



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR2450/10

In the matter between:

MAOKA PULE VICEROY HILLARY

Applicant

and

GPSSBC

First Respondent

THULANI AKIM NO

Second Respondent

DEPARTMENT OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Third Respondent

Heard: 21 December 2011

Delivered: 24 January 2012

Judgment

BRUINDERS AJ

[1] The subject matter of this judgment is an award by the second respondent (the arbitrator) dated 5 September 2010. He was appointed by the first respondent (the bargaining council) to arbitrate a dispute referred by the applicant (the employee). The dispute concerned the alleged constructive dismissal by third respondent (the employer) of the employee.

[2] The employee was promoted to the post of Director Administrative Secretary in the Justice Ministry in January 1999. According to the employee, he was constructively dismissed when he resigned on 12 September 2008. He says that he resigned because the employer had made his continued employment intolerable by transferring him to, a position for which there was no post and then transferring him twice to posts that were not vacant, such that he was compelled to resign.

[3] The arbitrator found that the employee had failed to discharge his onus of proving on a balance of probabilities that his resignation amounted to a constructive dismissal. That is because it was undisputed that the employee had already referred - to another arbitrator - a dispute claiming that his transfers were unfair. That arbitrator found, on 5 August 2009, that the transfers amounted to an unfair labour practice. He ordered the employer to pay to the employee the allowance he would have been paid, had he not been transferred. The arbitrator found that the fairness of the transfers had been decided in the first arbitration. Consequently, the transfers could not be relied on for the constructive dismissal claim in the second arbitration. That is why the arbitrator in the second arbitration, which is the subject of the review before me, dismissed the constructive dismissal claim.

[4] Much was made by both parties in the review before me of the application of the *res judicata* rule. The employee 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. The employer, 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, the arbitrator in the second arbitration was correct to dismiss the constructive dismissal claim.

[5] On reflection, it is not necessary to decide whether *res judicata* or issue estoppel apply to the second arbitration award. I have assumed, in favour of the employee, that they do not, as consideration of the merits of the employee's case seems appropriate and just. Consequently, counsel were asked to address me on the merits of the constructive dismissal claim. On the facts, I am not persuaded that the resignation in this case amounts to a constructive dismissal. My reasons for this finding follow.

[6] The employee did not resign because his employer had made his situation at work so intolerable that he could no longer work there - which is the only basis for success in a constructive dismissal claim.¹

[7] The facts are that the applicant resigned twice. The first time, he resigned on 5 May 2008 with effect from 30 June 2008. He retracted that resignation when, on 30 June 2008, he was offered the post of Director or Manager of the Johannesburg Magistrate's Court. He took up that post. He began working in that post after acceptance of the offer, and did so until his second resignation.

[8] On 30 July 2008, he sought an agreed termination by offering to resign with effect from 31 July 2008; i.e. he sought an agreed reduction in his notice period. It is clear from his e-mail giving notice of resignation that his reason for resigning was that he refused to accept the failure of the department to increase his remuneration as demanded. He was unhappy that his appointment in the Johannesburg post was at the same salary as he had received before appointment in that post.

[9] The employer did not agree to a reduction of his notice period, or to termination. Instead, on 14 August 2008, it made an offer to the employee with two options. The first, was that he remain a permanent employee in the post of Manager at the Johannesburg Magistrate's Court until that post was filled, and that he would be paid a travelling allowance. The second, was that

¹ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 983-985

he be appointed for one year in the post of Court Manager at the Johannesburg Magistrate's Court, but at an increased salary.

[10] He attempted, unsuccessfully, to negotiate an increase in the second offer of increased remuneration. On 12 September 2008, he resigned for the second time with effect from 30 September 2008. In his e-mail of 12 September, he gave as the reason for his resignation, the reason proffered in his memorandum of 18 August 2008.

[11] In that memorandum, he explained why he sought an increase in the increased offer of remuneration by the employer in its second option; i.e. he was prepared to work in the Johannesburg post for one year with an increase in remuneration. But he sought an additional increase of R4000, 00 per month, on the basis that. He travelled to work in Johannesburg from Pretoria. An increase of R4000,00 per month, the employee said, would cover what he called "travel and subsistence payments".

[12] Significantly, the memorandum does not say anything about the employer 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.

[13] What is clear from the facts is that the employee resigned because he could not get the employer to agree to the salary he demanded during negotiations. Put differently, he would have continued working for the employer, had it agreed to his counter-proposal.

[14] The employer had not made life unbearable at the workplace in Johannesburg. It had simply refused to agree to his counter-proposal, having itself offered to increase his salary. An employer and employee may bargain or negotiate salary increases. Neither is compelled in law or fairness to accede to the salary demands of the other. Refusing to accede to a salary increase demand is legitimate conduct in the employment landscape. The fact that the employee here found the refusal of his counter-proposal for a salary increase unpalatable, does not make his employment intolerable.

[15] 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 employer 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 employee could not be expected to put up with it. Only in these circumstances, would he have been entitled to resign.

[16] 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 is no reason to set aside the award. Consequently, the review application must fail.

[17] It is not necessary to decide whether the arbitrator was correct that the matter was *res judicata* - which is the basis on which the employee seeks to review the award. In the circumstances, it would not be fair to award costs against the employee.

[18] Consequently, the order made is the following:

- [a] The application to review and set aside the arbitration award (PSGA 1173-08/09, 5 September 2010) is dismissed;
- [b] There is no order as to costs.

T J BRUINDERS AJ

ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

APPLICANT: F. A Boda

Instructed by: Mashobane Attorneys

RESPONDENT: D. T Skosana

Instructed by: State Attorney – Mr. E. Erasmus

LABOUR COURT