



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS98-18/19**

Panellist: **Thando Ndlebe**

Date of award: **3 November 2018**

In the matter between:

MOSIKILI, MOTSHWALE ISAAC

APPLICANT

and

DEPARTMENT OF HEALTH - FREE STATE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

- [1] The matter was heard by me under the auspices of the Council as an arbitration process on 29 June 2018, 2 August 2018, 3 August 2018, 3 October 2018, 4 October 2018 and 5 October 2018 at Dihlabeng District Hospital in Bethlehem.
- [2] The Applicant, Mr. Motshwale Isaac Mosikili was present and was represented by Mr. Charl Wewege, an attorney from Engelbrecht Attorneys based in Harrismith.
- [3] The Respondent was represented by Mr. Mncube, its Labour Relations Manager.
- [4] The parties submitted bundles of documents and same was admitted as the Applicant's Bundle "A" and Respondent's Bundle "B", accordingly.

PRELIMINARY ISSUES

[5] The Applicant's legal representative made an application that the matter be postponed on 29 June 2018 as he had only received the representation instruction on 27 June 2018. I then ruled that no evidence be led by the parties on the day and that the matter proceed on a future date.

ISSUES TO BE DECIDED

[6] I am required to determine whether or not the Respondent constructively dismissed the Applicant on 18 September 2017. I am also required to order appropriate relief, in the event I find in favour of the Applicant. .

[7] The main thrust of the Applicant's case is that the Respondent made his continued employment relationship within the organisation so intolerable that he was left with no option but to resign.

BACKGROUND TO THE DISPUTE

[8] The Applicant was appointed by the Respondent on 13 March 1991 and held the position of Security Officer at the time of resignation.

[9] The Applicant resigned from the Respondent on 18 September 2017 and earned a monthly salary of R13 000.00

SUMMARY OF EVIDENCE AND ARGUMENTS

The Applicant's case

Mr. Isaac Mosikili

Mr. Isaac Mosikili testified under oath as follows:

[10] He resigned from the Respondent on 18 September 2017 as a result of negative work circumstances that were brought about against him by Mr. Phillip Radebe. He

had a bad relationship with Mr. Radebe as from 2009 until 2017 when he ultimately resigned. He was once at the gate at Phekolong District Hospital and the security personnel used a remote to open the gate and there were challenges concerning patients. At about 07h20 Mr. Radebe drove into the gate on his motor vehicle speedily. Mr. Radebe then informed him that he had received a telephonic complaint from a certain Ms. Van der Bijl that she was denied access into the facility by security personnel. He informed Mr. Radebe that the allegation was not true as the gate was open.

- [11] Mr. Radebe then summoned security personnel to his office where he spoke to them harshly. He then tried to explain to Mr. Radebe, but he was not willing to hear their explanation. He later received a letter from Mr. Radebe as found at page 8 in Bundle "A". He replied to Mr. Radebe's letter as confirmed in the letter found in page 9 of Bundle "A". Mr. Radebe had no authority to discipline him. It was the Head of Security, namely Mr. Van Tonder, who had the authority to discipline him. He was then issued by Mr. Radebe with Final Written Warning but he did not sign it.
- [12] He lodged a grievance as found at page 12 of Bundle "A" as he required the Respondent to intervene in his workplace challenges. He then tried to avoid Mr. Radebe after the confrontational incidents he had with him. Mr. Radebe was harassing him before the 4 September 2009 by interfering in his work. Mr. Radebe once instructed his Radiology staff to leave the hospital without pass outs even though there was a standing instruction on that from Ms. Kala, the then Chief Executive Officer. He then reported this incident to Mr. Van Tonder.
- [13] He once reported the ill treatment by Mr. Radebe to Mr. Mncube and Mr. Van Tonder. It was Mr. van Tonder who advised him to lodge a grievance against Mr. Radebe. The Respondent never resolved his grievance and Ms. Zanele Khoza can bear testimony to this as she was a trade union shop steward. He referred the grievance to Mr. Moranye after he submitted same to Mr. Motaung. A grievance meeting was latter convened by the Respondent and the following officials were present, namely; Mr. Shadrack Shabangu, Mr. Motsitsi and Mr. Radebe. The grievance meeting was not concluded as it took place towards the end of the year. He had a tense relationship with Mr. Radebe between 2009 and 2016.

