



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC131/2019 _____
Date of Award: 12 August 2020 _____

In the ARBITRATION between:

NEHAWU obo SS NKOSI

(Union / Applicant)

AND

DEPARTMENT OF COMMUNITY SAFETY SECURITY AND LIASON

(Respondent)

Union/Applicant's representative: Mr Sidney Sibuyi _____

Union/Applicant's address: NEHAWU _____

Union Official _____

Telephone: _____

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Respondent's representative: Mr Ndlovu _____

Respondent's address: Dept of Community Safety Security & Liason _____

18 Klip Street _____

Middleburg _____

Telephone: _____
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration on 05 to 07 February 2020 at the Offices of the Department of Community Safety & Liason, 18 Klip Street in Middleburg.

The employee party, Mr Nkosi SS (hereinafter referred to as the Applicant), was represented by his union representative of NEHAWU Mr Rodney Sibuyi. The employer party, Department of Community Safety Security & Liason (hereinafter referred to as the Respondent), was represented by its labour relations officer Mr Ndlovu.

The proceedings were electronically recorded.

ISSUE TO BE DECIDED

I have to decide whether, in the circumstances detailed hereunder, the Respondent has constructively dismissed the Applicant.

BACKGROUND TO THE ISSUES

The Applicant Mr SS Nkosi was employed by the Respondent on 01 September 1988 and was at the position of Assistant Director (ASD): Safety Engineering at the time of his resignation. The Respondent is the Mpumalanga Provincial Department of Community Safety Security and Liason.

The Applicant alleges that he was constructively dismissed by the Respondent when he was made to work in intolerable conditions, he tried his means to work, he attempted to engage the Respondent until there he could not find an amicable solution, and his health was affected and all this led him to resign on the 31 December 2018. He then referred the dispute of constructive dismissal to Council. The Applicant was earning a monthly salary of R43 651.50 at the time of his resignation. The Applicant referred the dispute to Council, but could not be resolved through conciliation. The Applicant seeks retrospective reinstatement or compensation as a remedy.

The parties stated that they had no point *in limine* to raise and submitted bundles A & B of documents. Each party led testimony of two witnesses to prove their case respectively.

ANALYSIS OF EVIDENCE AND ARGUMENT

The Applicant testified that he started serving the Respondent in 1988 as Provincial Inspector and grew within the ranks to the level of Chief Provincial Inspector in 2008. In 2009 he got appointed as a Safety engineering Official. Amongst his duties was to ensure submission of stats for the Regional Accident Register in Nkangala region in collaboration with the South African Police Service (SAPS) who are the custodian of the National Register. For this duty, in Nkangala region he had to coordinate 26 police stations every day from Monday to Friday by collecting information, capture the stats manually on an Excell Spreadsheet, and ensure that the stats are send to HQ before 10h00 am every day. He did this alone from 2009 to 2015 April when the Respondent got him an Administrative Assistant in the office. It took the Respondent six years to assist him which was a great success and only success for him whilst with the Respondent. Despite having an admin staff he still had to do analyzing of the accident stats daily to inform what are the causes and necessary solutions. It was difficult to gather the stats from 26 Police stations within 2 hours every day, where one is not a

custodian and his managers could not understand means to get companies to assist with the system could not materialize. The Respondent made promises to buy the system, which would have addressed many challenges, but to no avail. The promise also came from the General Manager at HQ level and this did not materialize until he (Applicant) left. He pushed management to have officials to collect this information from the 9 Cost Centres of Nkangala region to submit to his admin official. The Respondent then seconded the Provincial Inspectors to assist in the administration of the Accident Register. However the challenge was that they never reported to him and this led to conflicts with Cost Centre Heads as the inspectors will be changed now and then which led to failure to deliver at HQ. He had to train now and then another group of provincial inspectors. In cross-examination he stated that it is news to him that provincial inspectors were given cars to do his work. He left the Respondent with this status. He however conceded in cross-examination that when he resigned he had Cost Centre officials doing analysis for him although he did the final analysis at high level.

