



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1491/15

In the matter between

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY

Applicant

and

COMMISSIONER COLLINS LENKWAS MAKAMA N.O.

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION (CCMA)**

Second Respondent

WELLINGTON MOKGOSI MOLOKELE

Third Respondent

Heard: 20 July 2017, 10 August 2017, 18 August 2017

Delivered: 19 September 2017

**Summary: Review. [Labour Relations Act 66 of 1995] – [Section 186 (1) (E) –
[Alleged constructive dismissal], Compensation.**

JUDGMENT

EDMONDS, AJ

Introduction

- [1] This is an application to review and set aside the arbitration award of the First Respondent in the matter between Wellington Mokgosi Molokele (Molokele) and Ngaka Modiri Molema Municipality (the Municipality) dated 4 November 2013 under case number NWKD 2575-14, alternatively an order remitting the dispute back to the Second Respondent to be heard *de novo* before another Commissioner. Costs of the application and further and/or alternative relief. There was also an application for condonation. The applications were opposed
- [2] At the hearing of the matter, the parties agreed that the condonation application would not be opposed. Having considered the condonation application and the principles applying thereto, condonation was granted and the parties proceeded to the merits of the matter.
- [3] This is a review application in terms of Section 145 (1) of the Labour Relations Act¹, (the LRA) against a written award by the First Respondent in the matter cited above dated 30 July 2015.

Factual Background

- [4] On 1 December 2011 the Third Respondent was appointed and employed as the Chief Financial Officer of the Applicant in terms of the provisions of Section 57 of the Local Government: Municipal Systems Act²,. The Third

¹ Act 66 of 1995 as amended.

² Act 32 of 2000.

Respondent reported to the Applicant's former Municipal Manager, Mr. M Mojaki (Mojaki).

- [5] On 14 July 2014 the Third Respondent resigned from his employment in terms of a written resignation letter. He worked during the notice period until 31 July 2014.
- [6] The Third Respondent (Molokele) alleged that the erstwhile municipal manager, Mojaki, irregularly and unlawfully took away his responsibilities without any consultation and without providing Molokele any opportunity to make representations. Mojaki issued direct instructions to Molokele's subordinates and employed consultants to do portions of Molokele's job, rendering the terms of Molekele's employment a nullity.
- [7] Molokele alleged that in some instances invoices would be generated and processed and paid, without any of his involvement., whose responsibility it was to handle the finances of the Municipality. In addition, a number of payments were made and authorised by Mojaki without the involvement of Molekele in the procurement of these services.
- [8] As a consequence of this Molekele filed a grievance against the Municipal Manager, regarding his performance and the manner in which his duties and responsibilities were taken away from him. He stated that the actions of Mojaki were calculated to force Molokele out of his role as Chief Financial Officer and were designed to make and had the effect of making his continued employment intolerable.
- [9] Molokele raised these issues with Mojaki on a number of occasions during their quarterly performance management meetings and it was indicated that the situation would be corrected.
- [10] The Applicant did not lead any evidence but relied solely on cross-examination of the Third Respondent's witnesses.

- [11] After Molokele's resignation on 27 August 2014, Molokele referred a dispute based on constructive dismissal in terms of Section 191 of the LRA to the Second Respondent. The matter was heard on 14 and 15 July 2015 and an arbitration award dated 30 July 2015 was issued.

Parties Submissions

- [12] The Applicant submitted, in this review application, that Commissioner Makama, the First Respondent (the Commissioner), committed gross irregularities as contemplated in the provisions of Section 145 (2) (a) (ii) of the LRA in arriving at his finding that Molokele was constructively dismissed and that his dismissal was unfair and that he was entitled to compensation equivalent to 11 months' salary.
- [13] Molokele submitted that in the circumstances the Commissioner returned a reasonable reward that was based entirely on the uncontested evidence led at the arbitration that Molokele could no longer watch Mojaki wreaking havoc with the Municipal finances for which he held statutory responsibility as the Chief Financial Officer and that despite this he was ignored by the Executive Mayor and the Finance Committee politicians.
- [14] Molokele submitted that the Commissioner acted reasonably in accepting his uncontested version that the Third Respondent had been side-lined by Mojaki and could not continue to function in the position of Chief Financial Officer, for which he bore legislative accountability.
- [15] Molokele cited the various authorities in regard to constructive dismissal to which the Commissioner had reference including that of the Supreme Court of Appeal in *Murray vs Minister of Defence*³ in which the Court held that an employee must prove that his or her resignation was not voluntary and not intended to terminate the employment relationship, but that the employee had resigned because the employer made continued employment impossible. The

³ (2008) 29 ILJ 1369 (SCA).

SCA held further that once an employee had established this, the enquiry was whether the employer had, without reason 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. It held that the Court would look at the employer's conduct as a whole, and its cumulative impact and ask whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with.