- [14] In 2015 he was responsible for the Security personnel and he held that position from 2013 to 2017 up until he resigned from the Respondent. During his tenure as the Head of Security Mr. Radebe also interfered in the management of overtime. Mr. Radebe was latter involved as an Investigation Officer in a matter by the Respondent against him even though he was not supposed to perform such a task.
- [15] The issue of the hospital gate involved a decision by hospital management on whether to keep the gate open or closed. The stakeholders that were involved in the gate saga involved the African National Congress Coalition, organized labour, civic society and other political parties. Mr Radebe was against to the gate being closed. During management complex meetings Mr. Radebe used to verbally attack him.
- [16] He then wrote an email to his immediate supervisor, namely Mr. Rakhomeng, the District Security Control Officer and reported the conduct of Mr. Radebe. The document as appearing at page 31 of Bundle "A" is a copy of email to Mr. Radebe in respect of a meeting that took place between Mr. Radebe with security staff in his absence. He wanted the minutes of the said meeting but Mr. Radebe was not keen to release those meeting minutes. He became aware through Ms. Van der Merwe in May 2016 that the ANC, EFF, Nehawu and Sanco wanted to meet security personnel in respect of the opening of the gate. The meeting never took place.
- [17] Mr. Radebe once used a degrading language against him when he referred to his wife. Mr. Radebe compared his wife to an adulterous woman. Mr. Radebe also wrote correspondence to him wherein he complained that he was spending too much time at the office. It was clear that the Mr. Radebe was not happy with his work within the Respondent. He once received an email that related to allegations of sexual allegations against him by the Respondent. The Respondent never convened a disciplinary hearing against him for the sexual harassment matter. The Respondent conducted a formal investigation lead by Ms. Mpanza on the allegations of sexual allegations and he was found not guilty. One of the recommendations of the investigation was that there be reconciliation between him and the perpetrator. The

reconciliation meeting never took place as he could not sit in the same table with the perpetrator.

- [18] He asked for forgiveness from the woman who made the sexual harassment complaint. The then Acting Chief Executive Officer, Mrs. Van der Merwe and Dr. Valdez, requested that he issue a formal letter to Mr. Getrude Motsoeneng, the complainant. It was Mr. Radebe who advised the complainant to lodge a sexual harassment case against him.
- [19] On the 13 June 2010 he was on sick leave as he was suffering from depression as diagnosed by Dr. Mabaso. He was approached by Mr. Rakhomeng the District Manager, Ms. Malebu the Assistant Manager of Phekolong and Mr. Rasola the Employment Assistance Practitioner who advised him that they were sent by Mr. Radebe to ask him to apologise to Ms. Getrude Motsoeneng and to Mr. Radebe.
- [20] It was Dr. Mabaso who referred him to another doctor for his depression, namely Dr. Mofokeng. Dr. Mofokeng referred him to Dr. Moloji. It was Dr. Moloji who referred him to a Clinical Psychologist, namely Dr. De Lange. During his admission at Corona Hospital Dr. Van Jarsveldt encouraged him to attend sessions with Dr. De Lange. He was booked off by Dr. Lange from the 18 July 2017 to 11 August 2017. He was booked off by his family doctor for the 13th July 2017. A copy of the report by Dr. Lange is found at pages 24 and 25 of Bundle "B". It was Mr. Radebe who responded to the report by Dr. De Lange and he stated that the Applicant was abusing sick leave.
- [21] He realized after Mr. Radebe's response to Dr. De Lange's report that his issues within the Respondent were not resolved. He then got his family together and presented his circumstances at work. He made a recommendation to the Respondent that he be transferred to another institution as confirmed at page 38 of Bundle "A". He directed the letter for him to be transferred to the Head of Security based at Bophelo House. He did not receive a reply from the Respondent. He resigned from the Respondent on 18 September 2018 in writing. He drafted the resignation letter as he could not sleep.

[22] On 18 September 2018 after having sent the resignation letter, he received a telephone call from the Human Resources Department to the effect that Mr. Radebe had asked him to come to the offices and sign resignation documents. He never went to meet Mr. Radebe after the resignation. On 18 September 2018 at about 15h00 the Respondent's messenger arrived at his house with resignation forms from the Human Resources Department. He then saw that he was no longer needed within the Respondent. He believes that the Respondent should have allowed time to review his resignation decision in the light of the work issues. He completed the resignations forms.

Under cross-examination, Mr. Mosikili responded as follows:

[23] The reference to change in conditions of employment in the resignation letter related to his role as Security Officer. He agreed that has appointed by the Respondent as a Security Officer and was not supposed to stay in his office for eight hours. The Respondent was allowed to assign him at different locations depending on its needs. It was Mr. Radebe who caused him to suffer a major depression.

[24] The sexual harassment investigation report by Ms. Mpanza recommended that he reconciled with the complaint. It was Mr. Radebe, Mrs. Van der Merwe and Dr. Valdez who facilitated the reconciliation meeting between him and the complainant. It is not true that it was Mr. Radebe who retracted the sexual harassment charge. He was never charged with misconduct relating to sexual harassment. He never cried uncontrollably in a meeting relating to the sexual harassment issue in the presence of Mrs. Van der Merwe, Dr. Valdez and Ms. Malebo.

