



ARBITRATION AWARD

Case No: PSHS337-17/18

Commissioner: Lungile Matshaka

Date of award: 17 September 2018

In the matter between:

Khathutshelo Nethavhani

Applicant

and

Department of Health – Gauteng

Respondent

DETAILS OF REPRESENTATION AND BACKGROUND

1. The matter was set down for arbitration hearing as a part-heard in terms of section 186(1) (e) of the Labour Relations Act 66 of 1995, as amended, on 16 & 17 August 2018 at the SJ Nursing College in Pretoria under auspices of the Public Health and Social Development Sectoral Bargaining Council (“the Council”).
2. Mr, W Moeketsane, an attorney from Rams Inc Attorneys, represented the Applicant, while Mr Z Shange, Assistant Director: Labour Relations and attached to the Department’s section of Labour Relations, represented the Respondent.
3. The proceedings were digitally recorded and the witnesses gave evidence under oath. The initial proceedings were held on 25 April 2018 leading to a postponement ruling. They continued on 4 & 5 June 2018. Due to time constraints the proceedings had to be adjourned. Parties requested and were enabled to submit closing arguments in writing within seven (7) days. Both complied.

ISSUE TO BE DECIDED

4. I am required to decide whether or not the Applicant was constructively dismissed in terms of section 186 (1) (e) of the Labour Relations Act (“the Act”), and if so, to determine an appropriate remedy.

BACKGROUND TO THE ISSUE

5. The Applicant was appointed by the Department of Health (Respondent) on 1 December 2009 as Corporate Services Manager at Mamelodi Hospital tasked with overseeing all non-core support services in Human Resources, Finance, Logistics, Legal and Strategic Services.
6. It came to light that on 1 October 2010 the Respondent approved a new organisational structure without the post of Corporate Services Manager. According to the Applicant this meant that the post had been abolished, even though he continued to serve in the same position as before.
7. In his referral to the Council the Applicant has highlighted that he faced unfounded allegations and that the Respondent has failed to deal with the grievance. He then resigned due to intolerable working conditions on 26 May 2017. He has also added that his reputation and integrity has been negatively affected by unfounded charges against him. As relief he is seeking compensation.
8. In refuting the Applicant’s claim the Respondent made the point that it will confine itself on what the Applicant has highlighted in his referral. It is convinced that processes are very clear if they were followed, if not, the Respondent will be able to address that.

SURVEY OF EVIDENCE AND ARGUMENTS

Applicant’s evidence

9. The Applicant testified to the effect that:
 - 9.1 He confirmed his employment effective from 1 December 2009 as a Corporate Manager responsible for non-core nursing services ranging from finance, Human Resources, Finance, Logistics, Strategic Management, and all other related services.

- 9.2 In 2010 the hospital had to restructure after the Respondent had taken a decision to elevate the institution to a provincial hospital. As a result his post was abolished, and three (3) new positions were created i.e. Deputy Director (HR), Deputy Director (Finance) and Deputy Director (Admin & Logistics). After the then Chief Executive Officer (CEO) had identified the skills that will be required for the said positions, it became clear to the Applicant that none of these new positions were suitable for him.
- 9.3 On approval of the new structure he then approached the Respondent for re-deployment or clarity as to what will happen to him. In 2011 he wrote to the CEO seeking clarity as to what will happen to him on 15 August 2011. The CEO kept on telling him that he was engaging the Head Office. On 21 September 2018 the CEO reverted to the Applicant advising him that the Respondent had nothing to offer and made an undertaking that it was still looking.
- 9.4 What the Applicant found concerning was the implication that the Respondent did not have any position for him. The Applicant made reference to the CEO's letter which confirmed that consultation with Tshwane District Office and Provincial Legal Department were done, but not solution was forthcoming. He was further informed that the matter was tabled before the Provincial Human Resource Department, a response still awaited.
- 9.5 On 3 October 2016 there was an illegal strike at the hospital. The Applicant was one of those managers who received a memo from the striking workers of the institution. According to the Applicant the issues had nothing to do with him.
- 9.6 However, the findings in respect of Case No. 3 relating to the appointment of Dr Musasa on recruitment and selection process on the post of (1) Medical Specialist (Paediatrics), reflect that it was highly irregular. The Applicant's name as the Corporate Manager as the one who is assigned to oversee Human Resource is mentioned. In the above-mentioned case the Applicant signed both submissions for two doctors to be appointed on one vacant post. The findings make it clear the maladministration of recruitment and selection process. In the end the charges that

he had had to face emanated from the findings made by the two officials from Provincial Department of Health (Respondent).