- [16] The Applicant argued that, even if the employee's case is not rebutted, as in this case, t this did not mean that Molokele had proved his case.
- [17] The Applicant submitted that there had indeed been a response to Molokele's grievance, contained in page 236 of the bundle. It submitted that the Commissioner did not understand the legal framework and that, had he done so, he would have seen that the Municipal Manager was entitled to interfere with the authority of the Chief Financial Officer, even if there is a delegation.
- [18] The Applicant further submitted that the Third Respondent had other remedies available to him which he failed to exercise and in failing to do so could not complain of constructive dismissal.
- [19] It submitted that Molokele had been entitled to declare a contractual breach in terms of clause 53 of his contract of employment, alternatively, clause 20 of his contract of employment entitled him to deal with the issue through arbitration and that he was reminded of this in Mojaki's response to his grievance. He was also entitled in terms of paragraph 10 of his contract of employment to table his grievances before the Municipal Council. He did not make use of any of these remedies.
- [20] The Applicant also submitted that the employer had not rendered Molokele's continued service intolerable, and that Molokele's complaint was actually with the role of Mojaki. Had he declared a dispute in terms of his contract then the real employer would have become involved. The real employer being the Ngaka Modiri Molema District Municipality, not Mojaki himself.

- [21] The Applicant submitted that, at pages 70, 75, and 78 – 80 of the transcript, it started becoming apparent that the real reason for Molokele's resignation was because the politicians became hostile towards him and that he was concerned that he may be attacked and that these concessions and admissions had not been taken into account by the Commissioner.
- [22] It stated that, under cross-examination Molokele had given the real reason for his resignation, that he felt that his safety was at risk. It stated that because of this, the Commissioner should have found that Molokele had not prosecuted his case correctly, and that his findings were, therefore, not rational.
- [23] In response, Molokele argued that he had only wanted to do his job, i.e. ensure the proper financial management of the Applicant. Mojaki was not entitled to ride roughshod over him and his contractual duties. Whilst not taking his functions away from his office, Mojaki had elected to work directly with the Chief Financial Officer's subordinates which was designed to make him feel worthless.
- [24] He submitted that the alleged alternative remedies which the Applicant proposed, were disputes around his contract of employment i.e leave pay, overtime etc. They were not intended to deal with his grievance.
- [25] In regard to the amount of the award, Molokele stated that it was within the discretion of the Commissioner to make such an award.

Reasoning/Merits

- [26] Given the fact that the Applicant did not lead any evidence and relied solely on its cross-examination of Molokele, I do not find that it was unreasonable for the Commissioner to reach the decision which he did on the material before him. The Commissioner took into account the authorities in *Eagleton and*

*Others v You Asked Services (Pty) Ltd*⁴ which stated that in order for an employee to prove a claim of constructive dismissal, three requirements had to be met: (a) The employee terminated the contract of employment; (b) Continued employment had become intolerable for the employee; (c) The employer must have made continued employment intolerable.

- [27] He also referred to the SCA decision in *Murray*⁵ in which the Court found that the employee must prove that the resignation was not voluntary and that it was not intended to terminate the employment relationship. Once this has been established the enquiry is whether the employer 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.
- [28] The Commissioner found that the question that must be answered is whether or not the conduct of the employer had created circumstances that induced Molokele, to resign. He found that the answer was in the affirmative and that he was of the view that having raised his issues with Mojaki, the Executive Mayor, the Speaker of the Council and the members of the Mayoral Committee, and after the issues were not addressed, he had no option but to tender his resignation.
- [29] The Commissioner found that Molokele had discharged his onus in establishing the existence of a constructive dismissal and that Molokele was entitled to compensation.
- [30] He found that, taking into account the circumstances that lead to the resignation of Molokele, his position with the Applicant, his length of service with the Applicant and also the reasons for his resignation, compensation equivalent to 11 months' was appropriate under the circumstances.

⁴ (2009) 30 ILJ 320 (LC).

⁵ *Supra*.

[31] The ordering of compensation must be an order that a reasonable arbitrator could arrive at. It is my view that in the absence of any evidence in regard to the Applicant's ability to afford the compensation awarded, and in taking into account only the position of the Third Respondent, the Commissioner did not exercise his discretion in a reasonable way having not considered all of the facts.

[32] I am inclined, therefore, to refer the matter back to the Second Respondent to hear evidence only in regard to the appropriate compensation. The matter is to be heard by a Commissioner other than the First Respondent.

[33] Both parties have, to some extent, been successful in this matter. Therefore I am disinclined to make an order as to costs.

[34] Accordingly, I make the following order:

Order

1. The First Respondent's award is reviewed and set aside only in respect of the amount of compensation;
2. The matter is referred back to the Second Respondent for a hearing before a Commissioner other than the First Respondent on the question of appropriate compensation only.
3. There is no order as to costs.

R Edmonds

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate ESJ van Graan SC

Instructed by: Mr M Myambo from De Swart, Vogel and Myambo

For the respondent: Advocate: XD Matyolo

Instructed by: RS Tau Attorneys

LABOUR COURT