

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CaseNo: JR662/10

In the matter between:

RABONE MORIPE

Applicant

And

**THE GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL
ADV. A. SIRKHOT
DERPATMENT OF HOME AFFAIRS**

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

CAWE AJ

Introduction

- [1] This is an opposed review application in terms of which the applicant seeks an order reviewing and setting aside an arbitration award issued by the Second Respondent (“the Commissioner”), under case Number PSGA 67/08/09, and substitution with an order to the effect that he was constructively dismissed by the third Respondent.

Background Facts

- [2] The Applicant was appointed Deputy Director, by the third Respondent in January 1999. He was to head the third Respondent’s Anti-Corruption Unit.
- [3] Around December 2001, the Sub-Directorate, Anti-Corruption Unit and another Department collapsed and a new section was formed called the Security Service and Ethical conduct. The Director of this section resigned

and the then Director General, Billy Masethla, instructed the Applicant and Strobos, Deputy Director, to be co-responsible for the management of the Directorate until the post was suitably filled. The acting appointment of the Applicant was terminated in June 2002. In May 2002, the Applicant was accused of misconduct by Strobos and provided with an opportunity to respond to the allegations of misconduct within 5 days. The Applicant responded by denying the allegations made by Strobos. That was the second instance that the Applicant was threatened with disciplinary action and nothing happened. Around June 2002, Masethla left the employ of the Respondent and Lambinon was appointed as Acting Director General. During the tenure of Masethla, it was agreed to send officials on training courses in July 2002.

- [4] The Applicant took the officers on the training course but was instructed, by Lambinon, to withdraw them. This led to the Applicant being charged with 157 counts of misconduct and was only found guilty on two. The sanction was that he would forfeit his salary for one month. He appealed the sanction. The sanction was never imposed although the Applicant had not received a response to his appeal.
- [5] The Applicant remained in the employ of the third Respondent until April 2004. On the 23 December 2003, a letter was received from National Intelligence Agency regarding the Applicant's negative security clearance (A49-53) as a result of which the Applicant was placed on special leave. On 19th May 2006 the Applicant received a letter from the Respondent requesting reasons why his services should not be terminated. The matter was resolved. There was a proposal that the Applicant be placed on level 14 subject to a security clearance.

- [6] The Applicant returned to work on the 16th October 2006. His version is that he was not provided with any position or duties. This led him to refer a dispute but he later withdrew this “ as it was defective”.
- [7] On the 14th May 2007, the Applicant received a letter of placement but did not accept this promotion as it was below level 14.
- [8] The Applicant then tendered his resignation and this was accepted by the Director General. He served his notice period from 1st March to 31st March 2008.
- [9] The Applicant referred a constructive dismissal dispute, to the Bargaining Council, in terms of Section 186(e) of the Labour Relations Act. The matter was scheduled for arbitration before the second Respondent. There were several issues put forward by the Applicant. The Applicant believed that the Respondent had created an adverse situation at the workplace in order to make his continued employment intolerable. He sets out the situation as follows:
- “a) that the Respondent had levelled charges against him and did not pursue the allegations made against him and had ignored his appeal;*
 - b) not being afforded the roles and responsibilities in terms of his contract of employment and in breach of his employment as the security manager;*
 - c) being placed at a demoted level of a Deputy Director, communications department despite having been appointed as security manager;*
 - d) Being denied to be a security manager as a result of unattested allegations of intimidation and victimisation;*
 - e) Being put on unfair special leave;*

- f) *Having his office locked;*
- g) *Persistently being ignored by the Director General.”*

[10] The Commissioner found that the Applicant had not been constructively dismissed. In his analysis of evidence and argument, he, the Commissioner states the following;

“I find it disconcerting that the Applicant had never utilised the Respondent’s internal grievance procedure to address his issues with the Respondent. I regard this omission as a fatal flaw on the part of the Applicant. The Applicant was faced with options as alternatives to tendering his resignation, he could have allowed the Respondent to terminate his employment in terms of Section 17(h) of the Public Service Act which the Applicant has conceded in heads of argument would have been irregular as the Respondent must institute a disciplinary inquiry which would have given the Applicant the opportunity to be heard. The Applicant could alternatively have declared a grievance regarding his placement to the position of Deputy Director, Internal Communication.”

