



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case Number JR362/2014

In the matter between:

KENNETH MAPENGO

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONR THEMBEKILE NSIBANYONI

Second Respondent

BLA- LEGAL EDUCATION TRUST

Third Respondent

Date heard: 21 April 2014

Delivered: 30 September 2015

JUDGMENT

RABKIN-NAICKER J

[1] In this unopposed review application, the applicant seeks the setting aside of an award under case number GAJB 1149-13 in which the second respondent (the Commissioner) found that the applicant had failed to prove he was constructively dismissed.

[2] The applicant was appointed as director of the Legal Education Trust Centre (the Centre) of the Black Lawyers Association (BLA) on the 7 February 2012.

He had been head hunted for the position by Advocate Motimele SC (Motimele), the Chairperson of the Board of Trustees of the Centre. According to the Applicant at the arbitration it was only during 2012, after he was tasked to register the current members of the board of trustees that he realised that in terms of the Trust Deed, the Director of the Centre is required to be an admitted attorney or advocate.

[3] It is further recorded in the Award that it was applicant's evidence that he had told Motimele about his discovery and that the latter had brushed it aside and stated that the matter was going to be addressed by a member of the Board and the instruction was to amend the Deed of Trust by removing the requirement from the Deed of Trust. He was therefore surprised to be summoned to an impromptu meeting of the Board where Motimele questioned him about his academic qualifications in the presence of other Board members. He felt shocked and utterly betrayed by the conduct of Motimele, and pressurized to resign. At this point he decided to resign from his employ.

[4] The Award records that it was put to the applicant under cross examination:

"[4.1.16].....that the Members of the Board in an extended Exco meeting requested the academic qualifications of the applicant and had given him an extension to submit his qualifications the following day. It was further pointed out that the applicant will be suspended pending the investigation of his qualification. It was at this point that the applicant chose to resign from his employment. The applicant stated that he was pressurized to resign and decided to resign.

[4.1.17] It was put to the applicant that he was offered an alternative position since he was not an admitted attorney. Furthermore Motimele offered to make an urgent application in the High Court for the applicant to be admitted as an Advocate. It was at this stage that the applicant admitted to not having an LLB.

[4.1.18] The applicant stated that he was aware that Molimele wanted to get rid of him and decided to resign because he 'did not want more blood on the floor', a saying he inherited from Motimele.

[4.1.19] It was put to the applicant that at the time he resigned, he had indicated that he will serve a notice period up until the 21st December 2012 when the

Centre closed for the summer vacation. The applicant stated that he decided not to serve his notice period because when he returned to work on 12 December 2012, he did not have access to the respondent's systems."

- [5] The applicant has brought his review application in reliance on the grounds set out in section 145 and the "reasonableness test". However the issue before this court is whether on the facts of the case a dismissal had taken place. This approach and the law in respect of constructive dismissal cases was recently dealt with in **Western Cape Education Department v General Public Service Sectoral Bargaining Council & others**¹ by the LAC as follows:

"[19] In terms of s 186(1)(e) of the LRA, dismissal means that 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'. It is clear from the provisions of this section that in any proceedings concerning any unfair dismissal dispute, the employee must establish the existence of the dismissal if this is placed in dispute. In the case of *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SA Rugby Players Association Union & another*, the following was stated in relation to a dismissal in terms of s 186(1)(b) of the LRA:

"[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. ...

[41] The question before the court a *quo* was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary."

¹ (2014) 35 ILJ 3360 (LAC)

[20] In terms of s 192(1) of the LRA, it is clear that where an employee asserts that he/she resigned because the employer made the employment relationship intolerable, the employee bears the onus of proving that the employer indeed made the employment relationship intolerable. In the case of *Murray v Minister of Defence*, the Supreme Court of Appeal described this onus in the following terms:

'[12] ... These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the enquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[13] 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 may be 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".'

[21] In *Jordaan v CCMA & others*, this court, referring to *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 ILJ 1240 (LC), confirmed the two-step approach to constructive dismissal disputes. It held that an employee who leaves employment bears the onus of showing that the employer effectively dismissed the employee by making his/her continued employment intolerable. Once this is established, it then has to be established whether the dismissal was unfair.

[22] In determining whether an employee has proven that the employer made continued employment intolerable, the employer's conduct must be

considered as a whole in order to make an objective determination of whether the employer made the employment relationship so intolerable as to warrant its termination. In doing so, it must be borne in mind that the test for constructive dismissal does not require that the employee should not have the choice but to resign, but only that the employer should have made continued employment intolerable.”

