



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR15/15

In the matter between:

MPENDULO MORRIS MANZINI

Applicant

and

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

First Respondent

COMMISSIONER JOSEPH MPHAPHULI

Second Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Third Respondent

Heard: 29 June 2017

Delivered: 16 February 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] With this application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the third respondent (Commissioner) under case number JMD121304. In the alternative, he seeks that the matter be

remitted back to the first respondent (SALGBC) to be heard afresh by another Commissioner.

- [2] In his award, the Commissioner found that the applicant had not discharged the burden placed on him to prove that he was dismissed for the purposes of a constructive dismissal claim.
- [3] Two preliminary points raised on behalf of the third respondent (Municipality) in opposing the application were abandoned at the hearing of the matter.

Background:

- [4] The applicant was employed with effect from 1985. As at the last day of his employment on 22 March 2013, he was employed as a Human Resources Officer. Having resigned from his position for reasons that will be elaborated upon further in this judgment, he had then referred a dispute to the SALGBC and alleged that his resignation amounted to a constructive dismissal. He sought reinstatement or compensation. Attempts at conciliation having failed, the dispute was referred for arbitration and came before the Commissioner.

The arbitration proceedings:

- [5] The applicant's case is essentially that he had resigned from his position as a result of unfair treatment by the Municipality. In this regard, he testified that;
 - a) The unfair treatment had commenced as soon as he took a position in the HR Department of the Municipality. He alleged that three directors in the Department, viz, Zardad, Kajee and Jones appeared to be displeased with the fact that he had joined them and had even suggested to him that he should leave and join the Labour Relations Department;
 - b) At some point he had moved to the Labour Relations Department after threats of a disciplinary action were made against him if he did not take up a position in that department. Having joined this department, he was nonetheless remunerated at a rate of an HR Officer. When his concerns with his rate of remuneration were not resolved, he then

opted to go back to the HR Department in or about 2008/2009, where he became responsible for Training and Development;

- c) Between 1985 and his date of resignation, he was never considered for any promotion or afforded opportunities to grow, and had accordingly lodged numerous grievances in that regard. He contended that he had not received any responses from the Municipality;
- d) In 2012 he had lodged another grievance pertaining to his request for a transfer to another department and lack of opportunities for growth. The grievance hearing was held on 25 February 2013. The outcome thereof was that a personal development plan was to be initiated by his supervisor, and that prospects of a transfer to another department were to be considered. He alleged however that his immediate supervisor failed to facilitate the transfer;
- e) Whilst waiting for the implementation of the grievance outcome, he was then informed of intended disciplinary steps against him. At the time, his health had deteriorated and he had received medical treatment for work related stress. He had resigned after being informed of intended disciplinary steps against him;

[6] Doctor Hendritta Pieters testified that the applicant's resignation was precipitated by a variety of factors including various ailments such as hypertension, insomnia and severe headaches, which she had attributed to his stressful working environment. She had further testified that the resignation was involuntary and that the applicant was not in full control of his mental faculties when he resigned.

[7] Mrs Lenco Mabuse's testimony on behalf of the Municipality was essentially that she was the applicant's superior. Over time, she had observed that her working relationship with him had deteriorated. This was mainly as a consequence of him being in the habit of refusing to obey her instructions. She had further observed that the applicant's work had suffered and when she took up the matter with him, his response was that he did not find his job

challenging. Aligned to that was the applicant's complaints that management was not attending to his grievances in relation to his growth and salary.

- [8] Mabuse confirmed that a grievance hearing was scheduled and it was resolved that she was to develop a personal development plan for the applicant, something the latter had rejected as he wanted to leave the department. She further complained that the applicant frustrated her attempts in assisting him to find solutions to his grievances.
- [9] At the time that the applicant resigned from his position, Mabuse was on leave. Upon her return and after hearing of his resignation, she had contacted him with the intention of talking him out of his decision to resign. Her attempts in that regard failed as the applicant was resolute in his decision.
- [10] Other witnesses called on behalf of the Municipality were Eric Mafuyeka, the applicant's line manager, who had testified in relation to his fractured employment relationship and the fact that he had refused to obey his instruction. Mafuyeka also testified in regard to his attempts to facilitate the applicant's transfer to another department, and further attempts to address his concerns regarding lack of developmental growth opportunities.
- [11] Another witness, Mr Dlamini, the Deputy Director of Labour Relations, testified in regard to the applicant's request for a transfer to his department, but that such a transfer could not be facilitated due to the demands made by the applicant.