[11] The Commissioner went further and stated that since the Applicant seemed to be very aggrieved by not being placed at level 14, as he desired and maybe deserved, he should have utilised the internal grievance procedure, failing which, declared an Unfair Labour Practice on the basis of demotion. The Commissioner accordingly found that the conduct of the Respondent under the circumstances was not unreasonable nor does it constitute conduct which made continued employment intolerable for the Applicant.

[12] Before one deals with whether the Applicant has convincingly set out a case for review, it is important to deal with whether there was constructive dismissal of the Applicant by the Respondent or not. The Commissioner found that the Applicant was not constructively dismissed. I agree with the conclusion of the Commissioner as the Applicant did not discharge the onus placed upon him to prove on a balance of probabilities that continued employment with the third respondent was intolerable. In **Mafomane v Rusternburg Platinum Mines Ltd(2003) 10 BLLR 999(LC)** at page **1013D**, Tregrove AJ concluded as follows:

“The conclusion that the question whether the employee’s continued employment has become intolerable in that he or she cannot “ reasonably be required to endure it, must be made from the perspective of a reasonable person in the shoes of the employee, obviously does not mean that the employee’s own views must prevail. The test remains an objective one. The idiosyncrasies of the particular employee are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position.”

[13] I hold the views that the incidents that are cited by the Applicant as having led him to resign from the employ of the third Respondent are not so grave as to have rendered the employment relationship intolerable for the Applicant. At the Arbitration the third Respondent offered reasonable explanation for actions taken by itself against the Applicant. Each time the Applicant raised a complaint a decision was taken that favoured him, even in circumstances where there did not appear to be any justification therefor,

one gets the sense that there was a determined effort to resolve whatever issues Applicant had with his superiors . I am left with the feeling that the Applicant was unduly sensitive and uncooperative with his superiors.

The grounds for Review

- [12] In his Heads of Argument the Applicant sets out his reasons for moving the instant review proceedings. These are contained in 21 paragraphs of the Heads. I will not deal with them individually but collectively. These grounds or reasons for review deal with the Applicant's perception that the Arbitrator/ Commissioner failed to attach sufficient weight to particular evidence. He also details how the Commissioner made several mistakes of fact regarding numerous written communication between the Applicant and his employer. These mistakes of fact do not go to the real issue of the Commissioner misdirecting himself to the existence of a constructive dismissal.
- [13] The Constitutional Court in **Sidumo and Another v Rustenburg Platinum Mines (2007) 12 BLLR 1097(CC)**, held that the test for review of an Arbitration Award is to determine whether the conclusion reached by the Commissioners is one which a reasonable decision maker could not reach. The grounds for review as set out by the Applicant do not reveal how the Commissioner failed to apply his mind or exceeded his mandate in finding that the Applicant was not constructively dismissed. What is set out by the Applicant would be applicable in an appeal as it deals with factors that could or should only be dealt with in an appeal.

Conclusion

[16] The arbitrator, in the award, dealt extensively with the evidence of all witnesses, including that of the Applicant. He had regard for every detail that was brought to his attention at the arbitration. In his analysis he sets out very comprehensively why he finds that the Applicant was not constructively dismissed. The award illustrates that the Commissioner applied his mind to the evidence before him.

[17] I, therefore, of the view that the Applicant has not made out a case that would warrant the interference with the Commissioner's award.

[18] For these reasons, I make the following order:

1. The Application is dismissed
2. There is no order as to costs

Cawe N

Acting Judge of the Labour Court

Appearances:

For the Applicant: In person

For the Respondent: Adv. Gwala

Instructed by: The State Attorney

Date of hearing: 27 May 2011

Date of Judgment: 24 June 2011

LABOUR COURT