9.7 However, the Applicant raised some observations about the findings and found them disturbing, because he was never interviewed to find out his version.

9.8 According to the Applicant, on receiving the charges from on Mr Mpyana, the latter made it clear that the mandate was to get rid of the Applicant.

9.9 On approaching the CEO, the latter characterised the Investigation Report on Allegations of Corruption at Mamelodi Hospital that led to illegal strike embarked by Organised Labour as junk and rubbish. She went to the extent of saying that as an Accounting Officer she should be the one who is charged.

9.10 Emanating from the above Report the Applicant faced the following charges:

9.10.1 **CHARGE 1**

***Corruption**, in that on the 29th January 2016 you signed the submissions supporting the appointment of Dr Musasa for a post of paediatrician and you further on the 29 February 2016 signed the submission supporting the appointment of Dr Monene for the same post.*

9.10.2 **CHARGE 2**

***Gross Dishonesty**, in that during January/February 2016 you signed the submission for both supporting Drs Monene and Musasa for the same post whereas you were aware or ought to have been aware that Mamelodi hospital needed one Doctor to occupy the post.*

Alternative charge

***Maladministration** in that during January/February 2016 you signed the submissions for supporting both Dr Monene and Musasa for the same post*

whereas you were aware or ought to have been aware that Mamelodi hospital needed one doctor to occupy the post.

9.10.3 CHARGE 3

***Collusion** in that during January/February you colluded with Joyce Vilakazi and Mr C J Sibanyoni in that you signed and supported Dr Musasa into the post that he was not the recommended candidate.*

9.10.4 CHARGE 4

***Dereliction of duty** in that during January/February 2016 you failed as the overall manager in Human Resource to ensure that proper procedures were followed in appointing a successful candidate in the post of paediatrician.*

10. The scheduled date for the disciplinary hearing was 27 March 2017 to be held at Mamelodi Hospital Boardroom at 10:00. The Applicant availed himself together with union representative on the day in question. However, the initiator of the case together with the chairperson was not present. It turned out that the Respondent was still trying to arrange for a Commissioner to chair the hearing.

11. Further, the Applicant expressed a view that he found it quite disturbing that the Respondent did have not a courtesy to advise them about its predicament. In his view he was also supported by the CEO who also felt that there was a lot of ineptitude and unfortunately she could not do anything about that. The Applicant continued with his duties.

12. The Applicant further brought to the forum's attention that he lodged a grievance on 8 May 2017 and subsequently resigned on 28 May 2017.

13. In cross-examination the Applicant responded as follows:

13.1 The Applicant insisted that constructive dismissal is induced by the Respondent by making the conditions unbearable. In the above sense the Respondent made the Applicant redundant amidst unfounded allegations.

13.2 He further confirmed that his relationship with management was good except that the working environment was very difficult. In the same breath he pointed out that if one felt aggrieved, one is enabled to lodge a grievance.

13.3 It further came to light that the Applicant endorsed the fact he would not have resigned if he did not have to face disciplinary allegations.

Dr L N Pooe – CEO Mamelodi Hospital

14. The Applicant's first witness, Dr Pooe, confirmed that the Applicant was responsible for HR, Finance and other related duties. He further confirmed that he was aware of the meetings between the union and the labour relations but not the contents of the meetings in terms of minutes. He did try to get the minutes without success.

15. Dr Pooe pointed out that he refused to sign the charges because of the process and the content of the charges. This was not because the Respondent was hell-bent to exit the Applicant.

16. He further confirmed that during the appointments that were effected in January 2015 he acted as CEO until he was permanently appointed to the post in February 2017.