[25] He did not cry uncontrollably in a meeting on 25 August 2017 that was facilitated by the Respondent's Head Office were Mr. Rakhomeng, Mr. Masithela and Mr. Kgokga were present. He can remember lodging a grievance with the Respondent through his trade union. There was an indication that Mr. Masithela would visit Phekolong Hospital to sort out his work problems. The document as appearing at page 41 in

Bundle “B” relates to a grievance form by Mr. Morris from his trade union but it does not say who is the recipient is.

[26] He signed the grievance form that was lodged on his behalf by the trade union but it was written by the trade union official, Mr. Kgololo. He is not aware that the Head of Department instructed Mr. Majola from the Respondent’s Provincial Labour Relations to attend to his work-related issues. Mr. Majola never telephonically contacted him.

[27] He was appointed by the Respondent as a Level 4 Security Officer. He was acting as Security Manager at the time of his resignation. He was reporting to the Acting Chief Executive Officer, Mr. Mokone and the Head of Administration, Ms. Malebo, from 2013 up until he resigned on 18 September 2017.

[28] He did not discuss his personal issues at the cluster complex meetings. The security management structure within the Respondent is in the following reporting order; District Manager; Administration Manager, District General Manager, Chief Operating Officer, Deputy Director General, Head of Department and finally the Member of the Executive Council. Officials occupying the latter mentioned positions were aware of his work challenges. He is not certain if the trade union took up his matter up to level of the Member of the Executive Council. The Member of the Executive Council is aware of his resignation. He informed the Member of the Executive Council about his resignation.

[29] He referred the grievance to the office of the Head of Department through his trade union. He cannot say with certainty if the office of the Head of Department acknowledged receipt of his grievance. The receipt of the grievance document as appearing at page 3 in Bundle “A” was not acknowledged by an official of the Respondent. He referred his dispute with the Council in October 2017. He is aware of the grievance rule that a grievance becomes valid once it is acknowledged as being received the employer. A grievance must be handled from the lower levels of the Respondent till the office of the Member of the Executive Council. He did not elevate his grievance to the office of the Member of the Executive Council.

[30] He is not aware that he was supposed to refer his grievance to the Public Service Commission in terms of section 196 of the Constitution. He did not inform the Deputy Director General about his grievance. He did not inform the Chief Operating Officer about his grievance. He informed the Security Manager about his grievance. He cannot prove that he made the Security Manager aware about his grievance. He has a valid claim against the Respondent.

[31] In so far as the grievance procedure is concerned, he did not exhaust all the Respondent's internal processes. He received a verbal reply from the Respondent's Mr. Motsitsi for the grievance dated 8 July 2016. He never received an official reply on his grievance dated 8 July 2016.

Mr. Molefe Levy Rakhomeng

Mr. Molefe Rakhomeng testified under oath as follows:

[32] He is appointed by the Respondent as a Security Manager for the Thabo Mofutsanyane District. The Applicant reported to him and the Chief Executive Officer.

[33] The breakdown in the work relationship between the Applicant and Mr. Radebe started long ago when the pass out was introduced. Mr. Radebe stated that Applicant was creating problems. The real issue between the Applicant and Mr. Radebe was the closing of the gate. He was informed by the Applicant that there was a shortage of security personnel at Phekolong District Hospital and that there were concerns about the security of patients. The role of security personnel is to safeguard employees, assets and classified information.

[34] He was involved in the decision concerning the closure of the gate at Phekolong District Hospital. The community was not satisfied about the closure of the gate which was an administrative issue. The hospital board was informed about the closure of the gate. Mr. Radebe was arrogant towards the Applicant and there was conflict between them.

- [35] He had a superb working relationship with the Applicant. The Applicant acted in his position from time to time. The other previous Chief Executive Officers never had issues with the Applicant. It was only Mr. Radebe who had issues with the Applicant.
- [36] He is aware of the meeting of the 25 August 2017 wherein Mr. Masithela was present. He summoned Mr. Masithela to intervene but nothing materialized on that day as there was no agenda and an attendance register. He only saw the attendance register in the bundle of documents at page 18 of Bundle “B” during the arbitration process. The Applicant cried in the meeting of the 25 August 2017. It was Mr. Radebe and Mr. Masithela who spoke in the meeting even though he initiated the session. The Applicant cried because Mr. Radebe told him that because he was not reporting for duty he would implement the Public Finance Management Act and that he would charge him.
- [37] He received a transfer letter from the Applicant as found at page 38 of Bundle “A”. The transfer letter was a foundation to request an intervention from Mr. Masithela hence the meeting of the 25 August 2017. The Applicant also asked Mr. Kgaso to help him in his work challenges. The document as appearing at page 52 of Bundle “A” is an email he sent to Mr. Kgaso wherein he advised him of the Applicant’s transfer request. Mr. Masithela verbally promised to attend to the Applicant’s transfer request.
- [38] He is aware that the Applicant lodged a grievance before he resigned. He is referring to the grievance document found at page 3 in Bundle “A”. He thought the issues of the Applicant would be discussed in the meeting of the 25 August 2017. He does agree that the Respondent was unaware of the Applicant’s grievance.