His other duty was to conduct Road Safety Audits. He conducted this audits alone on the 9 Cost Centres with no support. The audits were conducted on the newly constructed roads and existing roads to counter or mitigate causes of accidents on the infrastructure. Within the 22 days in a month one needed one needed at least 03 days to conduct the audits. The audits are done in the morning and in the afternoon which are times when accidents occurs. Since he would start with the stats in the morning, he would do the audits in the afternoon and come early tomorrow morning to finalize the audit before he goes to the office for the admin and then finalize the outstanding audit thereafter. He would not finish an audit because it is not just writing a report. One writes a detailed report that includes photos to depict what one saw on the road, hence one needs 03 days to do an audit. He was expected to do an audit 06 times in a month which meant it would take 18 days spend solely on audits. It was quite hectic. The seconded officials were not trained to do audits. Hence he had to come down from the Regional Office to the Cost Centre. At the same time he was expected to be on strategic level and attend meetings. All this was to be done within 22 days. Meetings were part and parcel of his daily duties and others are unplanned and only himself could attend.

His other duty is attending to accident scenes and reconstruction thereof. If he had to reconstruct an accident he had to investigate the cause and what to do to deter recurrence. Any accident with 03 or more fatalities he was compelled to attend, reconstruct, write relevant reports after his findings and submit to HQ, communicates with other stakeholders e.g Tracker, Sanral, Public Works who are custodians of the roads. For this duty one also need a minimum of 03 days to work on the report, investigate where the person involved came from, investigate if the person was fatigued by checking when he started driving. He was compelled to do this physically. He would go around 04 times which require 03 days to reconstruct which meant he needed about 12 days for this. Officials were only trained on this one month after he was gone. In cross-examination he indicated that had he, as a section head, known that there were training plans he probably would not have left. He has not seen the Respondent's training plan

The other duty was attendance of meetings. Every Monday they have weekly Management meetings. Without the stats they would not even plan these meetings. From the 22 days one has to take out this 04 days. In this meeting they would sit with Cost Centre Heads and plan for proper deployment. He had no one else to delegate, and needed to do all this on his own. Other meetings would be the Provincial Strategic Services called by HQ. This meetings are not planned. He also form part of the RTMC meetings that can be called for 4 days in different provinces. He had to go there physically since no one else was trained. He also had to attend High Court cases to explain his audits on a certain day. His Admin Officer was treated like other provincial inspectors and transferred to Middelburg from his office in Kwa-mhlanga. This was not resolved until he left.

All of the above contributed to the stressful work environment which was toxic. Further, it was difficult for any of his managers to understand. They were not trained in line with what he did. Whenever one explain the challenges it was hard for them to understand. They would not understand a report he needs to do or its urgency. They would be frustrated not being able to attend a meeting on his behalf since they don't know his work. They could not understand HQ's cut off time.

Hence he resigned in October 2016. The GM Mr Nkosi called him wanting to know why he resigned. He explained to him the above issues with much emphasis on lack of training and having to work without rest. The GM promised to attend to the structure of Safety Engineering and also to buy the system. He withdrew his resignation due to the promises to address his challenges. He stayed on until he resigned in 2018 with no change at all to his challenges.

His life was deteriorating due to stress and fatigue. He could drive from Nkangala to Nelspruit and not come back. He was forced to raise his hands and resign. Some of the problems were solved after he left. The Respondent sent officials to training (2 in Nkangala and 2 in Gert Sibande). The work is now shared amongst the two officials whilst he was doing that work alone. The Respondent also solved in his absence the challenge of transport to get stats from Cost Centres. Officials were permitted to use their vehicles and were paid (Scheme B). Issues were resolved after he left.

Health. In February 2016 he started feeling sick which was not the case all the years. He was diagnosed with High Blood Pressure. In 2015 November he was diagnosed with High Blood and Diabetes. His sugar was very high. When confronted in cross-examination that the Doctor in his medical note indicates that "he was not previously diagnosed of hypertension or diabetes", he said he understood the note to say he did not have it before but it was detected in 2015. He then discussed this with his senior Mr Nkuna who promised to better the environment, officials and buying the system. On page 92 is a sick report after he left as he is now chronic. His family was affected. He had sleepless nights trying to achieve the Respondent's goals. He used to take work at home and ended up not doing it as his wife did not believe that. In 2015 they were the best performers in the Department but he sweat blood for it and his family took the sting. He was an absent father who would be home at the earliest 20h00pm. He saw that he will die on hypertension and fatigue will kill him on the road.