The award:

- [12] The Commissioner summarised the applicant's case and reasons for his resignation, which were on his version, the Municipality's unrelenting unfair conduct which manifested itself in the form of its lack of appreciation of his hard work; its refusal to allow him opportunities for growth in the organisation and to grant him a transfer from one department to another, and its intentions to institute disciplinary proceedings against him. On the applicant's version and as further attested to by Dr. Pieters, these factors had led to a mental breakdown and other ailments, forcing him to resign.

- [13] The Commissioner established that it was not in dispute that prior to his resignation, the applicant had filed grievances, and that he had resigned at a time when his request for a transfer was receiving attention, and when disciplinary steps were being contemplated against him. Medical reports referred to by Dr Pieters also demonstrated that during consultations, the applicant had expressed his frustrations at the lack of resolution in regard to issues of concern to him.
- [14] The Commissioner had however observed that the medical report relied upon by Dr Pieters was in fact issued some four months after the resignation of the applicant. He further established that the issues that had led to the resignation were those already referred to above, but that the Municipality had made attempts to address them following the grievance hearing. Those attempts had however failed either due to the applicant rejecting any suggestions in that regard, or having resigned before any steps could be taken.
- [15] The Commissioner also had regard to the applicant's letter of resignation and concluded that it did not send any signal of distress, and that the letter was in fact complimentary of the Municipality, giving an impression that he had left under peaceful circumstances. In the end, the Commissioner concluded that the applicant had not made out a case for constructive dismissal.

The grounds of review:

- [16] The applicant's grounds of review are that;
- a) The Commissioner despite having acknowledged that he was treated unfairly at all times committed misconduct when he found that he was nonetheless the orchestrator of his exit, and that the exit was not influenced by the Municipality's alleged unfair conduct.
 - b) The Commissioner failed to consider that the Municipality made working conditions intolerable for him, as evident from the lodging of various grievances. Further unfair treatment flowed from the outcome of the grievance hearing when the Municipality instead of implementing

the outcome of the hearing, instituted disciplinary proceedings against him. This had led to his experiencing stress and depression.

- c) The Commissioner committed an irregularity by finding that Dr. Pieters' report could not be considered as it was not relevant since it was compiled after his resignation. This was in circumstances where Dr Pieters was his regular doctor with whom he had consulted over a long period. Furthermore, in the absence of contradictory medical evidence, there was no basis for the Commissioner to reject Dr. Pieters' evidence

The review test and applicable principles:

- [17] The dispute before the Commissioner was whether the applicant's resignation was a dismissal within the meaning of Section 186(1)(e)¹ of the Labour Relations Act (LRA).² The onus of establishing a dismissal was upon the applicant as contemplated in section 192 of the LRA³. This implies is that if he failed to pass that first hurdle, that would have been the end of the matter.
- [18] The test for establishing constructive dismissal is well known. It is an objective test involving a value judgment in terms of which the enquiry is whether the conduct of the employer has rendered the continued employment objectively intolerable.
- [19] Thus, the issue is whether the employer's conduct was of such a nature that the employee could not reasonably be expected to sustain the employment relationship⁴. In essence, it is required of the applicant to show that: -

¹ "Section 186: **Meaning of dismissal and unfair labour practice**

"(1) **'Dismissal'** means that:

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

² Act 66 of 1995, as amended

³ Which provides that;

- "(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
- (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

⁴ *Smithklein Beecham (PTY) LTD v CCMA & Others* (2000) 21 ILJ 988 (LC).

- a) He terminated the employment relationship.
- b) The termination of his employment was as a result of the Municipality having made continued employment intolerable⁵.
- c) The conditions or events of which he complained were the main cause of his decision to terminate the relationship;
- d) The Municipality's conduct brought about the situation that made his continued employment intolerable;

[20] The test is a two-stage one. Thus, if the applicant succeeds in showing that his resignation amounted to a constructive dismissal, it remains for the Municipality to show that the dismissal was not unfair.

[21] The issue of a dismissal being paramount and a jurisdictional one⁶, the test on review in such cases is not that of a reasonable decision maker as enunciated in *Sidumo*⁷. The test to be applied is whether the Commissioner was right or wrong and not whether the conclusion reached by him was one that a reasonable decision maker could not reach. Thus, it has to be determined whether the Commissioner correctly found that the applicant was not dismissed. This principle was reinforced in *Enforce Security Group v Fikile and Others*⁸, where the Labour Appeal Court held that;

'The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding.'

Evaluation:

⁵ *Strategic Liquor Services v Mvumbi N O and Others* (2009) 30 ILJ 1526 (CC) at para 4.

⁶ See *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 ILJ 2218 (LAC) At paras [39] – [41].