Under cross-examination, Mr. Rakhomeng responded as follows:

[39] He is an agent of the Respondent in his role of Security Manager. He is supposed to respond to grievances from employees that report to him. He is not sure if the grievance as found at page 13 of Bundle "A" was replied to by the Respondent. He did not attend to the Applicant's grievance as there are officials within the Respondent that handle grievances. He is aware of the grievance rules.

[40] The Applicant lodged a grievance on 8 July 2016. There was a response from the Respondent on the grievance in correspondence dated 14 July 2017. In the grievance form at page 3 in Bundle "A" it is clear in that the form is not signed. In terms of the grievance rules, the latter means that the grievance channels were not followed. The intolerability against the Applicant started at the time when Mr. Kalla was the Chief Executive Officer.

[41] In the event he had an issue with the Respondent, he would refer the matter to the District Manager and if it is not resolved, he would escalate it to the Head of Department. He referred the issue of the Applicant to Mr. Kgaso. He did not refer the grievance of the Applicant to the Head of Department and the Member of the Executive Council. He thought that channels would take the matter to the next level. He does not know of the if the office of the Head of the Head of Department attended to the Applicant's grievance.

[42] He is aware of the Batho Pele Principles and the President's Line. In the event a matter is not resolved at a lower level it must be elevated to higher levels. He initiated the meeting of the 25 August 2017 as confirmed at page 52 of Bundle "A". It was him and Mr. Masithela who suggested the meeting. He is not aware that the Provincial Office sent an official to engage the Applicant in respect of his issues.

[43] He is not aware that the Respondent initiated a follow up meeting after the meeting of the 25 August 2017. He did not call for such a follow up meeting. The Applicant requested a transfer to another institution and he referred the request to Mr. Masithela hence the meeting of the 25 August 2017. He ordered the Applicant go

back to work but he did not go to work as he was diagnosed with a heart attack. There was also a meeting scheduled by the Respondent for the 1st September 2017 and this session was planned by Mr. Masithela.

[44] The meeting of the 1st September 2017 was meant to discuss the same issue that was discussed on 25 August 2017. The meeting of 1 September 2017 was cancelled as Mr. Radebe said he was not satisfied. He never informed Mr. Radebe of the Applicant's application for leave. Mr. Radebe did not refuse to sign the Applicant's leave forms.

[45] The Applicant cried in the meeting of the 25 August 2017 because he expected that there would be an intervention from the Respondent on his transfer. He cried because Mr. Radebe told the Applicant that he was going to charge him with misconduct. Mr. Radebe had a duty to charge the Applicant. He was aware of the financial stress of the Applicant. The document at page 40 in Bundle "B" was that the Applicant must report for duty at Phekolong District Hospital on 21 September 2017. The Applicant was not on leave as he was waiting for an intervention and he never reported for duty as instructed by the Respondent. Mr. Masithela cancelled the meeting of the 1 September 2017 because Mr. Radebe said he (Mr. Rakhomeng) was protecting the Applicant.

THE RESPONDENT'S CASE

Mr. Papi Phillip Radebe

Mr. Papi Radebe testified under oath as follows:

[46] He is appointed by the Respondent as the Chief Executive Officer of Phekolong District Hospital. He is not aware of the allegations that have been made against him by the Applicant. The Applicant was never charged for misconduct by the Respondent. A sexual harassment complaint against the Applicant was shared with him by a female colleague who said that she was touched inappropriately by the Applicant. He then advised the complainant to speak to the Applicant and she did. The complaint informed him that the Applicant had touched her on her buttocks. He

then asked the complainant to speak to the Applicant in the presence of witnesses and that session took place.

[47] The recommendations of the sexual harassment investigation report was that the Applicant and the complaint reconcile. The investigation on the Applicant's sexual harassment allegation was conducted by Ms. Sibongile Mpanza who was appointed by the Chief Executive Officer, Ms. Van der Merwe. The report by Dr. De Lange was incorrect as it implied that the Applicant was charged with misconduct relating to sexual harassment. The Applicant was exonerated of the sexual harassment allegations. The Applicant misled Dr. De Lange.

[48] He never had differences with the Applicant at a personal level. There was an incident about the closing of the gate when he was the Head of Radiography and some security officers were in favour of the gate being opened. The gate fell under his area of responsibility when he acted a Head of Administration from April to August 2016. The issue relating the gate occurred just before the national elections and management was not supposed to be appearing to be favouring a certain political party. He then decided that there be a compromise that the gate be opened at certain intervals.

