



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JR 1733/16

Not Reportable

In the matter between:

SAMUEL MOGALE

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL (GPSSBC)**

First Respondent

ELSABE HARMSE N.O

Second Respondent

**DEPARTMENT OF GOVERNMENT
COMMUNICATION AND INFORMATION SYSTEM**

Third Respondent

Heard: 13 January 2017

Delivered: 24 January 2017

Summary: Bargaining Council Arbitration proceedings – review of proceedings, decisions and awards of Arbitrators – Constructive Dismissal – Employee only giving generic and generalised evidence at Arbitration – No corroboration of version provided despite opportunity to do so – constructive dismissal not proven.

JUDGMENT

BECKENSTRATER AJ:

Introduction

- [1] This is an unopposed review application in terms of which the Applicant seeks to, amongst other things, review and set aside an Arbitration Award of the Second Respondent (the Commissioner) of the General Public Service Sectoral Bargaining Council. The Commissioner was appointed by that Council to determine a constructive dismissal dispute between the Applicant and his previous employer, the Department of Government Communication and Information System (the Third Respondent).
- [2] In the Award the Commissioner found that the Applicant failed to prove that he had been constructively dismissed and consequently dismissed his claim.
- [3] In bringing the present review application the Applicant represented himself. In essence he contended that the Commissioner had not properly appreciated the evidence before her and that she should have accepted his evidence that the Respondent had made his continued employment intolerable.
- [4] When faced with a review of an award of this nature the Court is required to consider whether or not the Commissioner's finding was objectively correct. (See *Conti Print CC v CCMA & Others*¹).

Applicant's contentions

¹ (2015) 36 ILJ 2245 (LAC) at paras 4 - 6.

- [5] The Applicant's evidence before the Commissioner appears from the transcription of the evidence led at the Arbitration. The Applicant's contentions as appear from that transcript are summarised below.
- [6] The Applicant had been employed by the Third Respondent as a Senior Administration Clerk on 1 May 2008. During 2010 he had a sinus operation. As a result of this operation he had, from time to time thereafter, suffered from spontaneous bleeding from his nose.
- [7] Sometime in 2012 his nose had started bleeding at work and he had gone to the bathroom to staunch the bleeding. Blood had fallen on the floor and he had used a cloth to wipe up the blood. Apparently a co-employee had seen this incident and had alleged that the Applicant had been conducting himself as a witch at the time. At that stage the Applicant had considered the comment simply to be a joke and thought nothing further about it.
- [8] During 2013 the Third Respondent relocated its office to new premises. The alarm system at those premises was faulty and would often be triggered for no apparent reason. Rumours of the Applicant being a witch again then surfaced and the triggering of the alarm system for no apparent reason was blamed on his being a witch. These allegations were made directly and verbally and also through numerous innuendoes, references and gestures. As the Applicant denied he was a witch the allegations were degrading and humiliating.
- [9] The Applicant alleged that some time thereafter the Third Respondent had hired private investigators to investigate his background with a view towards ascertaining whether he had a history of practising witchcraft. The investigators had apparently spoken to a J T Mahlangu whom the Applicant had considered to be a friend from High School. He had given unfavourable detail about the Applicant. These investigators had also ascertained detail relating to the Applicant's financial reports, cell phone records and information about his personal life and his family. During 2014 this information started being leaked on a regular

basis to co-employees so that people at work knew all of his private information. This, the Applicant alleged, was the *modus operandi* of the Third Respondent.

- [10] Sometime thereafter rumours also started circulating that he was HIV positive. Again these rumours were communicated to him through innuendo and gestures. The Applicant denied that he was HIV positive and again found these allegations humiliating.
- [11] At first the Applicant attempted to put up with the situation, but he found it humiliating, degrading and destructive of his dignity.
- [12] The rumours and innuendo about the Applicant were not only circulated by co-employees, but also by the Third Respondent who is alleged to have engaged external parties such as the SABC and social media to propagate these rumours. Even various Ministers and the President who, from time to time, attended the offices of the Third Respondent, were said to be in cahoots with the Third Respondent in this regard.
- [13] By late 2015 the situation had become unbearable and intolerable. The Applicant accordingly submitted a grievance to the Third Respondent. At first he was simply told to ignore the incidents about which he complained. Thereafter he had a further meeting with the Third Respondent's Chief Director: Human Resources, Mr Keitumetse Shadrack Semakane (Semakane). Thereafter he had resigned by way of a letter on 7 January 2016.
- [14] The Applicant also advised that he had reported his complaints to several other organisations such as Vodacom, the State Secrecy Agency, the South African Police Services and the Human Rights Commission.

