelevant for present purposes. Here the dispute is not an unfair dismissal in the conventional sense, relating to conduct or capacity, but a constructive dismissal. To prove a constructive dismissal, the facts of the case must point to the employer having been aware or ought to have been aware of the

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[3] Ibid para 13.
[4] *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC) at para 4.
[5] *National Health Laboratory Services v Yona & Others* [2015] ZALAC 33; (2015) 36 ILJ 2259 (LAC) at para 30.
[6] *Jordaan v CCMA* (2010) 31 ILJ 2331 (LAC); *Sappi Kraft (Pty)Ltd t/a Tugela Mill v Majake NO & Others* (1998) 19 ILJ 1240 (LC) at 1250.

mental distress of the employee. If an employer is aware of an employee's psychiatric illness and the employer is indifferent or insensitive with regard to the employee's mental illness or vulnerability and thereby making continued employment intolerable a proper case for constructive dismissal might be established.

[34] An employer must always be vigilant and act sensitively when the employer becomes aware or ought to be aware of a particular susceptibility or vulnerability of an employee. In a case where the employee claims constructive dismissal based on psychiatric ill health, the employee must, therefore, prove that the employer was aware or ought to have been aware of the employee's psychiatric ill health.

[35] It is common cause that the employee suffered from stress or depression during October 2018, after his mother fell ill. He saw a psychologist and his condition was treated. He did not complain to or discuss his condition with his employer thereafter. In fact, the employee's case was that the problems between him and the employer started in December 2018.

[36] During the arbitration proceedings he did not mention his mental health condition as the reason for his resignation, neither did he mention the employer's actions as exacerbating his condition. It was only in the review application that he mentioned that his mental health condition (stress) led to his resignation.

[37] In his replying affidavit in the court *a quo*, the employee stated the following about his mental health condition:

> 'Whilst it was not mentioned at the CCMA, I was diagnosed with a mental illness six months prior to my resignation. I am willing to share this information with the labour court if privacy is guaranteed.'

[38] On his own case, his mental condition was not mentioned at the arbitration hearing. The medical certificate which stated that he resigned due to stress

was presented after his resignation. The court a quo's finding that the employee's mental ill health was common cause is not substantiated by the facts that were before the commissioner. Therefore, the conclusion that the employee's claim 'should have incorporated the common cause mental ill health suffered by him during the material period' is also incorrect. His mental ill health was not common cause.

[39] The court *a quo* mentioned that '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'. This comment is misplaced because there was no evidence whatsoever that the employee was incapacitated due to mental ill health.

[40] The employee's explanation with regard to the December leave incident was accepted by the employer. The employee admitted that his CEH certificate had expired. The gout and the KPI incidents were about the employee's tardiness and absenteeism. It was common cause that he was found guilty of bringing the company into disrepute. He did not appeal this finding. It was also common cause that he did not lodge a single grievance against any of his seniors or colleagues, except for informing Lane that Vermeulen was not treating him fairly.

[41] The commissioner correctly found that Vermeulen's conduct of requesting the employee to report to the office, albeit for a few minutes, was unacceptable but did not render the employment relationship intolerable.

[42] The aftermath to the Kenya problem led to the 'ultimatum'. The employee was indifferent to his colleagues' and other pentesters' endeavours to solve the problem. He admitted that he preferred to work alone. He did not deny that arrangements were made with their Kenyan counterparts for him to login the Saturday morning, and that he did not do so. He did not deny that Smit frantically attempted to get hold of him on that Saturday. He further admitted that he made contact with the team on the Sunday evening whilst he was

under the influence of alcohol and ridiculed Smit. The Monday morning when he was informed that the problem which he thought he had solved, had already been solved, during the previous week, he accused his colleagues of lying. Regardless of their assurances he persisted with his accusation. He felt bad because the implication was that he was the liar. When he mentioned his intention to resign, Smit informed him that they want him to be a team player. Vermeulen was also of the view that he was not a team player.

[43] It is important to note that the court *a quo* did not mention in what manner the employer made the employment relationship intolerable. It conflated the requirements for an incapacity dismissal with those of a constructive dismissal. The employer, in both instances, must be aware or ought to be aware of the mental infliction before a duty can be placed on the employer to act in one way or the other. There was no evidence that this employer was aware of the employee's mental ill health. Even when he took his last sick leave he said that he had the flu and not that he was suffering from stress or anxiety. It is only after his resignation that his medical practitioner certified that he had resigned due to stress.

[44] I am convinced that the court *a quo* misdirected itself when it adjudicated the review based on evidence that was not before the commissioner. In any event, there was insufficient evidence to conclude that the employer made continued employment intolerable. The court *a quo*, therefore, erred in finding that there was a constructive dismissal. It, unfortunately, lost sight of the fact that the onus on an employee to prove a constructive dismissal is heavy. An employee should not be allowed to rely on the fact that certain rules which applies to all employees, frustrates, irritates or do not suit him or her as the basis for a claim of constructive dismissal.[7]

[45] The commissioner considered all the incidents cumulatively and concluded that the employee was not constructively dismissed but resigned. I cannot find

[7] *Old Mutual Group Schemes v Dreyer and Another* [1999] ZALAC 50; (1999) 20 ILJ 2030 (LAC) at 2036.

fault with this conclusion. The commissioner's conclusion with regard to all the incidents was, correctly, not questioned by the court *a quo*.

Ruling

[46] The appeal ought to succeed.

Order

[47] I therefore make the following order:

1. The appeal succeeds with no costs order.

2. The order of the court a quo is set aside and replaced with the following:

   (i) 'The review application is dismissed, with no order as to costs.'

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CJ Musi JA

Molahlehi ADJP et Savage AJA concur in the judgment of CJ Musi JA.

APPEARANCES:

FOR THE APPELLANT:	M. Aggenbach Heads drafted by RGL Stelzner SC Instructed by Grant Marinus Attorneys
FOR THE RESPONDENT:	In Person