



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA14/2012

In the matter between:

MAOKA, PULE VICEROY HILLARY

Appellant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

THULANI AKIM N.O.

Second Respondent

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Third Respondent

Heard: 09 May 2013

Delivered: 12 June 2014

Summary: Constructive dismissal- employee bearing the *onus* to prove that resignation due to employer making continued employment intolerable- employee transferred to various vacant posts- arbitrator finding that employee not constructively dismissed. Evidence showing that the true reason for employee resigning was disagreement on remuneration- Labour Court correct in upholding arbitration award- Appeal dismissed.

Coram: Waglay JP, Molemela and Francis AJJA

JUDGMENT

FRANCIS J

Introduction

- [1] The appellant who was employed by the third respondent - the Department of Justice and Constitutional Development (the department), resigned on 12 September 2008 and referred a constructive dismissal dispute to the first respondent – the General Public Service Sectoral Bargaining Council (the bargaining council). He alleged that the department had made his continued employment intolerable by transferring him to a position for which there was no post and then transferred him twice to posts that were not vacant, which compelled him to resign. The second respondent (the arbitrator) was appointed as an arbitrator. He issued an award and found that the appellant had failed to prove that he was dismissed and dismissed his referral with no order as to costs.
- [2] The appellant brought a review application to set aside the arbitration award.
- [3] The application was dismissed by Bruinders AJ on 24 January 2012 on the basis that the appellant had failed to prove that he was dismissed but had resigned after the department had failed to offer him an increased salary. The court found that although the arbitrator had found on a different basis that the appellant's resignation did not amount to a constructive dismissal, he was correct that his resignation did not amount to a constructive dismissal.
- [4] The appeal before us is with leave of the court *a quo*.

The arbitration proceedings

- [5] It is common cause that the appellant was employed by the third respondent on 1 July 1991 to 30 September 2008. He commenced employment as a public prosecutor on 1 July 1991 until 1999 when he was promoted to the position of a senior public prosecutor. In January 2005, he was promoted to the position of Director: Administrative Secretary: Ministry. This position was advertised

internally and externally at a salary scale of R427 497.00 per annum. He had negotiated the salary scale increase to R488 154.00 per annum before he accepted the post. His duties included doing sessional duties in Cape Town about four times a year. In addition to his salary, he was entitled to receive about R3 100 per month for a Personal Non-Pensionable Allowance (PNPA allowance) and to receive sessional allowances for sessional duties in terms of Public Service Sectoral Bargaining Council (PSSBC) Resolution 3 of 1999. A written agreement of employment was signed between the parties on 13 January 2005.

[6] The appellant served as a Director: Administrative Secretary: Ministry from 1 February 2005 to 30 September 2006. In March 2006, the third respondent seconded a Ms Ncongwane to the appellant's unit as a deputy director. In September 2006, the department notified the appellant that he was transferred to the position of Director: Court Efficiency Services in the court services branch with effect from 1 October 2006 even though there was no such vacant post. In the result, although the appellant was transferred, he retained his title of Director: Administrative Secretary: Ministry. The effect of this transfer was that the appellant did not have sessional duties anymore, which resulted in the third respondent not only stopping the payment of his PNPA allowance in August 2007 but also demanded that he refund the PNPA allowance that he had received after the 2006 transfer. The appellant initiated negotiations with the third respondent about making up for the financial loss caused by the transfer. Ms Sejosengwe supported by Ms Modise, advocate Jiyane, Ms Gomm and Dr De Wee who are all senior employees of the third respondent endeavoured to create a post for the appellant. The Director General rejected the recommendation without furnishing reasons. The appellant thus continued to occupy the post of Director: Administrative Secretary: Ministry although he no longer served as such until 30 November 2007.

[7] In November 2006, the third respondent advertised the appellant's post. In July 2007, the third respondent interviewed candidates to be appointed to the appellant's post of Director: Administrative Secretary: Ministry. In September 2007, the third respondent notified the appellant that he was transferred to the Chief Directorate Programme Co-ordination and Court Services with effect from

1 October 2007. There was no such vacant post when he was transferred. He lodged a grievance with the third respondent which failed to respond to it within the prescribed time frames. He then referred the matter to conciliation and arbitration.

[8] On 5 December 2007, the appellant received notification from the third respondent that he was temporarily relocated to the position of Director: Business Operation with effect from 1 December 2007. In December 2007, the third respondent drew a memorandum dated 11 December 2007 motivating that Ms GG Ncongwane should fill the appellant's post of Director: Administrative Secretary: Ministry. In December 2007, the appellant referred a dispute for conciliation. The recommendation was approved by the Director General and the Minister in January 2008. In February 2008, the third respondent offered the aforesaid post to Ms Ncongwane who accepted it.

