



CASE NO: GPBC1548/2019

MABOTHA D C

Applicant

AND

LIMPOPO DEPARTMENT OF ROADS AND PUBLIC WORKS

Respondent

ARBITRATION AWARD

1. This award is rendered in terms of section 138(7) of the Labour Relations Act, 66 of 1995 as amended (the LRA).
2. The dispute was referred for arbitration in terms of section 186 (1) (e) of the Labour Relations Act 66 of 1995 as amended ("LRA"). The hearing was held on the 17 July, 04 September and finalized on the 27 October 2020
3. The **Applicant, Mr D C Mabotha (Employee)**, was represented by **Mr Mampshika** legal practitioner and the Respondent, **Limpopo Department of Public Works** was represented by **Mr Sephoka** , its employment relations officer



4. The proceedings were digitally recorded and were finalized on the 27 October 2020.

NATURE OF THE DISPUTE

5. The dispute is about an alleged unfair dismissal

BACKGROUND TO THE DISPUTE

6. The Employee was employed as the Deputy Director: Employment Relations from 01 January 2012 until he resigned on the 29 March 2017. The Employee regards his resignation as a constructive dismissal because the Employer made his continued employment intolerable. The Employee further submitted that there were three issues which made his continued employment impossible. The issues involved being given unwarranted written warning, denied transfer and failure deal with his occupational disease issues. The relief sought by the Employee is compensation

ISSUES TO BE DECIDED

7. I am required to determine whether the Applicant was dismissed or not. If dismissed, I have to determine whether her dismissal was substantively fair or not. If so, to order the appropriate relief

SURVEY OF EVIDENCE AND ARGUMENT

Employee evidence

8. The Employee, **Mr. Mabotha** testified that he was employed as the Deputy Director: Employment Relations and resigned due to intolerable conditions created by the Employer. The Employee started to work for the Employer from 01 January 2012 and resigned 29 March 2017. He further testified that he was maliciously charged with absenteeism from 11-14 April 2016. The Employer accused the Employee of failing to report on duty without authorization. He further testified he responded to the letter and explained that he was sick



and his friend tried to phone Me Letsoalo, his supervisor without success. The Employee was then given a written warning on the 26 May 2016. There was then a further deduction of his salary in the sum R 4393.47. The Employee lodged an appeal on the 31 May 2016. The Appeal was finalized in December 2016 and the

Employee received the outcome on 28 February 2017, stating that the written warning was set side and his sick leave was approved.

9. Mr. Mabotha further testified that he was deliberately refused to be given horizontal transfer. He testified that he made an application for a horizontal transfer to Human Resources Development: Skills Development and Career Development on the 02 March 2015. His request was turned down by a written response dated 03 March 2015. The reason was that the Employer should, first deal with the principle of upward mobility to the people who already in that area and invested effort and in overtime and gained valuable within the area of that work.
10. He further testified he would have been given transferred because, there was a recommendation from Employee Wellness Programme which recommended his transfer as he had filed a grievance about his situation. There is further communication from Director: Employee Wellness dated 19 March 2015 which confirmed that the high stress levels and affect his performance. Change of his environment if possible can be the best solutions.
11. The Employee further testified that there has been a problem about the office he is occupying an argued that it was incompatible with Occupational Health and Safety Act 181 of 1993. He said further testified that he lodged that initial complaint about this office since 2013. He further testified that he engaged the Employer on 25 January 2015 and in 25 May 2015.
12. The Employee further testified on 30 August 2016 that, the Chief Director: Corporate to Services wrote a letter to the Director::Organizational Development and Strategy to assist the Employee to be placed in another Unit within the Department. There was further a letter from the Chief Director: Corporate Services to Chief Director: Property and Facility Management which confirmed that there was grievance lodged by the



Employee to PSA. It was recommended that he moved and that there only available funded post was assistant director under Property and Facility. The letter further enquired whether Mr. Kekana, the Chief Director can recommend his transfer. Mr. Kekana then responded and said the post of assistant director will be advertised to attract the applicants with the requisite skills.

13. He further submitted his medical reports then handed to the Occupational Health and Safety Section. In his communication of the 09 November 2016 he alleged that Ms. Malungana refused this forms for medical conditions be dealt as COIDA (Compensation of Occupational Injuries and Disease Act). There submissions for the application of his temporary incapacity leave submitted to the Department of Labour On the 02-03-2017 he was referred to Dr Makatu .(Compensation Commissioner). The Employee resigned on 29 March 2017

EMPLOYER'S CASE

14. The Employer's first witness, **Ms. Ntitane Esther Sethlapelo** testified that she was employed as the Deputy Director: Human Resources Development. She is responsible for the development of strategies and work skill plans. She confirmed that she received an application for transfer from the Employee. The application for a transfer was declined because for one to be successful, they must have the necessary skills. The Employee claimed to have the skills, but it was discovered that he only had the skills in teaching. During the cross examination, the witness was asked if she can decline the transfer even if it was recommended by Employee Assistance Programme. She responded that the approval of the transfer is on the discretion of the Head of Department. The Head of Department will only do so after receiving the recommendation. The Head of Department will decide whether to approve or not. There was no approval in this case and there the transfer requirements was to be dealt with on its merits and there was no recommendation forwarded to the Head of Department. There was nothing which prevented the Employee to approach the Head of department and request to be transferred.