17. With regards to the filing of the post(s) of medical specialist (Paediatrics and Surgery) at Mamelodi Hospital, following the interviewing process, he was made aware that the only candidate, Dr Musasa that was interviewed had already been appointed. This was despite the fact he made it clear in writing that his appointment will be pending the interview of Dr Monene, who could not make it for the interview, due to being on maternity leave at the time.

18. In cross-examination he confirmed his relations with the Applicant were fine on the whole other than that he was not happy with what he was doing. He further pointed out that all that the Applicant told him was what other people were saying about him.

19. In relation to the Applicant's request for the Respondent to consider other possibilities in other institutions, Dr Pooe confirmed that this did not stop him from applying externally.

20. In re-examination Dr Pooe further confirmed that there were no additional duties that were added to the Applicant, but the same duties as before were still there for him.

Ms M D Ngele

21. The second witness, Ms Ngele, confirmed her appointment and currently as Assistant Director, having commenced her employment in 2011 and started in Mamelodi Hospital in 2013. She made a brief mention of her duties as to attending to grievances, investigations relating to misconduct and discipline. She confirmed working relations with the Applicant as very good. He was always there to assist her whenever there was such a need.

22. Ms Ngele testified that in 2016 there was a strike and at the time she was on maternity leave and only came back in October/November of the same year (2016). Subsequent to the investigation report a month later she received a charge sheet. The allegations levelled against her related to gross dishonesty, corruption and abuse of power. On the day of the hearing one Mr S Mpyana, the Respondent's Labour Relations Official, only came to advise that the hearing is postponed for logistical reasons. At her next appearance she was found not guilty. She also mentioned the fact the CEO distanced himself from the charge levelled against her.

23. In cross-examination she confirmed that her junior brought to her attention a strike related to the filling of the post of an Operational Manager and other allegations relating to irregular appointments.

24. She further pointed out that she never received the Applicant's formal grievance. She further confirmed that if the Respondent decides to ignore a grievance / complaint an employee can declare a dispute.
25. In re-examination she confirmed that in the case of the Respondent the recourse that an employee when the latter makes conditions intolerable is to lodge a grievance or declare a dispute with the Council.
26. She further highlighted the issues that concerned the Applicant such as the abolishment of his post and non-compliance of the Respondent with time frames. She further confirmed that the interview process of the interviewing panel did not involve the Applicant.

Mr Jabulani Sibanyoni

27. The third witness, Mr Jabulani Sibanyoni ("Jabulani"), testified as follows:
28. He started working at Mamelodi Hospital as an HR Clerk in 2015 focusing mainly on recruitment. He confirmed the recruitment process that was followed in the case of one of the candidates, Dr Musasa. The second candidate, Dr Monene, who also applied but could not attend the interview on account of being on maternity leave, was interviewed later.
29. He further confirmed that, in relation to the investigation report following the illegal strike, he was only interviewed after he faced charges relating to Gross Dishonesty (3 charges), Insubordination and Collusion. His interview had a bearing on what transpired with regards to the medical appointments of Dr Musasa and Dr Monene respectively to the same post.
30. In cross-examination Jabulani confirmed that he knows the Applicant as HR Manager. He noted among his duties recommending and proofreading minutes of the interviewing panel.

31. He conceded that it was incorrect to have recommended for appointment Dr Musasa and Dr Monene for one and same post. However, Jabulani made the point that the CEO, despite recommending for Dr Musasa, but still wanted Dr Monene.
32. He further made the point that he was given a charge sheet in March 2017, appeared only in July 2017 and was sanctioned with a warning in August.

