Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR625/20

In the matter between:

SHOPRITE CHECKERS (PTY) LTD **Applicant**

and

PRINCE NKOSI **First Respondent**

COMMISSIONER MUSOLWA RAPALALANE *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION **Third Respondent**

Heard: **01 February 2022**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 07 February 2022.**

Summary: **Review application – constructive dismissal – jurisdictional issue to be determination *de novo* – to clothe the Commissioner with the necessary jurisdiction, the employee must provide a substantial explanation that is buttressed by concrete evidence to prove the intolerability that led to his/her resignation.**

JUDGMENT

NKUTHA-NKONTWANA, J

<u>Introduction</u>

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[1] This is a review application in terms of section of 145(1)(a) of the Labour Relations Act[1] (LRA). The applicant, Shoprite Checkers (Pty) Ltd (Shoprite), is challenging the arbitration award issued by the second respondent, Commissioner Musolwa Rapalalane (Commissioner) dated 24 February 2020, under case number GAJB25245-19 and the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner found that the first respondent, Mr Prince Nkosi (Mr Nkosi), was dismissed and that his dismissal was procedurally and substantively unfair. Mr Nkosi is the only respondent opposing the application.

Factual background

[2] Mr Nkosi commenced his employment with Shoprite on 1 February 2013. At the time of his resignation he was a Fresh Produce Manager. He was initially stationed at Shoprite's Vosloorus branch. It would seem that he started to have challenges with his managers sometime in 2016. It is common cause that since 2016, Mr Nkosi had been writing letters of complaint and lodging grievances on various allegations.

[3] In 2016, Mr Nkosi wrote a letter of complaint against his regional manager. However, he testified that he was dissuaded by the officials from Shoprite's Human Resources department from proceeding with that complaint in order to avoid problems.

[4] In April 2018, two years later, Mr Nkosi was transferred from Vosloorus branch to Clayville branch. The reason that was proffered for the transfer was costs saving. Mr Nkosi registered his concerns about the adverse effects of his transfer but still went ahead and reported at Clayville branch. On 1 May 2018, he was transferred back to Vosloorus branch after he had complained about being mugged on the way to Clayville branch.

[5] On June 2018, Mr Nkosi was transferred to Sontonga branch. He testified that he overheard the regional manager telling someone that the true reason for his transfer was because the branch manager at Sontonga branch would be able to deal with him. Within four days of his arrival at Sontonga branch, he

[1] Act 66 of 1995, as amended.

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was served with a charge sheet and had to appear before a disciplinary. As a result, Mr Nkosi referred a dispute of victimisation to the CCMA on allegation that his managers were ganging up against him. He withdrew that dispute because Shoprite had offered to transfer him to another branch. On 3 December 2018, he accepted a transfer to the Ridgeway branch. Shortly thereafter, he went to Alberton North branch to relieve the branch manager.

[6] On 5 January 2019, Mr Nkosi returned to Ridgeway branch. He testified that he was victimised and intimidated by Ms Truddy Dunn (Ms Dunn), the regional manager, because he had enquired about his promotion. Ms Dunn allegedly told him he would not be promoted and apparently she also made racist comments. Dissatisfied with Ms Dunn's response, on 13 February 2019, Mr Nkosi wrote an email to Mr Zakhele Sibiya (Mr Sibiya), a divisional manager, wherein he recorded his various complaints.

[7] Thereafter, Mr Nkosi allegedly begun to receive warnings which he viewed as retaliation by his senior managers for escalating his complaint to Mr Sibiya. Mr Nkosi, however, refused to sign those warnings as he believed that he had done nothing wrong. In response to the warnings, Mr Nkosi referred a second dispute to the CCMA. Apparently, the Commissioner advised Mr Nkosi to withdraw that matter case and reopen an unfair labour practice case. However, in the notice of withdrawal dated 08 July 2019, Mr Nkosi stated that he was withdrawing the matter in order to seek legal advice.[2] Mr Nkosi did not take any further steps thereafter.

[8] Mr Nkosi was subsequently issued with a final written warning for storming out of a disciplinary enquiry and for not responding to the alarm. He then agreed and accepted a transfer to another branch. Initially he was told that he would be transferred to Chris Hani branch but was later instructed to report at Heidelberg branch because there was no Fresh Produce Manager. He did so under protestation because of public transport challenges. However, Mr Bandile Nhlapo (Mr Nhlapo), the branch manager, allowed him to leave fifteen minutes early on a condition that all of his tasks were completed. So, he continued to work at Heidelberg branch.

[2] See record page 51.

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[9] It would seem that the last incident was in relation to the preparation for the store visit by the divisional team on 5 and 6 August 2019. Even though Mr Nkosi's department had completed its preparations at18:45, Mr Nhlapo refused to allow him to knockoff, notwithstanding his challenges with the public transport. That very same night Mr Nkosi was allegedly issued with three warnings. He challenged those warnings by lodging a grievance. Mr Nhlapo, on the other hand, also lodged a complaint against Mr Nkosi with the divisional manager.