On page 72 himself and other 2 safety Engineers wrote to the MEC and explained everything on 29 March 2017. Mr Erasmus was diagnosed with stomach cancer. Mr Singh due to fatigue overturned his car. He saw that he would not make it unless there were changes. The MEC opted to answer the issue of salaries and left out the environment issues. The toxic environment was that he was working alone, they needed to have a system, as he could not cover all jobs. He conceded that even though he is in the same band wagon with the other 2 they have their own reasons for not resigning and they might not resign now since the Respondent claims they have changed things.

When it comes to leave he had to put his managers under pressure to sign his leave since there would be no one to do his work in his absence. He still had to come to work when he was on leave. There would be no one to do the audits and accident reconstruction. The stats would however be done and sent to him to analyse for HQ. As to assessments he has achieved his goals with scores of 5 (for excellency). The Respondent has acknowledged his performance but it was like a gun on his head as he did not have a choice. If officials were trained he would not have been overworked. He has served a 30 days notice and resigned on 01 November 2018.

The essence of the Applicant's case from 2009 to October 2016 when he resigned for the first time could be summarised as follows: he could not ensure submission of stats for accident register; he could not properly conduct road audits; or properly attend to accident scenes and reconstruct; could not properly attend his scheduled and unscheduled meetings; the Respondent could not resolve the issue of his HR Admin Staff; lack of management support since the managers could not understand what he was doing; he had to compel his managers to give him leave since in his absence there was no one to do his work; he achieved bonus marks in his assessments through blood and sweat and his family took a bait; all this led to his health deterioration and he was diagnosed with stress and hypertension. He decided to resign in October 2016 but changed his mind when the GM spoke to him and made promises. He continued to work for the Respondent until 01 November 2018 when none of the promises were fulfilled and decided to resign again.

The Applicant called Mr John Hamilton Erasmus who testified that he is the Safety Engineering Official for another region. The structure that was supposed to be applicable is on bundle C and has 1 ASD, 1 SCO and 3 Admin Officers. It existed when they came from Public Works, Roads & Transport. In Nkangala region there was only one ASD and this other positions did not exist. He however conceded that his Region had more work than that of APP and Singh but that he did not resign. He further conceded that he did not say his health problem was caused by the work. He emphasised that indeed the working conditions are unbearable and intolerable, he explained that they are the only ones as Assistant Directors that are able to do Accident Reconstruction in their respective regions without any help, he indicated that they are expected to work 24hours 365 days which affects their wellbeing, family life and their health conditions.

On the other hand the essence of the Respondent's case is that the Applicant was not constructively dismissed but has resigned voluntarily. Mr J. Zondo testified for the Respondent that he had worked as a Cost Centre official and that he assisted the Safety Engineering in 2012 in data coordination from 4 police stations, capture and analyse crash statistics, generate crash reports, collect accident report from police stations, but that during his time he never had problems with transport as he was given state vehicle and after applying for a subsidized vehicle he was given approval to use his private vehicle for official purposes. Mr Zondo stated he was normally appointed to act on behalf of the Applicant when he goes on leave and that there will be minimal distractions as he will go to accident scenes and produce the required reports. Mr Zondo testified that when he acted in the Applicant's position he never had problems with receiving statistics due to lack of transport and that for him to finalise an accident reconstruction report it takes two days unlike the three days minimum spoken of by the Applicant.

The Respondent also called Mr Lewa Amos Masilela who testified that he was the acting Director Law Enforcement. He testified that the Provincial Inspectors were allocated a government vehicle to utilize permanently for the unit, they procured cameras for them and the Applicant was the one who prepared the memorandum with specifications; that he has never come across a situation where reports were never submitted due to lack of transport at Cost Centres; that the Applicant once complained about the seconded officials not given support and Mr Masilela dealt with the issue during their standing meetings of Mondays; that the Applicant could not apply for a subsidized vehicle but that he was given a government vehicle to utilize until he resigns. Mr Masilela further testified that he does not recall a single incident where the Applicant came to him and said he was unable to take leave due to workload and requested to be paid for forfeited leave days; that the Applicant came to him and requested to take leave because he had personal problems which was about court cases for maintenance and that such leave was never denied; that there was a period where the Applicant was on leave for about two weeks and there was at that time a major accident with 14 fatalities which attracted media attention and the Applicant was never requested to come back from leave and the crash was managed without him. Mr Masilela further testified that that the Applicant would sometimes perform work for other stakeholders including Department of Public Works Roads and Transport without his permission or an activity which he was not contracted to perform; that he never suspected that the Applicant was under any pressure from work; and that he was never informed that the Applicant was attending doctors/psychologist or was any sick note submitted to him.