Mr Steven Mpyana

33. In his testimony, Mr Mpyana (“Steven”) confirmed that he started working for the Respondent in 2007. In 2012 he was promoted to the position of an Assistant Director in the Department of Home Affairs. In 2015 he joined the Respondent and started working for the Respondent mainly in the facilitation and coordination of disputes and grievances in the Gauteng Province among others.
34. On or about October 2016 Head Office received a call from organised labour that it had embarked on illegal strike. In response one Ms K Mapunye and himself, both from Labour Relations section met the then Director, Mr Mogotsi. The latter appointed them to arrest the situation in Mamelodi. On arrival they met management of the institution. By that time the situation had calmed down and back to normal. They were given a go ahead to meet the organised labour, DENOSA and NEHAWU. They then advised the latter accordingly.
35. After listening to what was brought to their attention, they then again met the management and briefed them accordingly. Following this encounter, they submitted a report to Head Office as well as to the CEO. Because the latter was implicated, he did not want implement the report. Subsequent to a second meeting and after thorough discussions the CEO eventually agreed. This led to the disciplinary action taken against the following: Mr Nethavhani (Applicant), Mr J Sibanyoni, Ms MD Ngele, and Ms Vilakazi.
36. They then advised the Head Office to appoint an outside presiding officer/s and a motivation in this regard was also duly recommended. Due to financial constraints there was delay in getting the necessary approval.

37. On the day of the hearing they tried to explain the situation to the Applicant. Though he was not certain about the actual date, a few days thereafter a notice of resignation was received from the Applicant.
38. Steven made an observation that initially the CEO did not want to implement the investigation report primarily because he was protecting implicated officials that were involved, according to organised labour, in Dr Musasa's and Dr Monene's appointments respectively to one and same post.
39. In cross-examination Steven made the point that normally an employee in any disciplinary hearing will be given an opportunity to respond to allegation(s). Further, this situation cannot be seen to render an employment situation intolerable. He relied in this regard on Resolution 1 of 2003 concluded by both parties into a Collective Agreement.
40. He went further and pointed out that if there is non-compliance by the Respondent in terms of time frames, the Resolution is merely a guide. Further, recourse for an aggrieved party is enabled to file an application to the PSCBC (Public Service Centre Bargaining Council).
41. He further stressed that the Applicant had a good working relationship with the management of the institution. This is also demonstrated by the fact that he gave blessings to a document entitled Filing of the Post of Medical Specialist (Paediatrics and Surgery) at Mamelodi Hospital by appending his signature indicating that he was satisfied and agreeing that all processes, legislation and policies were followed in the appointment of Dr Musasa.
42. In the above regard Steven also made reference to their report on **paragraph 4.3 (Case no 3)** that highlights the following last 1st, 3rd and 4th paragraphs on **page 33** of the Applicant's bundle cited as **A1**:

- *Mr K Nethavhani the Cooperate manager who is assigned to oversee Human Resource signed both submissions for two Doctors to be appointed on one vacant post. This is clear maladministration and selection process.*
- *It is also not good Human Resource practice to hold interviews on two separate dates for one post.*
- *The HOD of the unit was not happy was not happy with the services Human Resources rendered on this post.*

43. Steven concluded his testimony by stating that the Applicant's resignation had nothing to do with the charges that levelled against him.

44. In cross-examination Steven confirmed that the Applicant was part of management though he could not remember interviewing him individually, but he was interviewed as part of management

45. He further confirmed that the institution appointed two people (two doctors) for one post. The submission for each appointment will always be accompanied with the advert, qualifications and scoring sheets of the interviewing session. The second candidate, Dr Monene, who could not attend the initial interview, had a valid reason. The interview should have been cancelled so that both candidates could be interviewed on the same day.

Respondent's submissions

46. The Respondent's representative opted not to call any witnesses on the bases that the witnesses that would be their witnesses were all subpoenaed to testify and presented the presented the Respondent's position reasonable well.

47. I have noted that the Respondent reflected on the key witnesses' evidence that clarified its position. These will be subject of my close scrutiny under my analysis below where necessary.