[49] He once sent an email to the Applicant to the effect that he must not sit in his office and that he must join other security officers and provide security services. He never had personal issues with the Applicant. The Applicant was supposed to assist other security officers at the back gate. The Applicant never gave reasons as to why he did not to assist at the gate. The Member of the Executive Council made an announcement in an Indaba that the gate should be opened at certain intervals. The Security Supervisor, namely Mr. Van Tonder, who was appointed before the Applicant used to perform duties at the gate.

[50] He never received a grievance from the Applicant. The document appearing as appearing at page 6 of Bundle "A" is a grievance he made against the Applicant after he was insulted by him as being evil. The Applicant was not charged for misconduct for the insult matter. Mr. Rakhomeng never made him aware of the Applicant's

grievance. The Applicant asked him for assistance. On one occasion the Applicant went to his home and discussed the sexual harassment issue. He never defamed the Applicant and his family.

[51] The business of the Cluster Complex meetings was to discuss operational issues and not personal issues of attendees. The Applicant started to abuse sick leave in June 2017. The sexual harassment investigation recommended that the Applicant reconcile with the complainant. The complaint stated that she was willing to forgive the Applicant. In the meeting that he had with Mr. Masithela and the Applicant he requested him to come back to work. The Applicant never reported back to work and his trade union referred the matter to the Head of Department. The Head of Department appointed an official to resolve the Applicant's issues.

[52] Mr. Majola from the Provincial Office was meant to meet the Applicant on the next Tuesday. The Applicant however resigned on the Sunday before the Tuesday which was scheduled for the intervention meeting by Mr. Majola. He attended the meeting of the 25 August 2017 where the Applicant, a trade union official, Mr. Masithela and Mr. Rakhomeng were also present. During the meeting they tried to speak the Applicant but he cried. The meeting did not resolve any issues and Mr. Masithela said that the next follow up meeting would be on the 1 September 2017.

[53] He provided a resource in terms of a motor vehicle for officials to go and visit the Applicant at his home. He discovered that Mr. Rhakomeng had hidden the Applicant's leave forms in his office after he had resigned. He then recommended that Mr. Rhakomeng be investigated as he was not a good guy.

[54] The reference to work challenges by the Applicant in his resignation letter meant that he liked challenges at work. The sexual harassment report of Ms. Mpanza was not disputed by anyone. The Applicant had no reason to resign as he was begged to come back to work. The fact that the Applicant resigned just before the meeting of the 1 September 2017 is something else. The Applicant never approached the Member of the Executive Council.

Under cross-examination, Mr. Radebe responded as follows:

[55] The decision on the closure of the gate was on the advice of the security personnel including the Applicant. Everyone was opposed to the closure of the gate and he was of the view that the issue could be dealt with differently. He did not agree to the closing of the gate. The closing of the gate was not a political decision but one has to protect the interest of the State. The South African Civic Organisation represented the community, the National Education, Health and Allied Workers Union represented the employees and there was no way that patients could be negatively affected. The gate was closed because there was a shortage of staff.

[56] He never made the Applicant's work life intolerable. The gate was opened in October 2016 and this happened after the Respondent secured private security to man the gate on a twenty four hour basis. In the event the closure of the gate put pressure on the Applicant in October 2016, he should have resigned then. He was not a Chief Executive Officer in October 2016. The Applicant never reported for work after he was appointed as a Chief Executive Officer.

[57] He was appointed by the Respondent into the position of Chief Executive Officer on 1 June 2017 but he had hand-over meetings with Departmental Heads before assuming office. The Applicant sent him emails in 2016 and not in 2017. He never told the Applicant that his wife was adulterous and dishonest. The comparison that he made about the Applicant's wife was merely a comment. He had a good relationship with the Applicant. In the event the Applicant did not like the comment about his wife, why did he not resign then?

[58] He had a normal relationship with the Applicant. He did not involve himself in the sexual harassment incident in order to torment the Applicant. He never requested the Applicant to apologise to the sexual harassment complaint after he took over as a Chief Executive Officer. He never instructed Mr. Rhakomeng, Ms. Malebo and Mr.

Rasulu to visit the Applicant at his home in order to obtain a written apology. The latter mentioned officials requested to visit the Applicant voluntarily.

[59] In as much the report by Dr. De Lange was sent to Ms. Malebo, it was proper for him to reply to same as the report made reference to him. The Applicant was treated by Dr. De Lange. It was Mr. Majola from the Provincial Office who got involved in the matter of the Applicant. He was not present when Mr, Majola contacted the Applicant telephonically. He never had a broken relationship with the Applicant. He did not have a problem with the Applicant. The Applicant never reported at work since he was appointed as Chief Executive Officer on 1 June 2017.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[60] In my analysis I have considered the evidence and closing arguments from parties in this matter.