- [6] I note that the approach taken in **Murray v Minister of Defence** 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA) was considered and applied in **Metropolitan Health Risk Management v Majatladi & others**² i.e. that the conduct of the employer must lack reasonable and proper cause is the key question to address and not just whether the work situation had become intolerable.
- [7] In respect of the issue of culpability of the employer herein, I note that the Chairperson of the Board of Trustees, Advocate Motimele SC did not give evidence at the arbitration. Thus the testimony of the applicant in respect of having informed Motimele of the problem of the Trust Deed requiring an admitted attorney or advocate, and the alleged assurances he received from Motimele that the Deed would be amended could not be disputed by direct evidence. Neither could his evidence that he never represented to Motimele that he was an admitted attorney be disputed. The querying of the applicant's status arose after the President of the BLA communicated to Motimele that he could not find applicant's name in the list of admitted attorneys.
- [8] It was undisputed that the applicant reported directly to Motimele during his tenure and that Motimele had recruited him. Further the only witness for the centre, member of the Board and Attorney, Ms Mbhele confirmed in her testimony that applicant had been interviewed by Motimele and that the applicant's CV had been in the personnel file but not copies of his qualifications. The CV, she confirmed did not say that applicant was an admitted attorney. She stated under cross-examination: “That it doesn't say that, but on face value, when one looks at it, it gives a person an impression that he might be an admitted attorney.” She further stated that Motimele thought he was admitted based on the fact that the CV recorded that he was a

² (2015) 36 ILJ 958 (LAC) at paras 30-32

'legal assistant' at a firm of attorneys, and because of the duties listed under this title, "it could be believed that he was a Professional Assistant, that would mean an admitted Attorney."

- [9] It was applicant's evidence that he had brought copies of his qualifications and the said CV to the interview with Motimele. At the arbitration the applicant testified as follows when asked why he resigned:

"I think let me start by saying that I worked very closely with the Chairperson of the Board and at all times I will engage with him in terms of what needed to be done at the Centre and I don't recall doing anything without engaging with the Chairman of the Board at all times. When these allegations during that meeting and when these allegations that were levelled during the meeting of the 11th were presented to me in the manner that it was presented to me, and it became very clear that the person that I will engage with directly on matters of running the Centre had now changed a tune in terms of what we have been discussion, specifically the issue of the admission. It came as a complete shock to me to say how can a person who has given me so much undertaking on numerous occasions that that issue is not an issue, that he is working on amending the Deed of Trust and suddenly today turn around and says to me I can't be there beyond that day. So it became apparent to me that clearly the person that I need to rely on in terms of all the issues that affects me at work has now turned against me and he turns against me in the presence of other Board members, him being the final arbiter on the issues if I had to take any grievance, him being the final arbiter, being the Chairperson of the Board, I could not have gone to any other person if there were issues I was not happy with there. "

- [10] He further testified that: "I worked closely with him on all of these issues and for him to dump me the way he dumped me at the eleventh hour or the last minute I still find I can't comprehend why he did that, except to say that maybe perhaps he was saving his own skin. The Board might have raised questions in the last Board meeting but I think I was made a sacrificial lamb.....Now if a person who has brought you there, who knows exactly where you come from, who knows you in and out, who you are working with for almost 10 months, suddenly has a change of heart in terms of your professional relationship, I then realised that that is the end of the road for me. That even if I stayed there, with all the other

allegations that they would have levelled against me, there was no way that he was going to hear me out.”

[11] The minutes of the Exco Meeting held on 11 December 2012 at which the applicant resigned, which were part of the record before the Commissioner *inter alia* record as follows:

- “6. The Director was asked what his academic qualifications were. He informed the Board members that he graduated with B.IURIS in 1994 at the University of Durban Westville. He served articles with AK MIA for two years soon after he completed his degree in 1994. He was not sure if his articles were registered with the Law Society. He could not remember if he signed a contract of articles. All he could remember was that he served articles for two years and he was doing all the work that other Candidate Attorneys were doing at AK MIA.
7. The Director was informed that the BLA President informed the Chairperson that he is unable to trace the name of the Director on the roll of Admitted Attorneys in all Provincial Law Societies. The Director informed the meeting that he is not an admitted Attorney and that he never created an impression that he was admitted as such. He was asked if he was aware that the Director at the Centre must be an admitted attorney or Advocate. He said he is aware of the provisions of the Trust Deed and that he became aware of the Provisions of the Trust Deed a few months after his appointment.
8. He was informed that the Centre is planning to revive Legal Aid Clinics and the only way that can materialise is when the Director is an Admitted Attorney or Advocate. After demanding from the Director proof of his qualifications and noted it was in contrast of the Trust Deed, further taking note of his lack of qualifications as insinuated by the Director, Exco communicated a resolution to relieve Mr Mapengo of his position pending finalisation of an in-depth investigation into his qualifications. It was mentioned during the

meeting that the Board might look into appointing him as one of the Programme Directors. The Director declined the offer.