[9] The appellant tendered his resignation in June 2008. In June 2008, the third respondent through its Director General notified him in a letter dated 30 June 2008 that he was absorbed into the post of Director: Court Manager Johannesburg Magistrate's Court. He refused the offer because he wanted the issue of the salary to be discussed first. He later agreed to accept the offer because the issue of the salary package would be discussed after his acceptance of the offer. After he had accepted the offer, the parties entered into negotiations around his salary. They could not agree about the salary scale. He tendered his resignation in September 2008 which was accepted by the third respondent. He referred a constructive dismissal dispute to the first respondent for conciliation and arbitration. The matter was arbitrated by the arbitrator.

[10] During cross-examination, the appellant conceded that the issue relating to his transfer that occurred in September 2006 to December 2007, was dealt with in the unfair labour practice award and that the remedy was in his favour and was granted arrear allowances. He agreed that the offer of court manager was similar to the one that was offered to him in February 2008 and June 2008 and that he had accepted that position until June 2008 and had reported at the regional head. He conceded further that his exit interview document indicates that he resigned because of an unfair labour practice. He did not pursue the unfair

labour practice dispute at the bargaining council because it was clear that the third respondent was not willing to resolve his concerns because despite the fact that he had referred the dispute of an unfair labour practice before, the third respondent continued with the transfer and after he had resigned, he decided to lodge a dispute. He resigned because he wanted to redress the wrongs that were done to him. He did not know that the unfair labour practice route at the bargaining council was still open to him before he could resign because it was the first time that he had become involved in such issues. He agreed that he had obtained advice before he resigned. His dispute arose on 12 September 2008 when he resigned. He conceded that the third respondent had made two options and he chose option 2 but that he wanted his salary to be pushed up. The third respondent considered his proposal and the Director General decided to put him on a personal notch which he did not accept. The third respondent withdrew the offer of the absorption to the court manager post and the allowances. He regarded himself as Director: Court Manager Johannesburg Magistrate's Court. He conceded that his complaint was not about the withdrawal of the permanent post but about his employment becoming unbearable with effect from March 2006 to 12 September 2008. It was part of his concern that he was incurring financial loss particularly from the Ministry position. He served his resignation on 6 June 2008 and on 11 June 2008, he was advised that that post of Director: Court Manager Johannesburg Magistrate's Court was abolished. He did not want to continue to work in an acting post. The offer was made in February 2008 and was withdrawn on 11 June 2008. He accepted the offer and it was thereafter withdrawn or abolished. He conceded that he had a verbal agreement with the Director General but not in terms of the service regulations.

- [11] The third respondent called Vuso Shabalala as its witness. He testified that he became a Director General on 29 June 2008. He was involved in the issue of the appellant's employment. The Director General brought it to his attention that the permanent absorption of the appellant as Director: Court Manager Johannesburg Magistrate's Court was made in early February 2008. The director general requested him to handle the absorption of the appellant. He was aware that the appellant had accepted the offer. Two options were provided to the appellant

after he had indicated that he expected a salary increase. He thereafter tendered his resignation after the third respondent did not accept his proposal.

The arbitration award

- [12] The arbitrator was required to determine whether the appellant's resignation constituted a constructive dismissal in terms of the Labour Relations Act 66 of 1995 (the LRA). He said that it was common cause that he had tendered his resignation on 12 September 2008 and that the appellant had said that it constituted constructive dismissal. The appellant had said that the circumstances which led to his resignation occurred from 2006 to 2007 i.e. transfer issues. The third respondent argued that the transfer issues that occurred during 2006 to 2007 were resolved and finalised after the appellant had lodged a dispute about an unfair labour practice relating to the Ministry post and subsequent transfers. The arbitrator said that the third respondent's version was probable in that it was common cause that the appellant had lodged the grievance at the workplace about the issue of being transferred. It was further common cause that the third respondent failed to deal with that issue and after that he had referred the dispute to the Council for Conciliation and Arbitration. The appellant had conceded during cross-examination that the issue relating to the transfer that happened between September 2006 to December 2007 was dealt in an arbitration award which was in his favour.
- [13] The arbitrator said that the appellant's version clearly showed that the issue relating to the transfer was resolved by means on an arbitration outcome issued on 5 August 2009. The appellant could not rely on the circumstances that occurred in September 2006 to December 2007 which were dealt with and resolved. This meant that his conviction and apprehension which drove him to resign on 12 September 2008 no longer existed, [since he had resigned on 6 June 2008 before the outcome of the arbitration award was issued](#) The appellant could in that referral have limited the arbitrator to grant him the relief he sought that he be taken back to his Ministry position. The appellant was not happy about how this matter was resolved and repeated this issue as grounds of his referral in his constructive dismissal referral. He testified during cross-examination that he resigned on September 2008 because he wanted to redress the wrongs that