[61] The case of the Applicant is that he was “constructively dismissed” by the Respondent because Mr. Phillip Radebe, the Chief Executive Officer of Phekolong District Hospital, made his continued employment with his then employer intolerable. The Respondent on the other hand submitted that the Applicant voluntarily resigned on 18 September 2018 on his own free will.

[62] The **Labour Relations Act 66 of 1995 in section 186(1) (e)** defines “constructive dismissal” as a dismissal in circumstances when “an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”. It is trite law that the onus to prove a claim of constructive dismissal rests with the applicant.

[63] It is common cause that the Applicant resigned from the Respondent on 18 September 2017. I would be failing in my duty as an arbitrator if I do not include the contents of the Applicant’s resignation letter in my analysis as found at pages 14 and 15 of Bundle “B”. The resignation letter reads as follows;

“Subject: Resignation with effective immediately as of Monday 18/09/2017

1. I Matshwale Isaac Mosikili Persal no. 12636193 ID no 63017 5359 086 residing at house number 5782 Xolo Street Bohlokong Bethlehem 9701.

2. Hereby with a sad note writing this letter to my employer namely Free State Department of Health, Phekolong District Hospital in Bethlehem tender my resignation letter with effective immediately as of Monday 18/09/2017.

3. I cannot as required by Labour Laws of the Republic of South Africa serve my intention of resignation notice as Phekolong District Hospital due to the following reasons;

3.1 Advice from my Psychiatric Dr and Clinical Psychologist who termed the cause of my chronic diseases as “Victimization at Workplace”.

3.2 My family GP on 11/09/2017 confirmed that, current chronic diseases is the main cause to my latest heart problems and the chronic medication should help in that case.

3.3 The institution (Phekolong District Hospital) that I had spent my entire half of my life sacrificing my being is now haunting my soul and my reputation with irreversible deeds.

3.4 I have exhausted all my leave privilege and.

3.5 New terms and conditions of my contract of employment makes difficult for me to perform my duties to the best of my ability also I respect, accepted my employers conditions as he sees fit for his environment. “Hake sebatse ha Mme kappa Ha pelo keya rata”.

3.6 Psycho analysing my conditions by assuming that I **“be abusing my sick leave”** by **most senior person/s** with due respect to the/ir speciality in the field of Medicine and feel it as a further disturbing comment also as a clear indication of **humiliation, harassment and violation of my patient’s rights.**

4. As the results of my personal health status for the past couple of months, every second moment I was looking at my shoulder and in the absence of short term solution to my work related problems, my whole family is badly traumatized by ongoing changes on my health status.

5. After the lengthy family meetings, my family agreed that my well-being is more treasured to them more than anything and that I must do the right thing for them and myself since life is too short to embrace also that they do not want to be bitter persons for their rest of their lives to anybody.

6. Though they know that this decision is not easy one for them, we have to sacrifice for our wellbeing too.

6.1 My work related problems started to affect my innocent colleagues who are passionate and loyal to their duties like me negatively as well as service delivery to our nation (Batho Pele Principles).

6.3 Before they can become victims, I have to stay away from them in order to live longer to be bread winners to their immediate families.

Thank you for the opportunity that you have shown me to me through the years.” **(My emphasis).**

[64] I will deal with the highlighted areas in paragraph 62 hereunder in my correlation of the contents of the resignation with the evidence that was presented by the parties at the arbitration proceedings. I must state that the Applicant filled in and submitted his exit questionnaire on the 18 September 2018 with no reference to “intolerability in employment”.

[65] The Applicant submitted he started to have clashes with Mr. Phillip Radebe as early as 2009 up until his resignation on 18 September 2017. In the event the Applicant was badly treated by Mr. Radebe as early as 2009, why did he wait so long up until towards the end of 2017? The evidence of the Respondent through Mr. Radebe was

that he did not have any personal issues with the Applicant and that he differed with him like any other employee. It was the evidence of Mr. Radebe and Mr. Rakhomeng that the Applicant was a capable and competent employee. Mr. Radebe's evidence that the Applicant visited him at his home for advice was not contested by the Applicant. Why did the Applicant visit Mr. Radebe at his home if they did not see eye to eye in the workplace?

[66] During the proceedings the Applicant submitted that Mr. Radebe was behind the investigations on sexual harassment that were initiated by the Respondent against him. The Applicant questioned the interest of Mr. Radebe in the sexual harassment investigation as he was not working in the Human Resources Department. It is common cause that the Mr. Radebe was the Head of the Radiography Unit before he was appointed in the role of Chief Executive Officer of Phekolong District Hospital with effect from 1 June 2017.