15. The Employer's second witness, **Ms. Modjadji Letsoalo** testified that she is employed as Deputy Director: Employment Relations. She testified that she is responsible for collective bargaining and dispute handling. She further testified that she knew the Employee very well and she was the Employee supervisor from 01 April 2013 until 27 March 2017. She testified the relationship was good. There were, however challenges due to the Employee's absenteeism without informing the superiors. The Employee resigned and they even organized a farewell function for him. She further testified that she knew nothing about the transfer and that might have been before she joined the sub-directorate. She further testified that the issue of the complaint about the office only came into the picture in 2016 not long before the Employee resigned. The Employee never complained to her as the supervisor about the issue of the office. She further testified that there was a pattern about the Employee's absenteeism. She further testified that she did not charge him but tried by all means to engage the Employee in discussing these challenges. She further testified that she only charged the Employee when she realized that counseling was not yielding any positive results. She further submitted even after the written warning was issued, the relationship with the Employee remained normal.
16. The Employer's third witness, **Mr. Thomas Moshobologe Mmaphethu**, testified that he is employed as the Occupational Health and Safety Officer. He also dealt with the Employee's wellness and occupational disease and injuries on duty. He further testified that, the first time he was contacted by the Employee was during September 2016 when he came to report about his occupational sickness. The Employee came to his office and reported the respiratory problems. The Employee was given an opportunity to complete the prescribed form for COIDA. The Employee further testified that all the necessary documentation were forwarded to the Workmen's Compensation Commissioner. The witness further testified that he took the documents personally to the Department of Labour during October 2016.



ANALYSIS OF THE EVIDENCE AND ARGUMENTS

17. This dispute was referred In terms of section 186(1) (e) of the LRA, which provides that 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.
18. I am required to issue an award with brief reasons. I do not wish to offer an exhaustive survey of all the evidence and arguments presented at the arbitration hearing. I have had regard to everything presented to me, and what follows is a brief summary of the evidence relevant to my findings only
19. In the case ***Murray v Minister of Defence [2008] ZASCA 44; [2008] 6 BLLR 513 (SCA)*** it was held that:
“It is trite in our law that: where alleged constructive dismissal is concerned, the onus rests squarely on the shoulders of the party alleging it and that such a party must prove that her resignation was not voluntary and not intended to terminate the employment relationship. Once this onus has been discharged, the conduct of the employer must be assessed and the question then is whether the employee could reasonably have been expected to put up with the conduct of the employer. The mere fact that an employee resigns because work became intolerable does not, in and by itself, make for a constructive dismissal.”
20. The Employee testified on three issues which he considered to have been created by the Employer and thus made his continued employment intolerable. I have to decide is whether those issues were deliberately created by the Employer and caused the breakdown of trust in the employment relationship
21. The Employee led the evidence and made reference to some of the documents in the Bundles. The first issue is that he was given a written warning which was not warranted and testified that he submitted the



necessary documents and explanation that he was sick. The Employer went further and issued the warning and also implemented leave without pay. Evidence was led and was not contradicted that the Employee's disciplinary record, before this incident was clean and there were no warnings issued before.

22. The Employer's testimony is that there were concerns about the Employee's pattern of sick leaves and absenteeism and believed that there was a need for an action. I agree with the Employee that the Employer acted unreasonably by not accepting the explanation which was provided by the Employee in writing. In addition the Employee was informed of the successful appeal after about six months. Can this be regarded as malicious charge? The appeal was lodged in May 2016 and the Employee only became aware of the appeal outcome in February 2017. The decision reversed the written warning and the deducted money was refunded. This appeal process was conducted by the Office of the Premier and the Employer had no control over the process. The logic is that the Employer cannot be held responsible for the delay because this was beyond its control. Can this be regarded as one the cases of making working conditions intolerable?
23. Evidence was led that immediately after the warning was issued, the Employee applied for incapacity leave. In fact since that time until his resignation, the Employee was not reporting to work. The Employee was granted that incapacity leave. The conduct by the Employer cannot be regarded as being intolerant. The Employee was then given the benefit and he used his right for appeal successfully. The Employee got that warning for the first time and by then, the Employer was concerned about the pattern of absenteeism by the Employee, probably due to his medical conditions. The issuing of a warning was the prerogative of the Employer and the management tool to maintain discipline at workplace. There is no evidence before me to prove that the Employer was malicious. The Employee decided to resign after receiving the appeal outcome. The question why did he wait for almost 8 months after the warning he regarded as intolerable, and then resigned. The argument is that the resignation was already in his plans and he was just waiting for the outcome. The other concern is why did he resigned when whilst the outcome was in his favour.