were done to him. The arbitrator said that the evidence showed that the appellant was under a genuine impression that when he resigned, he would be able to address the issue which was not dealt with satisfactorily in terms of the arbitration outcome.

- [14] The arbitrator said that it was common cause that the appellant sought reinstatement alternatively compensation. The relief on its own cast a light that it was improbable that the appellant had believed that there was no point in continuing with the employment relationship when he resigned in September 2008 despite the fact that he was aware that the post was abolished. The arbitrator said that as a result of this, it was not necessary for him to deal with the issue of the offer of absorption to Director: Court Manager Johannesburg Magistrate's Court post because it was the appellant's evidence and argument that the continued circumstances occurred from 2006 to 2007 that made his condition of employment intolerable. The issue of the permanent post started after 2007 i.e. on 1 February 2008 to September 2008. He found that the appellant had failed to discharge on a balance of probabilities that he was dismissed constructively. His referral was dismissed with no order as to costs.

The decision of the court *a quo*

- [15] The appellant felt aggrieved with the arbitration award and brought a review in the court *a quo*. He sought that the arbitration award to be reviewed and set aside on several grounds. It is not necessary to repeat those grounds of review.
- [16] The court *a quo* said that much was made by both parties in the review before him of the application of the *res judicata* rule. The appellant contended that he was entitled to rely on the same facts for his unfair labour practice claim in the first arbitration and for his constructive dismissal claim in the second referral. The department, on the other hand, contended that the fairness of the transfers is the same question for consideration in both arbitrations. Because the question before him had already been decided in the first arbitration, he said that the arbitrator in the second arbitration was correct to dismiss the constructive dismissal claim. The court said that on reflection, it was not necessary to decide whether *res judicata* or issue estoppel applied to the second arbitration award. It

had assumed, in favour of the appellant that they did not, as a consideration of the merits of his case, seemed appropriate and just. The court invited counsel to address him on the merits of the constructive dismissal claim. The court said that on the facts it was not persuaded that the resignation amounted to constructive dismissal.

- [17] The court said that the appellant did not resign because his employer had made his situation at work so intolerable that he could no longer work there which was the only basis for success in a constructive dismissal claim. He resigned because he could not get the third respondent to agree to the salary he had demanded during negotiations. He would have continued working for the third respondent had it agreed to his counter-proposal. The third respondent did not make his life unbearable at the workplace in Johannesburg. It had simply refused to agree to his counter-proposal, having itself offered to increase his salary. The fact that the appellant found the refusal of his counter-proposal for a salary increase unpalatable, did not make his employment intolerable. At best, for him, he resigned because he did not succeed in obtaining his salary demand in salary negotiations. He did not resign because, without reasonable justification, the third respondent had made his life so unbearable at the workplace that it damaged or was likely to damage the relationship of trust and confidence between the parties, such that the appellant could not be expected to put up with it. The court said that he would have been entitled to resign in those circumstances.
- [18] The court said that although the arbitrator found on a different basis that the employee's resignation did not amount to a constructive dismissal, he was correct that the resignation did not amount to a constructive dismissal. There was therefore no reason to set aside the award and that the review application had to fail. The court said that it was not necessary to decide whether the arbitrator was correct that the matter was *res judicata* – which was the basis on which the appellant sought to review the award. The court said that it would in the circumstances not be fair to award costs against the appellant. The review application was dismissed with no order as to costs.

On appeal

- [19] The appellant contended that the first issue to be decided is whether the award which was the subject matter of review before the court *a quo* should have been set aside because of process related irregularities more particularly a material failure to consider evidence. Secondly whether this Court should re-determine the matter and uphold the appellant's constructive dismissal claim which the appellant submitted it should.
- [20] The appellant submitted that the court *a quo* erred in upholding the award for reasons different to those advanced by the commissioner. Secondly, the court *a quo*'s approach to testing whether there was proof of a constructive dismissal was too narrow. The court erred by not giving sufficient weight to the appellant's submission that in terms of the decision in *Murray v Minister of Defence*,¹ a broader approach was warranted. Based upon the evidence as a whole, the appellant had satisfied the test of constructive dismissal.
- [21] It was further contended that the court *a quo* erred in dismissing the review application by relying on grounds other than those relied upon by the arbitrator for his finding. The arbitrator had found that the issue was *res judicata* and accordingly dismissed the referral. The court found that it was not necessary to deal with the issue of *res judicata* and found that the appellant had resigned because the parties could not reach an agreement on the salary.