The Respondent also called Ms Bawinile Mabuza (a senior manager in HR Management and Development) who testified that the Applicant's post was evaluated and graded at salary level 10. She also testified on the structure for Safety Engineering section stating that the structure on bundle B (that had ASD and Admin Officer only) was the one approved and applicable from 2015. The structure on

bundle C (it has that came with Mr Erasmus and has ASD, Senior Admin Officer and three Admin Officers) is an old structure from the previous Department.

The Applicant conceded that by the time he left in 2018 he had Cost Centre officers who collected, captured and analysed statistics but that he had to do the overall analysis for the Region. He further conceded that he got bonuses for his assessments which meant he reached the targets.

In *Eagleton and others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) at par 22 states that: An employee must prove that-

1. He or she terminated the contract of employment;
2. Continued employment became intolerable for the employee;
3. The employer must have made continued employment intolerable.

1. He or she terminated the contract of employment;

In *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 984 (LAC) the Labour Appeal Court held that when an employee resigns as a result of constructive dismissal, the employee is in fact indicating that the situation has become so unbearable that the employee cannot work. Effectively the employee is saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee resigns because he or she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If this assumption was wrong and the employer proves that the employee's fears were unfounded, there was no constructive dismissal but in fact resignation.

In *Asara Wine Estate and Hotel (Pty) v Van Rooyen and Others* [2012] 33 ILJ 363 (LC), the court considered the authorities and held that where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee. Therefore where an employee resigns and claims that he or she was constructively dismissed, the test is whether a reasonable alternative to resignation existed.

2. Continued employment became intolerable for the employee;

In *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) the Court further held that the employee must satisfy the Court that at the time of the termination of the contract, he or she was under the genuine impression that the employer behaved in a manner that rendered the relationship intolerable and would continue to do so. The test remains that the conduct of the employer must be judged objectively (*Smithkline Beecham (Pty) Ltd v CCMA and Others* (2000) 21 ILJ 988 (LC) at par 38). The subjective apprehensions of an employee cannot be a final determinant of the issue. In the same case the Court held that- "it would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when those perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the Act".

3. The employer must have made continued employment intolerable:-

- Without reasonable and proper cause
- Being aware of the alleged intolerable conditions and afforded an opportunity to address and rectify

In *Pretoria Society* the Labour Appeal Court held that the enquiry is whether the employer- "without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract; the court's function is to look at the employer's conduct as a

whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

In *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369(SCA) at para 13, the Supreme Court of Appeal accepted that there are many things an employer may fairly and reasonably do that make an employee's position intolerable. However the SCA confirmed that the employer must be culpably responsible in some way for the intolerable conditions. It held 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 circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that 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 ... have lacked 'reasonable and proper cause'."*

In *Jordaan v CCMA and Others* [2010] 12 BLLR 1235 (LAC); (2010) 31 ILJ 2331 (LAC) at page 2336, the Labour Appeal Court approved a salutary caution that constructive dismissal is not for the asking and held that: *"with an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal"*.

In the present case, the Applicant explained several incidents that occurred over the years as indicated above as the reason for his resignation. In the present case the Applicant reversed his earlier resignation in February 2016 and continued to work for another 2 years before he finally resigned. The Applicant claimed that the GM made promises to resolve the issues but he did not and he then resigned in 2018. How one could stay in a toxic environment for years and even decide to stay another two years and call it unbearable? I find this and other incidents explained by the Applicant not sufficient to justify constructive dismissal. Constructive dismissal could be likened to a gross misconduct by the employer to the employee. In this present case there was no such 'misconduct' directed to the Applicant. It is a case of ineffective management by the Respondent. Such is directed to the Respondent itself and not to the Applicant. The Applicant claims he was overworked yet he opted to proceed working in that environment for years. The Applicant could have opted to work his normal hours and do reasonable work for the Respondent each day, and allow HR to do its work of providing human resources and the Respondent to provide other resources if they were not available. The Applicant opted to put himself in that environment. He could have done his normal duties or even left the employ of the Respondent which he opted to do in this case. The Applicant resigned.

From the circumstances outlined above I find that the Applicant was not constructively dismissed.

AWARD

1. This matter is dismissed.
2. I make no order as to costs.



PANELLIST: MARTIN SAMBO

Date: 12 August 2020