[67] Mr. Radebe testified that he did not conduct the sexual harassment investigation as same was effected by Ms. Sibongile Mpanza. The Applicant conceded that the Respondent did not charge him for the sexual harassment allegations. It was the evidence of Mr. Radebe that he became involved in the sexual harassment from the onset as the complaint reported the matter to him. I cannot find anything wanting from the part of the Respondent to involve Mr. Radebe in the sexual harassment matter. The evidence of Mr. Radebe that the recommendation by Ms. Mpanza was for the Applicant to reconcile with the Applicant was not challenged by the latter. The fact that the Applicant was not charged for misconduct on sexual harassment allegations as confirmed in the report dated 14 October 2016 should have ended the matter there.

[68] The Applicant submitted that it was Mr. Radebe, Dr. Valdez and Mr. Van der Merwe, who were part of the senior management team at Phekolong District Hospital who facilitated that he apologize to the sexual harassment complaint. I agree with the Applicant that there was nothing in the recommendations by Ms. Mpanza that referred to an apology but reconciliation. However for me, whether the recommendations by Ms. Mpanza were not entirely implemented is not relevant in

the matter before me. My humble view is that the Applicant raised the issue of the sexual harassment matter so as to augment his “intolerability in the workplace” argument. I humbly find that this matter had no relevance in this dispute as I have outlined above.

[69] It was the testimony of both parties that the Applicant was not charged for misconduct relating to sexual harassment issue by the Respondent as outlined above, and has therefore not relevance in the application before me. In the matter of **Pillay v Old Mutual Property (Pty) Ltd [2015] 36 ILJ 1961 [CCMA]** the Commissioner held that where an employee lodged a complaint of sexual harassment against another employee and the employer took appropriate disciplinary action against the alleged perpetrator and found him or her not guilty, the complainant cannot resign and claim that continued employment was intolerable for him or her”.

[70] In the matter of **Albany Bakeries Ltd v Van Wyk & Others [2011] JOL 27545 [LAC]** the Court held that it was critical to consider in a 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 Court held that the dismissal was not the last resort and as such the employee had not proven constructive dismissal. The Applicant submitted that he lodged a grievance through his trade union to the Member of the Executive Council in respect of his issues with Mr. Radebe. The Applicant did not provide any evidence to substantiate this claim and I find that there was never a grievance filed with the office of the Member of the Executive Council.

[71] It is clear as daylight from the evidence of the Applicant that the incidents relating to the gate closure, sexual harassment allegations, comment by Mr. Radebe about his wife and other related issues took place long before the 18 September 2017. The Applicant continued to work thereafter for the Respondent and same can therefore not be found to support his claim of constructive dismissal. The aforementioned principle was confirmed in the matter of **Niland v Harvey & Others [2017] 5 BLLR**

521 [LC] where it was held that “in order for a dismissal to fall within the ambit of section 186(1) (e) and thus be considered to be constructive dismissal, the facts must prove that the “sole reason” the employee left his or her employment was due to a continued intolerable relationship caused by the employer. The continuance of employment even following the “intolerable event or conduct” may invalidate a claim of constructive dismissal especially, where the “intolerability” was not raised with the employer during such period so as to give him an opportunity to remedy the claim”.

[72] Mr. Rakhomeng testified that he was aware of the Respondent’s grievance rules and that a grievance by an employee becomes valid if it can be proven that it has been received by the employer. In the grievance document dated 8 July 2016 that was presented at the arbitration proceedings as found at pages 13 to 15 of Bundle “A” it is clear that its receipt was not confirmed by the Respondent. Moreover, another grievance by the Applicant dated 6 September 2017 as found at page 3 of Bundle “A” was not acknowledged as being received by a designated employee of the Respondent. The Applicant conceded during cross examination that he was aware of the Respondent’s grievance rules and it does not make sense why he did not follow all the required internal procedures before resorting to resignation on 18 September 2017.

[73] The other issue that was submitted by the Applicant during his testimony and closing arguments was the gate closure matter. I find that the gate issue took place on or about in 2016. It was the testimony of Mr. Radebe that the gate issue was resolved in October 2016 when the gate was opened on a twenty-four-hour basis after the Respondent secured services of private security. It is my finding that the Applicant’s argument to dwell on the gate issue to support his case was unjustified in the proceedings to say the least.

[74] The Applicant also submitted that Mr. Radebe made disparaging statements about his wife in a meeting they had. It was the evidence of Mr. Radebe that he made an innocent statement which was not meant to harm the Applicant. I therefore cannot find if this comment made the Applicant to resign from the Respondent. The Applicant did not lodge a grievance with the Respondent in respect of the so-called

comment with the Respondent. Be that as it may, I do not agree with Mr. Radebe that it was appropriate for him to make reference about the wife of the Applicant in a work discussion.

[75] It was the evidence of Mr. Rakhomeng that he raised the issues between the Applicant and Mr. Radebe with Mr. Masithela, a Senior Manager within the Respondent. Mr Rakhomeng confirmed that a meeting was facilitated by Mr. Masithela to address the Applicant wherein Mr. Radebe, a trade union official was also present. The afore-mentioned meeting took place on 25 August 2017. Mr. Rakhomeng submitted that the meeting did not yield any positive results as it did not have an agenda. It was the testimony of Mr. Radebe that the meeting could not come up with any decisions as the Applicant cried uncontrollably in the meeting. Mr. Rakhomeng confirmed that the Applicant cried in the meeting.