48. The Respondent submits that the Applicant resigned because he faced serious allegations of misconduct. The Respondent did not put the Applicant on either precautionary suspension or transfer in terms of the Disciplinary Code and Procedure for the Public Service.
49. The Respondent takes the view that the Applicant decided to circumvent the disciplinary process by voluntarily taking a legal unilateral act to terminate his services with the Respondent. It is therefore the Respondent's submission that the Applicant's resignation with immediate effect left the Respondent with the belief that allegations were true.
50. The Respondent noted that the CEO subpoenaed by the Applicant denied having any knowledge of any official at Head Office informing him of any plan to remove the Applicant from the hospital.
51. The CEO's testimony also confirmed that the hospital was initially a District Hospital wherein the Applicant was holding a post of a Corporate Service Manager and heading Human Resource management, Finance and Supply Chain management. When the hospital was upgraded to a Regional Hospital, staff establishment changed and posts of Deputy Directors for Finance and Supply Chain management were created and the Applicant remained being a Deputy Director for Human Resource management. In the Respondent's view as evidenced by Dr Poole, this did not mean that the Applicant would be redundant, but was to reduce workload on the Applicant and the Respondent did not render working environment intolerable for him.
52. Further, the CEO never saw the Applicant as being redundant as he was still the Head of Human Resource Management. According to the CEO the Applicant was only frustrated because of the charges levelled against him. The Respondent submits that investigation into allegations cannot be viewed as rendering working conditions intolerable and whoever will subsequently be subjected to a disciplinary hearing to respond to the said allegations must do so without feeling victimised.

53. In relation to the recruitment of Dr Musasa and Dr Monene who were interviewed on separate dates for one and same post and both recommended to be appointed in the same post, the Respondent submits that this was an irregular process. Further, it is competence of the Applicant to guide on Recruitment and Selection Policy in terms of clause 6.5.5.
54. It has come to light that instead of advising the Applicant agreed with this irregular process. It was therefore the Respondent's submission that based on this evidence, the Respondent was justified to subject the Applicant to the disciplinary action and this cannot be viewed as making working environment intolerable. It is therefore the Respondent's submission that if the Applicant was confident that he did not commit an offence as alleged, he would not resign but he would wait for the disciplinary hearing to rebut the allegations.
55. The Respondent further submitted that the CEO was not aware of the Applicant's alleged humiliation and he could not stop the Respondent to subject the Applicant to a disciplinary hearing if there were allegations of misconduct. The Respondent viewed the Applicant as an employee and like any other employee in its employ. Further, when the Applicant is required to answer to the allegations of misconduct in a disciplinary hearing that does not mean that the Respondent pressurised him to resign by making working environment intolerable for him.
56. The Respondent is satisfied with the view of subpoenaed witnesses that if any party does not comply with the provisions of a Collective Agreement (PSCBC Resolution 1 of 2003), there is a clear procedure to be followed to enforce compliance. That the hearing was not held within 10 days does not constitute working environment intolerable.

ANALYSIS OF EVIDENCE AND ARGUMENTS

57. As a point of departure, section 186(1) (e) of the Labour Relations Act ("the Act") provides that "*an employee terminated employment with or without notice because the employer because the employer made continued employment intolerable for the employee*".

58. The Constitutional Court judgment of **Strategic Liquor Services v Mvumbi NO & Others (2009) 9 BLLR 847 (CC)** has also endorsed what section 186(1) (e) of LRA provides i.e. “... *the employer should have made continued employment intolerable*”. The Court further held that the test for constructive dismissal does not require that the employee has no choice but to resign, but merely that the employer should have made the continued employment intolerable.

59. The test for establishing whether the termination of an employment contract by an employee amounts to a constructive dismissal is clearly expressed as follows in **Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 at 724E, 984-F)**:

“When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely, to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

60. Further, it is generally accepted that employees who resign to escape facing disciplinary inquiries will seldom succeed in proving that they have been constructively dismissed. According to Grogan (Dismissal, 3rd Ed, 2017) there may be exceptions to the general rule that employees who resign to avoid disciplinary action cannot claim to have been constructively dismissed.

61. In the above regard in **Metropolitan Health Risk Management v Majatladi & others (2015) 36 ILJ 958 (LAC)** the court held that convening a second disciplinary enquiry against the employee, charging him/her with the same charges which he/she was

initially found not guilty on, where no exceptional circumstances exist that might justify the second enquiry, amounted to constructive dismissal.