The Arbitration

- [15] The background summarised above is largely taken from the Applicant's evidence-in-chief at the Arbitration. He did not identify any specific incidents or people responsible for the conduct about which he complained.

- [16] The transcript reveals that prior to the commencement of evidence, the Commissioner had explained, in simple terms, the process that was going to be followed at the Arbitration and offered the Applicant an opportunity to postpone the matter to ensure that he had documents available if he required any for purposes of corroboration. The Third Respondent's representatives indicated that they had no objection to such a postponement. The Applicant nonetheless elected to proceed with the matter recording that it was not his intention to either call other witnesses or to rely upon documentation. Soon after the Applicant commenced giving evidence he alleged that the Third Respondent had made use of mainstream media to publish gossip about him. The Commissioner again offered the Applicant an opportunity to postpone the matter in order to properly prepare, obtain witnesses and bring documents to the Arbitration, but the Applicant again declined this invitation. During both evidence-in-chief and cross-examination the Commissioner prompted the Applicant to supply detail of the allegations he was making. Despite this, he gave no detail of any particular incidents. Even in cross-examination the Applicant's evidence remained generic. When pushed, the only detail he gave was that one Lesi Moshwe had told him that he was under investigation and one Norma Thabisa also apparently knew about his being investigated.
- [17] When the Applicant was cross-examined by the Third Respondent's representatives, he maintained that when his grievance was initially lodged he was at first told that he should just ignore the incidents. He thereafter admitted that he had a lengthy meeting with Semakane on 11 December 2016 to discuss his grievance at which Semakane had offered him psychiatric counselling. The Applicant rejected that proposal as it offered him no assistance in investigating the complaints raised in his grievance. Semakane had then requested him to think about it. The following day the Applicant reverted to Semakane suggesting that his grievance be referred to the Bargaining Council for determination and that the Third Respondent's Health and Wellness Department appoint a psychiatrist or psychologist familiar with witchcraft to do an investigation at the workplace. Semakane advised the Applicant that he would give it further consideration. At

that stage the Applicant proceeded on annual leave from which he was due to return on 11 January 2016. Before that leave ended the Applicant resigned.

[18] After his evidence, the Applicant indicated that he was going to close his case. The Commissioner again warned him of the consequences of closing his case without calling further witnesses or introducing documentation, but the Applicant closed his case.

[19] Semakane then gave evidence confirming the handling of the Applicant's grievance as set out above. He further denied that there had been any private investigator appointed by the Third Respondent.

The case before the Labour Court

[20] The Applicant made use of one of this Court's standard Review Applications in terms of which he sought to have the Award set aside and the matter remitted for re-hearing. He further filed a standard Notice in terms of Rule 7A(8)(b) that he stood by his Notice of Motion. However, simultaneously therewith, the Applicant filed a 147 page Supplementary Affidavit with a variety of annexures consisting of letters he had written to various parties after his resignation and various items of "evidence". That affidavit sought to elaborate on his evidence at the Arbitration. In that Supplementary Affidavit the Applicant also sought further relief from this Court in the form of damages in the amount of R150 million. The Applicant then further delivered another bundle of documentation (running to 347 pages) which was labelled "*Documentation used at Arbitration*". This was largely repetitious of the annexures to the Supplementary Affidavit. While that bundle incorporated the referral forms and notices utilised at the First Respondent, most of it consisted of documents which were not part of the Arbitration.

[21] The reviewing Court is obliged to give consideration to the matter having regard to the evidence properly before the Commissioner. The reviewing Court should not

take into account evidence relating to the merits of the matter not placed before the Commissioner².

[22] Even if this Court were competent to receive further evidence on review, the Applicant would not be allowed to submit this evidence. He would clearly fail the usual test for when a party is entitled to present further evidence on appeal³.

[23] When the Applicant appeared in this Court I put to him that I was bound to only consider the evidence in the transcript, he accepted this. He then, however, continued to argue that the Commissioner had not given proper weight to the evidence he had submitted, erred in not accepting his evidence and erred in finding that there was nothing wrong with the manner in which he had been treated. As I put to the Applicant in Court, the Commissioner did not find that there was nothing wrong with the way he had been treated. The Commissioner's finding was that his allegations had not been proved.

[24] In constructive dismissal disputes the Arbitrator (and the reviewing Court) is required to determine whether the evidence establishes that there was (1) a termination of employment by the employee, (2) intolerability of continued employment, and (3) the intolerability was the fault of the employer. All three requirements must be present (see *Conti Print* case (above) at paragraphs 7 to 9).