[10] On 30 August 2019, a meeting was held at a regional office that was initiated by the regional manager, Mr Cata, to deal with both complaints. The outcome thereof was a commitment by Messrs Nkosi and Nhlapo to work together amicably.[3] Notwithstanding the amicable outcome of this meeting, Mr Nkosi testified that he was still ill-treated by Mr Nhlapo. However, the apex of his impugn was that Mr Nhlapo demanded to be addressed as *Meneer* (Sir in Afrikaans) and that he (Mr Nhlapo) and Mr Cata were "coming up with tricks". No details of the said tricks were provided.

[11] On 30 September 2019, Mr Nkosi tendered his resignation and accordingly served a month's notice period. Thereafter, he referred a dispute to the CCMA, claiming a constructive dismissal. The Commissioner accepted the evidence of Mr Nkosi as undisputed and accordingly found that he successfully managed to prove that he was dismissed. In these proceedings, Shoprite takes issue with this finding on several grounds which I do not deem necessary to repeat; save to state that the crux of its attack is that the Commissioner erred as his conclusions are not supported by the evidence on record.

<u>Legal principles and application</u>

[12] It is well accepted that in a case of constructive dismissal, the enquiry turns on the jurisdiction of the CCMA. This principle was elucidated in *Solid Doors*

[3] See record pages 138-141.

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(Pty) Ltd Commissioner Theron and Others,[4] where the Labour Appeal Court (LAC) held that:

> 'Having established what the requirements are for a constructive *dismissal*, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive dismissal - the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.' (Emphasis added)

[13] It follows, as stated in *HC Heat Exchangers (Pty) Ltd v Araujo and Others,*[5] that 'where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction on its own accord… In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator is right or wrong'.

[14] In the same way, the test for constructive dismissal is trite and the pivotal dictum is that in *Solid Doors*,[6] where the LAC referred to the following prerequisites to prove a case of constructive dismissal:

14.1. First, the employee must have terminated the contract of employment;

[4] (2004) 25 ILJ 2337 (LAC) at para 29.
[5] [2020] 3 BLLR 280 (LC) at paras 35 to 39.
[6] *Supra* n 4 at para 28.

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14.2. Second, the reason for termination of the contract must be that continued employment has become intolerable for the employee; and

14.3. Third, the employer must have been made continued employment intolerable.

[15] Significantly, the LAC put emphasis on the fact that, if one of the above requirements is absent, constructive dismissal is not established. By way of example, '…there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer'.[7]

[16] In *National Health Laboratory Service v Yona and Others,*[8] the LAC defined the test for proving a constructive dismissal as an objective one. In essence, '[t]he conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances'.[9] It is of no consequence that the employee should have had no choice but to resign to avail himself to a claim of constructive dismissal; providing the resignation was a reasonable step to escape the intolerable working environment.[10]

[17] In the present instance, the lifeblood of Mr Nkosi's grievances that led to his resignation are articulated in his resignation letter and are primarily the following: [11]

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[7] Ibid; see also *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* 2015] 9 BLLR 865 (LAC) at paras 7 to 9.

[8] (2015) 36 ILJ 2259 (LAC) at para 30; see also *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (JR1078/14) [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC); (2018) 39 ILJ 1568 (LC) at paras 5 to 16.

[9] Ibid.

[10] See *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at para 4.

[11] See record page 73.

17.1. He was frustrated by the fact that there was no promotion or career progression for him because he had been challenging his senior managers.

17.2. He was not paid for overtime he had worked over a period of three weeks.

17.3. He had lodged various formal grievances challenging the manner in which he had been treated. Some of the grievances were not dealt with. In any event, he was not happy with the outcome of the hearing that ultimately dealt with his grievances.

17.4. Ms Dunn told him that he would never be appointed as a branch manager as long as she was his boss.

17.5. He had safety concerns as he had been constantly instructed to work late hours when there was no public transport. He was no longer prepared to risk his life.

[18] Mr Mahafha, Mr Nkosi's counsel, conceded that Mr Nkosi's resignation letter referred to the grievances alluded to above. I accordingly propose to interrogate the findings of the Commissioner within the context of these complaints.

[19] Mr Cithi, Shoprite's attorney, correctly submitted that the Commissioner's finding that Shoprite failed to entertain Mr Nkosi's complaints and grievances was not disputed is not supported by the evidence on record. It is clear from the evidence of Mr Nkosi himself that, even though he had a long history of complaints and formal grievances, they were interrupted by agreements and concessions on how to best deal with them between him and his senior managers.

[20] On the issue of transfer to different branches, the Commissioner ignored the evidence in relation to the context of these transfers. True, Mr Nkosi had reservations about his transfer from Vosloorus branch to Clayville branch. But there was nothing untoward about his return to Vosloorus branch because it

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was done in response to his compliant that he had been mugged on his way to Clayville branch.

[21] Even though Mr Nkosi was later transferred to Sontonga branch, nothing much turns on what transpired there. It is so because, Mr Nkosi challenged the alleged victimisation as a result of being subjected to disciplinary processes by referring a dispute to the CCMA. Tellingly, he withdrew that dispute because Shoprite offered to transfer him to Ridgeway branch.