62. It is noteworthy that a CCMA Commissioner and the Labour Court found that the second hearing was the proverbial straw that broke the camel's back and therefore the employee had been constructively dismissed and awarded compensation.
63. Interestingly, the Supreme Court of Appeal in **Murray v Minister of Defence (2008) 29 ILJ 1369 (SCA)** found that the navy could not be blamed for taking action against its employee, Commander Murray, even if that had been done amid a 'blaze of media publicity' which he had naturally found distressing. But the navy was to blame for downgrading Murray's post after transferring him to the supernumerary position, and for not properly explaining to him the alternative post it had offered. In the Court's view, the distress caused by these blameworthy actions was enough to turn Murray's resignation into a constructive dismissal.
64. Turning to the present case, it is common cause that the Applicant resigned on 22 May 2018 claiming that he had been constructively dismissed under section 186(1) (e) of the Act on the basis that the Respondent made continued employment intolerable for him. The Applicant's referral reflects that he 'faced unfounded allegations and lodged a grievance but the employer failed to deal with the grievance.'
65. Briefly the allegations as spelt out in paragraph 9.10, relating to corruption alternatively maladministration, collusion and dereliction of duty, are a sequel to the investigation report to an illegal strike embarked upon by organised labour. It suffices just to indicate that the investigation report enumerates 12 cases and some of them faced disciplinary action. The Applicant's case was one of those that faced a disciplinary action as spelt out paragraph 9.10.
66. It has to be noted that the Applicant did attend the first scheduled hearing on 27 March 2017. However, the Respondent was not ready to proceed as it turned out that the presiding officer had not been appointed and thus proceedings had to be adjourned. I

must just place on record that this was not communicated to the Applicant party beforehand. Understandably it did not go down well with them.

67. I have noted further that the Applicant made an issue with the fact that the Respondent flouted its own policies and Resolution 1 of 2003 by failing to hold the disciplinary hearing within 10 (ten) days after proffering charges on 10 March 2017. In this regard I have noted the subpoenaed witnesses' response to the effect that if any party does not comply with the provisions of the Resolution, there is a clear procedure to be followed to enforce compliance. One would therefore have expected the Applicant with LLB, LLM degrees and being LLD Candidate would be more than ready and well equipped to exercise his rights in enforcing the Respondent to comply.

68. However, what is critically important and significant to me is the fact that the Applicant under cross-examination conceded that if it was not for the charges of misconduct levelled against him, he would not have resigned.

69. I certainly do not agree with the Applicant's argument that the charges are trumped-up to get rid of him. I have already alluded to about 12 cases that the investigation report has highlighted. The Applicant's case is one of them. Further, the charges that he faced related to his specific role as Human Resources Manager and being the head of that unit. The evidence of all the 5 (five) subpoenaed witnesses attested to that from different angles.

70. Without taking the matter too far, and taking into account that the Applicant still played the same role in the new structure as confirmed by the investigation report, can one say that the Respondent made the working conditions intolerable when he resigned? I am unable to say. That he himself conceded that he would not have resigned if he did not face a disciplinary action completely rules out constructive dismissal claim. This is exactly what Grogan has emphasized as a general rule that employees who resign to avoid disciplinary action cannot claim to have been constructively dismissed. This to me brings this matter to an end and nullifies the Applicant's claim of a constructive dismissal.

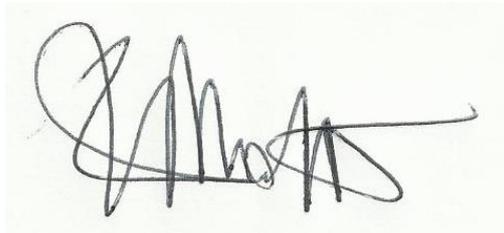
71. Just for completeness' sake, the exception highlighted in **Metropolitan Health Risk Management v Majatladi (supra)** does not apply in the Applicant's case. Also what to **Murray's** case (**supra**) that constituted constructive dismissal is contrary to the Applicant's case.

72. On a balance of probabilities, I can only come to one conclusion that in the light of the above exposition, the Applicant has not been constructively dismissed, but has resigned on his volition.

AWARD

73. I find that the Applicant has failed to prove that in terms of the section 186 (1) (e) of the LRA, the Respondent has been the working conditions intolerable.

74. The matter is hereby dismissed.

A handwritten signature in black ink on a light green background. The signature is stylized and appears to read 'Lungile Matshaka'.

Lungile Matshaka