24. The Employee led evidence that he was denied a cross transfer, even though that transfer was recommended by the Employee Wellness Programme. The assertion is that his transfer was deliberately blocked by his managers. The Employers evidence was that there was only one request for the transfer which was denied. The Employer's version was that the Employee applied for a position but did not meet the requirements. There was also a policy that, the Employer must first consider the upward mobility to those who have invested their time within the space. There was further evidence by the Employee that his transfer should have been given preference because these were the recommendations of the Employee Wellness Programme. He further testified that here was a dispute lodged and the recommendations were made by Adv. Baloyi that he should be considered for a transfer. This recommendations were not implemented.
25. There is a communication dated 13 September 2019 between the Chief Director: Corporate Services to Chief Director: Property and Facility Management referring to approved grievance outcome that he must be transferred. But the issue is that there were still communication requesting the other Chief Director whether he recommends that transfer. That position was, instead advertised. The Evidence by the Employer is that transfer only take place in terms of the Policy when the recommendation has been approved by the Head of Department. The question is, can you therefore hold the accounting officer to have been responsible for not granting the transfer. There is no evidence which put before to confirm that the Head of the Department was aware of the recommendations and he refused to implement those recommendations. The Employee was holding a senior position and was very much aware the internal processes. He would have taken the matter up to the Head of the Department. My findings is that the Employee could have taken the matter up with the Accounting Officer before he could resign.
26. The Employee's version is that he was occupying the small office which was initially meant for keeping the files. This office was according to him responsible for him to suffer from respiratory conditions. The Employer's version is that the office was used for office accommodation and it had proper ventilation. The



Employer's version by Ms Letsoalo, was that she has been the Employee's supervisor since March 2013 and all along the office was never an issue and this came to the picture in 2016, just about a few before the Employee resign. The Employee resigned in March 2017. It is common cause that the Employee did submit the medical report confirming that he suffered from respiratory sickness which as result of inhaling certain stuff. There was a recommendation that he should be provided with alternative accommodation.

27. Evidence was led that there was long term sick leave by the Employee and most of the part of 2016 he was in the incapacity leave. In fact, his application for COIDA was only lodged with the Employer in September 2016 and was submitted to the Department of Labour in October 2016. During that period, the Employee was on incapacity leave and never reported to work until his resignation. As regards the issue of the office there was inspection in loco and indeed the office had no window. But during our inspection it was properly ventilated and it also had an occupant. Whether the office was designed for keeping the files that view was contradicted by the Employer. It also important that not all offices have windows, what is crucial was whether it is properly ventilated. It is probable that office was responsible for the employee's sickness. My analysis is that the employee illness was being taken care of by the Employer and the Employee did bother to wait for the finalization of the matter by the Workmen's Compensation.

28. In ***Albany Bakeries Ltd v Van Wyk & Others [2011] JOL 27545 (LAC)*** the Court held it was critical to consider in constructive dismissal case, whether the employer had made continued employment intolerable for the employee. The Court pointed out that the employer had a grievance procedure, which the employee should have exhausted before his resignation. The employee also had an option to challenge his alleged demotion under the provisions of the LRA, which the employee had not done. As such the Court held the dismissal was not a last resort and as such the employee had not proven constructive dismissal



29. On the issue of the transfer, the last word comes with the Accounting Officer who is the Head of Department. In the present case the Employee had followed the internal process, but it appears that he did not give the Employer an opportunity to finalize some of the processes. He resigned before the issue of occupational illness could be finalized. The Employee also waited for the outcome of the appeal and immediately after the favourable outcome he resigned. He waited for more than 8 months and decided to resign when the outcome of the appeal was in his favour.
30. ***In Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others 2012) 33 ILJ 363 (LC) at para 20-***
.Steen Kamp J explained this test as follows: *"In the case of an alleged constructive dismissal in terms of s 186(1) (e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the CCMA did not have jurisdiction in the first place, even though the commissioner can only make that finding ex post facto."*
31. It is possible that some of the issues may be intolerable, but I am not convinced that resignation in this case was the last resort. I have taken into consideration of the evidence placed before and my finding is that the Employee has on a balance of probabilities failed to establish that there was a dismissal.



AWARD

32. The **Applicant, Mr Mabotha, (Employee)** was not dismissed by the **Respondent, Limpopo Department of Public Works (Employer)**.

33. The Council has no jurisdiction and the application is dismissed

34. No order as to costs

PANNELIST: JEFFREY NKUNA

DATE: 06 DECEMBER 2020