Analysis of the facts and arguments raised

- [22] There is only one test for reviews brought in terms of the LRA which is the test laid in the majority judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The test on review is whether the award was one that a reasonable decision-maker could not reach.
- [23] The arbitrator and the court *a quo* dismissed the referral for different reasons. They both found that the appellant had failed to prove that he was constructively

¹ [2008] 6 (BLLR) 513 (SCA).

² 2008 (2) SA 24 (CC).

dismissed. The court *a quo* considered the material that was placed before the arbitrator and found that the decision was reasonable for different reasons. The court *a quo* followed the approach endorsed in *Fidelity Cash Management Service v CCMA and Others*.³ The approach adopted by the court *a quo* was correct and the first ground of appeal therefore fails.

[24] The second ground of appeal is that the court *a quo*'s approach to testing whether there was proof of a constructive dismissal was too narrow and not the wide one in *Murray*. This is simply not correct. There is only one test that needs to be applied when dealing with constructive dismissals. The test used in the *Murray* matter is the same test that has been used by the Labour Court and the Labour Appeal Court over the years. This is based on the provisions of section 186(1)(e) of the LRA.

[25] The crucial question to be determined in this appeal is whether the appellant has proven that his resignation amounts to a dismissal in terms of section 186(1)(e) of the LRA which provides as follows:

‘Dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.’

[26] The appellant bears the *onus* to prove that he terminated his contract because his employer had made his continued employment intolerable. The facts are not much in dispute. The appellant is a lawyer by profession. He had been a state prosecutor for a number of years and eventually occupied the position of Director. He was in dispute with the department about his position with the department. He referred an unfair labour practice dispute which was subsequently resolved in his favour. He finally resigned from the department which accepted his second letter of resignation. He then proceeded to refer a constructive dismissal dispute to the bargaining council contending that the department had made his continued employment intolerable. The arbitrator found against him, so did the *court a quo* too. The court *a quo* found that dismissal of the appellant did not amount to constructive dismissal. It found that

³ (2008) 29 ILJ 964 (LAC) at para 102.

based on the material that served before the arbitrator he had failed to prove so. The court *a quo* arrived at the same conclusion for different reasons.

- [27] It is clear from the common cause facts and the various correspondence between the appellant and officials of the third respondent why he had resigned. Nowhere does he state that he resigned because the employer had made his continued employment intolerable. It is common cause that he was transferred to various vacant posts. He was unhappy with this and referred an unfair labour practice dispute to the bargaining council. In a letter dated 5 May 2008, he gave no reason why he was resigning with effect from 1 July 2008 and said that his last working day would be 30 June 2008. The Director General responded to his letter with a letter dated 29 June 2008 and informed him that he had decided to absorb him into the post of Director: Court Manager Johannesburg Magistrate's Court which was at the level of Director at his then current level. He was informed that it was a lateral transfer and should he find the transfer acceptable, he had to report to the regional head through the departmental structures. His current remuneration would remain the same. He was requested to indicate whether the above was in order. He indicated on 30 June 2008 that he accepted the transfer and withdrew his resignation.
- [28] The appellant sent Mr Shabalala an email and dealt with the history of his matter and the previous positions that he had occupied. It is not necessary to repeat what is stated in the email save to point out that nowhere in the email does he complain that his employer had made his continued employment unbearable. He dealt with the counter-offers. From the contents of the aforesaid email he resigned because he was not placed on a higher notch which had financial implications for him. In a letter dated 14 August 2008, the Director General in response to the appellant's resignation offered him two counter-offers of employment. The first option was for him to remain a permanent employee and to act in the post of Director: Court Manager Johannesburg Magistrate's Court until the post was filled on a permanent basis. The department undertook to reimburse him in respect of his travelling expenses from Pretoria to Johannesburg and back during the period of his acting appointment. The second option was for him to be appointed on a contract basis for a period of one year

as Director: Court Manager Johannesburg Magistrate's Court on a salary package of R599 346.00 per annum. If he accepted this option, the salary package would not be renegotiated during the forthcoming twelve months. He was required to indicate which option he was accepting.