[25] Considering the evidence before her, the Commissioner found the following in the Award:

"[23] To discharge the onus of proving that the Applicant was constructively dismissed, he must prove that it would have been intolerable to remain in employment and that there is a causal nexus between the employer's conduct and the circumstances that induced him to resign. The Applicant failed to prove that the

² See *Rambar Construction (Pty) Limited t/a Rixi Taxi v CCMA & Others* (2012) 33 ILJ 1911 (LC) at para 37 and 42; *ZA1 (Pty) Limited t/a Naartjie Clothing v Goldman N.O & Others* (2013) 34 ILJ 2347 (LC) at paragraph 32; *Xorile v CCMA & Others* [2014] ZALCJHB 512 at para 40 and *Mtshali v CCMA & Others* (1999) 20 ILJ 2400 (LC) at para 22.

³ *Mtshali* id at para 23 and 24.

Respondent was the direct cause of the alleged 'intolerable' working conditions. I have afforded the Applicant an opportunity to decide whether he wanted to postpone this matter in order for him to prepare his documentary proof and to subpoena witnesses that he wished to call as witnesses during these proceedings. He refused such opportunity, he failed to submit any documentary evidence and he did not call any witnesses to substantiate his claim of constructive dismissal. The Applicant made bold and unproved sweeping statements towards the Respondent and its employees. The Applicant mentioned that employees from the Respondent were saying all kinds of things to him and on social media, but he failed to provide me with any of their names or proof of such 'publication' on social media. ...

[25] It is not contested by the Applicant that he had a meeting with Mr. Semakane in an attempt to remedy the situation. The Applicant however chose to resign whilst he was still on annual leave and did not give the Respondent a full opportunity to investigate his concerns and complaints. He also only decided to lodge a formal grievance as required by the Respondent during November 2015, and a month thereafter he resigned.

[26] It is very clear from the lack of evidence presented by the Applicant that he was the maker of his own destiny by resigning without attempting to remedy the situation. The Applicant could not prove that his working conditions were intolerable and that the Respondent caused these intolerable working conditions". (Emphasis in original)

[26] In paragraph 24 of the Award, the Commissioner expressed the view that the Applicant had to prove that resignation was a measure of last resort. In the light of *Strategic Liquor Services v Mvumbi N.O. & Others*⁴ I do not think this is a correct statement of the law. Apart from that, however, I agree with the Commissioner's reasoning as quoted above.

[27] My re-assessment of the evidence before the Commissioner (as reflected in the transcript) leads me to conclude that the Applicant has failed to establish that

⁴ 2010 (2) SA 92 (CC) at para 4.

continued employment at the Third Respondent was intolerable or that any intolerability was the fault of the employer.

- [28] It must be said that the Applicant's allegations, particularly insofar as they include assertions that various Ministers, the SABC and social media were in cahoots with the Third Respondent are highly improbable. The simple say-so of the Applicant cannot be accepted as proof of those allegations without corroboration. As set out above no such corroboration was provided at the Arbitration. Even in relation to the allegations that co-employees had accused the Applicant of being a witch doctor or of being HIV positive or that they knew of his private information, the Applicant's evidence was vague. No details were given of where, when and by whom any such incidents had taken place. Even in relation to these allegations I do not think the broad generic statements made by the Applicant (no matter how many times emphasised and repeated) discharged the onus on him to demonstrate that they had, in fact, taken place.
- [29] Moreover, at the Arbitration the Applicant accepted during cross-examination, that after his last discussion with Semakane he had made alternative proposals which Semakane was going to consider. The Applicant then proceeded on annual leave. Before the end of that leave he resigned. This must also be seen in circumstances where Semakane had offered the Applicant assistance by way of counselling. While the Applicant rejected this proposal, it indicates that the Third Respondent was looking for solutions to the grievance. The Applicant thus did not demonstrate that the Third Respondent was unwilling to change its conduct. The Applicant accordingly failed to demonstrate that continued employment was intolerable.
- [30] Finally, no evidence was produced to demonstrate how the Third Respondent was at fault in relation to the Applicant's complaints. No evidence was introduced to indicate how the Third Respondent was "*in cahoots*" with others and why the Third Respondent (as employer) was responsible for the spreading of rumours and accusations by co-employees (if these were assumed to exist). In some matters the employer may be culpable for failing to act in the knowledge of ongoing

degrading or bullying conduct at work. This is not one of those matters. Even at the time of the grievance, the Third Respondent did not have any particularity of the allegations to allow it to accept that the conduct complained of was taking place. The Applicant resigned before his suggestion, that a psychologist with expertise in witchcraft be appointed to investigate the issues, was considered.

Conclusion

[31] In the above circumstances I find that there was no constructive dismissal of the Applicant and the Award cannot be set aside.

Order

[32] In the result the following order is made:

[32.1] The application is dismissed.

Beckenstrater AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: In person