[76] Mr. Radebe stated that the Respondent initiated a follow up meeting after the 25 August 2017 meeting. The follow up meeting was scheduled to take place on 1 September 2017 but it never took place. The Respondent submitted that it had arranged for a certain Mr. Majola from the Respondent's Labour Relations Unit based at the Provincial Office to engage the Applicant after the meeting of the 25 August 2017. The Respondent failed to prove that it had secured a meeting with the Applicant. In the event I was provided with documentary evidence of the intervention by Mr. Majola I would have attached weight to this version of the Respondent.

[77] I have deduced from the evidence of Mr. Rakhomeng and the Applicant, that they had differences of opinion with Mr. Radebe or that they were not happy with him. But can mere differences between managers result in one of them resigning and claiming constructive dismissal thereafter? Why did Mr. Rakhomeng also not resign as he did not agree with how Mr. Radebe made decisions relating to the security cluster and its personnel? The latter mentioned questions were dealt with in the matter of **Eastern Cape Tourism Board v CCMA & Others [2010] 11 BLLR 1161 [LC]** where it was held that "mere unhappiness at work is not enough. Managers in particular are expected to be able to put up with ambiguity, conflict in relationships, power, struggles and office politics. The subjective state of mind of the employee is

not a critical factor in the assessment of the existence or otherwise of constructive dismissal. In general, in order to succeed with a constructive dismissal claim the employee must show that he or she resigned because of coercion, duress or undue influence. This implies not only that the test should be objective but that it should be set at a high standard”.

[78] I now deal with the medical realities that the Applicant faced before and up until he resigned on 18 September 2017. There was ample evidence of medical reports that were part of the Applicant’s documentary evidence to confirm same. At paragraph 3.1 in the Applicant’s resignation letter as found at page 14 of Bundle “B” it is provided that “advice from my Psychiatric Dr and Clinical Psychologist who termed the cause of my chronic diseases as Victimization at Workplace”. The report by Clinical Psychologist Dr. Gert De Lange as found at page 24 and 25 of Bundle “B: reads in the first paragraph that “Mr. Mosikili became a patient of mine as a result of an unbearable situation that developed between the CEO (Mr. PP Radebe) and himself”.

[79] It can be deduced from paragraph 74 above that the Applicant based his constructive dismissal by relying on the report by Dr. Gert De Lange dated 26 July 2017. I cannot attach weight to the report by Dr. Gert De Lange as not only did he not testify in the arbitration proceedings but I was not provided with evidence as to what methodology did he use to come to his conclusions. It is my view that it is probable that he came to the conclusions he made in the report based only on his engagement with the Applicant. In the event Dr. Gert De Lange would have interviewed the Respondent’s officials, I would have been swayed otherwise.

[80] It was common cause that Mr. Radebe’s role of Chief Executive Officer of Phekolong District Hospital was from 1 June 2017 and that the Applicant was not at work before that period until he resigned on 18 September 2017 except for the intervention meeting he attended. The intervention meeting of the 25 August 2017 was meant to address his issues with Mr, Radebe amongst others. The Applicant therefore did not have dealings with Mr. Radebe as from 1 June 2018 until his resignation. The Applicant did not properly lodge a grievance with the Respondent up to the office of

the Member of the Executive Council, meaning that he had other alternatives to address his issues, but he chose to resign.

[81] In the resignation letter the Applicant mentioned a number of issues, namely; that his Clinical Psychologist advised him that the cause of his chronic diseases was workplace victimization, that he had exhausted his leave, that he had new terms and conditions of employment, that he was humiliated and harassed and that his family agreed with him that he must “do the right thing”. It can be inferred from the latter stated list of issues that “the Applicant had many issues that motivated his resignation. In the matter of ***Pretoria Society for the Care of the Retarded v Loots [1997] 18 ILJ 901 [LAC]*** the Court held that “the first test was whether when resigning there was no other motive for the resignation”.

[82] Finally, in the matter of ***Strategic Liquor Services v Mvumbi NO & Others 2010 [2] SA 92 [CC]*** the Constitutional Court held that “the test for constructive dismissal does not require that an employee must had no choice but to resign. It requires merely that the employer should have made continued employment intolerable”. I find that the Applicant’s continued employment relationship was not made intolerable by the Respondent but that he had other motives to resign from his employment as spelt out in his resignation letter and as confirmed in the relevant evidence outlined above.

AWARD

[83] The Applicant was not constructively dismissed.

[84] The Applicant’s referral is hereby dismissed.



THANDO NDLEBE