[22] Another riddle is what transpired at Ridgeway branch. Mr Nkosi, once more, felt victimised and intimidated by the senior managers, particularly Ms Dunn, who allegedly told him that he would not be promoted. He raised his issues with Mr Sibiya, a divisional manager and later referred a second dispute to the CCMA. Once more he withdrew that dispute in order to seek legal advice. No further steps were taken thereafter. While still at Ridgeway he was subjected to formal disciplinary enquiry that resulted in him being issued with a final written warning. Following that process, agreed to be transferred to another branch.

[23] Mr Nkosi's last transfer was accordingly to Heidelberg Branch because there was no Fresh Produce Manager. What is instructive is that, despite Mr Nkosi's complaints against Mr Nhlapo, he concedes that at the meeting of 30 August 2019 both were reprimanded by Mr Cata and that the outcome thereof was their commitment to work with each other amicably.

[24] There is no evidence on record that points to any complaint or grievance against Mr Nhlapo after the meeting of 30 August 2019. During oral argument I challenged Mr Mahafha to refer me to such evidence and he failed. As mentioned above, Mr Nkosi seemingly took issue with Mr Nhlapo demanding to be called Meneer. It is also strange that Mr Nkosi failed to lodge a grievance about the latest conduct or refer a dispute to the CCMA because at that stage he was fully alive to that options; and, in fact, he had availed himself to it on two previous occasions.

[25] What is conspicuous from the record and resignation letter, though, is the fact that Mr Nkosi was seriously aggrieved by lack of career progression. Yet, it

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was not his evidence that he had applied for promotion or there has been a specific opportunity to be considered for promotion but he was arbitrarily and unfairly turned down. Even what Ms Dunn may have said about Mr Nkosi's promotion did not assist his case as she was no longer her regional manager when he resigned. In any event, that incident preceded the meeting of 30 August 2019.

[26] Notably, the Commissioner seemingly acknowledged that the reason that led to Mr Nkosi's transfer history was a collision course with the workplace rules of conduct through his ill-discipline. If that was indeed the case, as accepted by the Commissioner, Shoprite could not have been responsible for making Mr Nkosi's continued employment intolerable. On the contrary, Shoprite explored all possibilities to keep Mr Nkosi in its employ; notwithstanding his appalling disciplinary record.

[27] In *Gold One Limited v Madalani and Others,*[12] this Court sanctioned a well-established principle that '…intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly. Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point.' This principle was recently concretised by the Constitutional Court, albeit in a context of reinstatement, in *Booi v Amathole District Municipality and Others,*[13] where it was stated that:

> 'It is accordingly no surprise that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one. The term "intolerable" implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour. This high threshold gives effect to the purpose of the reinstatement injunction in section 193(2), which is to protect substantively unfairly dismissed employees by restoring the

[12] [2020] ZALCJHB 180; (2020) 41 ILJ 2832 (LC); [2021] 2 BLLR 198 (LC) at para 46.
[13] (2022) 43 ILJ 91 (CC) at para 40.

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> employment contract and putting them in the position they would have been in but for the unfair dismissal. 35 And, my approach to section 193(2)(b) is fortified by the jurisprudence of the Labour Appeal Court and the Labour Court, both of which have taken the view that the conclusion of intolerability should not easily be reached, and that the employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability.' (Emphasis added)

[28] By parity of reasoning, intolerability should not be easily reached in a case of constructive dismissal. To clothe the Commissioner with the necessary jurisdiction, the employee must provide a substantial explanation that is buttressed by concrete evidence to prove the intolerability that led to his/her resignation. Mr Nkosi obviously failed to meet this threshold. It follows that the Commissioner's finding that Mr Nkosi was dismissed is untenable.

Conclusion

[29] In all the circumstances, I am satisfied that the Commissioner misconstrued the nature of the enquiry and incorrectly clothed himself with the jurisdiction he did not have. The award accordingly stands to be reviewed and set aside.

[30] There is no need to remit the matter back to the CCMA given the conclusion that I have arrived at. As such, the award stands to be reviewed and set aside and to be substituted with an order that Mr Nkosi failed to prove that he was dismissed as contemplated in terms of section 186(1)(e) of the LRA and, consequently, the CCMA had no jurisdiction to entertain the dispute.

Costs

[31] Shoprite did not pursue costs, prudently so, as the circumstances of this case dictate that each party should pay its own costs.

[32] In the premises, I make the following order:

Order

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1. The arbitration award issued by the Commissioner under case number GAJB25245-19 and dated 24 February 2020 is reviewed and set aside and replaced with the following order:

    1.1 Mr Nkosi failed to prove that he was dismissed as contemplated in terms of section 186(1)(e) of the LRA.

    1.2 The CCMA has no jurisdiction to entertain the dispute.

2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Mr D Cithi from Mervyn Taback Inc.

For the First Respondent: Advocate TS Mahafha

Instructed by: Matsimela Maja attorneys

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