9. The Director said that he would prefer to have this matter resolved with less blood on the floor, and offered to resign with immediate effect. The resignation was accepted by Exco on behalf of the Board. The Director mentioned that he is prepared to stay until the last working day of the month of December, being the 21st December.”

[12] In her analysis of the evidence before her the Commissioner essentially found:

- 10.1 that the evidence of Mbhele was more credible than that of applicant and thus the Commissioner did not accept that Molimele knew that he was not an admitted attorney;³
- 10.2 that objectively without an LLB (which would have allowed him to be admitted as an advocate) or being an admitted attorney he was ‘prohibited’ from being Director in terms of the Trust Deed;
- 10.3 that the applicant, on the credible evidence of Mbhele refused an alternative position and opted to resign.

[13] The Commissioner concludes her analysis by recording as follows:

“It is therefore difficult in these circumstances to see how the conduct of the respondent resulted in the applicant resigning and claiming he was constructively dismissed. The applicant in his own evidence stated that he did represent at the CCMA and should therefore be aware of what constructive dismissal entails. The applicant instead of resigning at a whim, should have engaged the respondent and even lodged a grievance against the respondent. He therefore failed to exhaust all mechanism available to him. His resignation was therefore premature.

Based on the above, the applicant had failed to prove that she (sic) was constructively dismissed.”

Evaluation

[14] The minutes of the meeting of 11 December 2012 do not reflect that applicant was offered a position but that the Board may look into doing so. This was in a

³ Mbhele had testified under cross-examination that at a meeting of BLA members in Mpumalanga, Motimele introduced the applicant as an admitted attorney and he did not contradict this version.

context in which the applicant was 'relieved of his position' as Director at the meeting, pending an in depth investigation into his qualifications. What is clear from these minutes is that the decision to revive Legal Aid Clinics could only materialise if applicant was an admitted attorney or had an LLB so that he could pursue admission as an advocate. The Commissioner makes no mention of the issue of the decision regarding the Legal Aid Clinics (which was communicated to applicant at the Exco meeting), which it is evident, precipitated the query as to whether the applicant was an admitted attorney. Given the fact that applicant did not represent he was either an admitted attorney or had an LLB at the board meeting, it was a foregone conclusion that he was not going to be able to continue as director.

- [15] The contents of the applicant's CV did not represent him as an admitted attorney or as holding an LLB. It is highly improbable that any person who had achieved admission as an attorney would omit this information on their CV. It is not credible in my view that Motimele could have been misled by the CV in the way suggested by Mbhele. The fact that Motimele did not give evidence at the arbitration should properly give rise to a negative inference. Even though the applicant bore the onus of proving that his resignation amounted to a constructive dismissal, the evidence that he gave that he was assured by Motimele that his non admittance could be dealt with by an amendment to the Trust Deed, was evidence that deserved rebuttal.
- [16] *Prima facie*, on applicant's evidence, he was faced with a shock 'changing of the goal posts' at the meeting of the 11th of December. He found himself questioned as to his credentials by the person who had headhunted him , recommended his appointment, had been given his CV, and had assured him his lack of admission could be sorted out by an amendment to the Trust Deed. Without any evidence in rebuttal by Motimele at the arbitration, these facts *prima facie* established that applicant was placed in an intolerable position.
- [17] I therefore find that on all the facts before the Commissioner, the applicant proved that there was a dismissal and that the dismissal arose due to the

conduct of the employer, i.e. due to a situation in which the conduct of the employer compels the termination by the employee.⁴

[16] In my judgment therefore the Commissioner should have found that the applicant had proved that he was dismissed. Once this is established, a second stage must be applied and this concerns an evaluation of whether the dismissal was unfair. In **Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others**⁵, the court said:

“[38] The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is so is however a matter of fact and no general principle can or should be laid down.”

[17] Given my finding that a dismissal took place, it follows that the award stands to be set aside. Substitution of the award would entail this court deciding on the second stage of the enquiry i.e. on whether the dismissal was fair or not. In my view this would be better determined at arbitration before a new commissioner, who would consider the second stage of the enquiry, in which the employer bears the onus, on evidence before her. I therefore make the following order:

Order

1. The applicant was dismissed by the third respondent.
2. The Award under Case number GAJB 1149-13 is reviewed and set aside.
3. The matter is remitted to the CCMA to be heard by a Commissioner other than second respondent who shall determine whether the dismissal of the applicant was unfair.

H. Rabkin-Naicker

⁴ *Jordaan v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 2331 (LAC) At 2335

⁵ (1998) 19 ILJ 1240 (LC)

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Adv Mvuyo Ndziba

Instructed by: KNT Attorneys

LABOUR COURT