⁷ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC)

⁸ (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC) at para 16. See also *Johnson v Rajah NO and Others* (JR33/15) (delivered on 26 January 2017)

- [22] The starting point is that it was not in dispute that the applicant had indeed handed in his written resignation letter on 20 March 2013. The letter read as follows;

“Kindly note that I am handing in my resignation letter. I am resigning with immediate effect and I thank you all for the opportunity that was given to me to work in your organisation. I hope you will find this in order”

- [23] The Municipality's contentions in the light of the contents of the resignation letter was that the Commissioner was correct in his conclusions that the termination of the employment relationship was voluntary, and that the letter was complimentary and had displayed an expression of genuine gratitude.
- [24] I share the view that the contents of the letter clearly do not show any discontentment or animosity towards the Municipality. There is no indication in the letter as to what could have triggered the resignation. I do not however share the view that much should be read into the contents of the letter, even though this is obviously a factor to be taken into account. This is so in that it is more the nature of the alleged conduct complained of that is determinative of whether a constructive dismissal has been established.
- [25] The issue of whether the Municipality made continued employment intolerable is assessed on an objective level, and the enquiry is what it is in the employer's conduct that can be said to have made continued employment intolerable.
- [26] As correctly summarised by the Commissioner, three main issues aggrieved the applicant, viz, the alleged lack of opportunities for growth; the alleged refusal by the Municipality to transfer him to another department; and the institution of a disciplinary process against him on account of alleged misconduct pertaining to a refusal to obey instructions.
- [27] Prior to dealing with the question of whether there was anything in the Municipality's conduct that made continued employment intolerable, there are some worrisome factors in this case which were also pointed out by the Municipality in its submissions that also needs to be highlighted.

- [28] The first is that the final grievance hearing was held on 5 March 2013 after which two options were to be looked at in addressing the concerns raised by the applicant. On the same date that the grievance hearing was concluded, he had referred an unfair labour practice dispute to the SALGBC. In his referral, he had again complained about lack of opportunities for growth and desire to be transferred to another unit. He however did not pursue that dispute despite the matter having been set-down by the SALGBC.
- [29] The test applicable in constructive dismissal cases is whether there were available alternatives other than a resignation. This point was long made in *Kruger v Commission for Conciliation, Mediation and Arbitration and Another*⁹. In my view, to the extent that the applicant was of the view that his grievances were not being addressed internally, and further to the extent that he deemed it not necessary to pursue that dispute at the SALGBC prior to his resignation, the Municipality is correct in questioning his motivations for his belated claim of a constructive dismissal. The explanation proffered by Dr Pieters as to the reason that the applicant had not pursued the alleged unfair labour practice dispute prior to resigning, *i.e.* that he 'could not handle the pressure', is feeble in the extreme.
- [30] Aligned to the above is that the applicant handed in his written resignation on 20 March 2013, but had only referred a dispute to the SALGBC on 23 October 2013, some seven months later. In support for his application for condonation before the SALGBC which was unopposed, the applicant had relied upon a medical report compiled by Doctor Pieters, in which the latter stated that he suffered from some ailments due to work related stress. Amongst the factors contributing to that condition were the applicant's alleged frustrations with the Municipality's lack of resolution of the issues he had complained about.
- [31] Significant with the above is the applicant only approached Doctor Pieters for consultations on 25 July 2013, some four months after his resignation and merely for her to assist him in compiling a report for the purposes of lodging a claim against the Municipality. Even if there was an iota of truth in the

⁹ (2002) 23 ILJ 2069 (LC), (2002) 11 BLLR 1081 (LC) at para 14

allegation that the alleged failure by the Municipality to address his grievances led to his alleged ailment, it is important to point out that as at the time that he resigned, the medical report he had relied upon and the alleged medical conditions he had suffered from, were factors unknown to the Municipality.

- [32] To come back to the issues that are said to have aggrieved the applicant and that allegedly led to his working environment being intolerable, it was common cause that the applicant had lodged various grievances and had complained about a variety of issues at the workplace since he joined the Municipality. For the purposes of this application however, what is relevant is the outcome of the last grievance hearing held on 25 February 2013.
- [33] Arising from that hearing and its outcome on 5 March 2013, a solution was for the applicant's immediate supervisor to initiate a personal development plan for him with the objective of addressing concerns surrounding the alleged lack of opportunities for growth. At that stage, the applicant appeared to be only interested in a transfer to another department, but was nonetheless not averse to the suggestion of a personal development plan. In the same token however, and as submitted on his behalf in these proceedings, he had no interest in the plan as he intended to leave the department. He was more interested in a transfer, and the Municipality did not appear to be averse to facilitating a transfer to another department as attested to by Dlamini and Mafuyeka.
- [34] Upon the outcome of the grievance hearing, and prior to its implementation of, charges of misconduct were laid against the applicant, which on his version aggravated whatever condition had afflicted him, causing him to resign. As I understood the applicant's case, and since he was to a large extent satisfied with the outcome of the grievance hearing, the Municipality was not under the circumstances, entitled to prefer charges of misconduct against him.
- [35] Clearly there is a difficulty with the applicant's approach. The first is that the mere that an employee has laid a grievance cannot by all accounts, imply that an employer is not entitled to institute disciplinary proceedings against that employee. Of course, there would be a problem if the disciplinary measures

are taken in retaliation for the lodging of a grievance¹⁰. This however was not the applicant's case.