[29] The appellant responded in a letter or memorandum dated 18 August 2008 and stated that the purpose was to obtain approval of the Director General to appoint him on a contract basis for a period of one year as Director: Court Manager Johannesburg Magistrate's Court on a salary package of R626 538 per annum with effect from 1 July 2008. He raised concerns regarding the remuneration package offered by the Director General and stated that he had accepted the offer made in the letter dated the 29th June 2008 on condition that his salary package would be reviewed to cover his transport costs between Pretoria and Johannesburg that he would have incurred as a result of the transfer. He then proceeded to deal with his motivation which is not necessary to repeat save to indicate that he said that the ideal position would be to relocate to Johannesburg; however, the current economic situation in the country had made it difficult for him to sell his house. He recommended that the Director General approved his appointment on a contract basis for one year as a Director: Court Manager: Johannesburg Magistrate's Court on a salary package of R626 538 per annum with effect from the 1 July 2008.

[30] The Deputy Director General sent the appellant an email dated 4 September 2008 requesting that he, *inter alia*, indicated who he was reporting to at national office and was requested to sign and indicate whether he accepted the last absorption offer to him. He responded in an email dated 6 September 2008 and stated, *inter alia*, what he had been doing and stated that he was executing his duties at the Johannesburg Magistrate's Court and would continue to do so until they have come to a final understanding/agreement. He said that he would respond to the final offer from the department on or before 12 September 2008.

[31] In a letter dated 12 September 2008, the appellant stated that he had considered the final offer of employment and had decided not to remain in the employ of the department as stated in his memorandum dated 18 August 2008. He said that his last working day would be 30 September 2008. The third respondent

responded to his letter with its on 17 September 2008 and said that it had tried to accommodate him in terms of the absorption but were constrained by considerations of equity and the relevant prescripts relating to remuneration. His resignation was accepted and that his last day of service was 30 September 2008. The appellant completed a Staff Statistics: Staff Losses form on 26 September 2008 and stated that the reason for the staff loss is "Nature of Work; Poor progress/promotions prospects; Inconvenience with Transfer and Abolition of position, reorganisation or rearrangement and Unfair Labour Practice".

[32] It is clear, viewed objectively, that the true reason for the appellant leaving his employ is stated in his letter dated 12 September 2008 read with the memorandum of 18 August 2008, which clearly show that his main concern was his salary. The position that he was absorbed into was still on a Director level salary but he was not happy with the salary that he was being paid. It is also worth noting that although he raised a concern about being supernumerary to the department, he opted for an option of a fixed term employment of just one year in exchange for a higher salary. The reasons advanced in his referral and that he gave at the arbitration hearing were an afterthought. He had attempted to make out a case for constructive dismissal when that was clearly not the case. As correctly stated by the court *a quo*, it is also clear that if his proposal for a higher salary had been accepted, he would not have resigned. He said that his financial position would lead to unbearable conditions of employment. He had acknowledged that if he moved to Johannesburg, his financial situation would be different but he could not sell his house at the time.

[33] He explained in that memorandum why he sought an increase in the increased offer of remuneration by the third respondent in its second option. He sought an additional increase of R4000.00 per month, on the basis that he travelled to work in Johannesburg from Pretoria. The memorandum said nothing about the third respondent having made life in his new post (in which he had already started) so intolerable that he was compelled to leave. On the contrary, the memorandum is a clear example of an attempt at negotiating a better remuneration package. That attempt was ultimately unsuccessful.

[34] The court *a quo* did not err when he found that the true reason for the appellant resigning was a disagreement on the remuneration which was based on the evidence that was placed before the arbitrator. In my view, the arbitrator should have taken into account the facts that were referred to him in the first referral in dealing with the issue of constructive dismissal but his failure to do so, however, did not render his decision susceptible to review. He still arrived at a decision which a reasonable arbitrator could have arrived at. The court *a quo* did not err in dismissing the appellant's review application. He failed to prove that he resigned because the employer had made his continued employment intolerable.

[35] The appeal stands to be dismissed.

[36] I do not believe that this is a matter where costs should follow the result.

[37] In the circumstances, the following order is made:

37.1 The appeal is dismissed.

37.2 There is no order as to costs.

Francis AJA

Acting Judge of the Labour Appeal Court

I concur

Waglay JP

Judge President of the Labour Appeal Court

I concur

Molemela AJA

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT:

Advocate F A Boda

Instructed by Mashobane Attorneys

FOR THIRD RESPONDENT:

Advocate N Cassim SC with Advocate D T Skosana

Instructed by State Attorney