- [36] A second difficulty is that it is trite that an employee who has an option of facing a disciplinary enquiry cannot simply resign and claim constructive dismissal¹¹. This is so in that discipline is a management prerogative, and it is for the employer to prove the charges preferred against an employee.
- [37] When an employee resigns in the face of a disciplinary hearing, the invariable conclusion to be reached is that indeed the employee had a case to answer, and which he or she was not prepared to do. There is therefore no basis for a conclusion to be reached in this case that the disciplinary measures taken immediately after the grievance hearing was concluded made the applicant's working conditions intolerable. It appears that the applicant was not prepared to go through a disciplinary process, and had instead opted to resign. A resignation under these circumstances cannot amount to a constructive dismissal.
- [38] In regard to the grievances surrounding the alleged lack of opportunities for growth or the alleged failure by the Municipality to consider the applicant's request for a transfer, it has already been stated that the applicant had no interest in the personal development plan the Municipality had intended for him. This is further confirmed by the applicant having referred an alleged unfair labour practice dispute on 5 March 2013 immediately after the grievance hearing, in which his dispute centred around the failure of the Municipality to transfer him.
- [39] From the above developments, the only conclusions to be reached are that the applicant snubbed the Municipality's attempts at resolving his grievances surrounding the alleged failure to afford him opportunities for growth through its intended development plan for him. In regard to the issue of a transfer, Mafuyeka's testimony was that the applicant had made certain demands attached to the transfer. These included an increase in his remuneration, or

¹⁰ See *Jabari v Telkom SA (Pty) Ltd* 5 (2006) 27 ILJ 1854 (LC); *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 ILJ 2887 (LC)

¹¹ See *Old Mutual Group Schemes v Dreyer & Another* (1999) 20 ILJ 2030 (LAC) para 18

choosing individuals he wanted to work with in another department. Other than these demands, the applicant appeared to have sought an immediate transfer which was something not possible to achieve in view of the internal workings of the Municipality.

- [40] In the end though, it is apparent that the applicant elected to resign in circumstances where he had conducted himself unreasonably in seeking a transfer, and where the Municipality was not even afforded an opportunity to fully explore the possibility of a transfer in the light of his demands.
- [41] It is trite that a claim of constructive dismissal would be unsustainable in circumstances where flowing from a grievance hearing and outcomes, an employee resigns prior to those outcomes being implemented in order to address the source of the grievance. In this case, the applicant's conduct of resigning in circumstances where he had rebuffed efforts to address his grievance or failed to afford the employer an opportunity to implement grievance hearing outcomes in order to address his grievances, cannot lead to a conclusion that the Municipality's conduct had made working conditions intolerable for him. Added is the conclusion that the applicant clearly resigned in the face of the impending disciplinary hearing.
- [42] To conclude then, there is no basis for a conclusion to be reached that at the time of the termination of the employment relationship, the applicant was under any impression that the Municipality had behaved in a manner that rendered the relationship intolerable. Furthermore, the circumstances that led to the applicant's resignation were not brought about by the Municipality through any conduct. Instead, to the extent that the applicant may have had legitimate grievances, those were attended to and were to be resolved, had the applicant not acted precipitously by resigning.
- [43] Upon an objective assessment of the factors relied upon by the applicant as having contributed to the alleged intolerability, and further having assessed the Municipality's conduct as a whole, I am satisfied that the Commissioner came to the correct conclusion when he found that the applicant had not

discharged the onus placed on him to prove that he was dismissed, or that his resignation amounted to a constructive dismissal.

[44] In regard to costs, it was submitted on behalf of the Municipality that costs were warranted in this case where the applicant had simply resigned in order to avoid a disciplinary hearing. Other than this factor, I am satisfied that on the facts, the referral to the SALGBC was clearly an afterthought, and this review application was equally clearly ill-conceived. In these circumstances, it is my view that the requirements of law and fairness dictate that the applicant should be burdened with the costs of this application.

Order:

[45] In the premises, the following order is made;

1. The application for a review of the Second Respondent's arbitration award dated 7 November 2014 is dismissed with costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr N Kubayi of Noveni Eddy Kubayi INC

On behalf of the Third Respondent: Adv. W. Hutchinson

Instructed by: Moodie & Robertson

LABOUR COURT