



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR 134/17

In the matter between:

NDABAKAZI MKHUTSHULWA

Applicant

And

DEPARTMENT OF HEALTH, EASTERN CAPE

First Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

COMMISSIONER THERESA MALGAS-SENYE

Third Respondent

Heard: 27 October 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the First Respondent's legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h00 on 4 April 2023.

JUDGMENT

LALLIE, J

- [1] The applicant launched this application seeking an order reviewing and setting aside an arbitration award of the third respondent, herein referred to as the arbitrator. The basis of this application is that the award has a defect as envisaged in section 145(1) of the Labour Relations Act¹ (the LRA). The application is opposed by the first respondent.
- [2] The factual background to this dispute is that the applicant was employed by the Department of Health of the Eastern Cape Province in January 2011 as an Assistant Director: General Maintenance. After facing difficulties at her workplace which will be dealt with in detail later in this judgment, the applicant tender her resignation in a letter dated 27 July 2016. The reason the applicant provided for her resignation was that her employer had made her continued employment intolerable. She subsequently referred an unfair constructive dismissal dispute to the second respondent. The dispute was arbitrated by the arbitrator who, in an award dated 22 May 2017 dismissed the applicant's claim.
- [3] The applicant's main grounds for review are that the arbitrator committed gross irregularities in the conduct of the arbitration. Her conduct resulted in her reaching an unreasonable decision which has to be reviewed and set aside. It was the applicant's case that at arbitration, as the record shows, she presented cogent evidence in support of her case but the arbitrator misconstrued and disregarded it in reaching her decision on the dispute before her. When this application was argued the first respondent conceded that the award under review does not pass muster. The parties before me

¹Act 66 of 1995 as amended.

could not agree on the relief due to the applicant in light of the concession. The applicant sought an order substituting the award with an order granting her compensation for her unfair constructive dismissal. It was argued on behalf of the first respondent that the matter should be remitted to the second respondent for arbitration *de novo* before a different arbitrator.

- [4] The applicant proved that the award under review has a defect which resulted from the arbitrator's failure to conduct the arbitration fairly as envisaged in section 138(1) of the LRA. Notwithstanding admissible evidence proving that the first respondent committed an unfair constructive dismissal against the applicant the arbitrator decided to dismiss the applicant's claim. The decision is unreasonable as it is not based on evidence properly placed before the arbitrator. The decision is therefore reviewed and set aside.
- [5] In determining to appropriate relief I have taken into account provisions of section 1(d) (iv) of the LRA which adds effective resolution of labour disputes to the list of the purposes of the LRA. The Constitutional Court added expeditious resolution of disputes in interpreting the above piece of legislation. Section 145(4) (a) of the LRA enables this court to determine the dispute in the manner it considers appropriate after setting an award aside. The papers filled of record contain sufficient information which will place me in a position to invoke the provisions of section 145(4) (a) of the LRA. Justice will be served if the dispute is resolved at this stage instead of having it resolved later at the second respondent where the parties have already been given a fair opportunity to present their respective cases.
- [6] In section 186(1) (e) of the LRA defines constructive dismissal as an employee's conduct of terminating employment because the employer made continued employment intolerable. In *National Health Laboratory Service v*

*Yona and others*² a decision the applicant sought to rely on, the test for constructive dismissal is stated in the following words:

“The test for proving a constructive dismissal is an objective one. The 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”.

[7] In *Murray v Minister of Defence*³ it was held that a fragmented approach should be avoided in determining whether a resignation constitutes constructive dismissal. The complaints which culminated in the resignation have to be considered as a whole. It is common cause that at arbitration only the applicant led evidence. Although the first respondent was afforded the right to call witnesses it elected not to exercise it. It was argued, base on the contents of the record that the applicant’s material evidence was unchallenged. As the applicant elected not to lead evidence, no evidence was led to refute the applicant’s version.

[8] The evidence which supports the applicant’s case is that upon taking up employment with the first respondent she reported directly to the Director: General Maintenance because the Deputy Director’s position was vacant. She worked well with Mr Musese (Musese) who was the Director at the time. The applicant’s complaints started when Musese moved from the Director’s position and Mr Tuswa acted in it. The applicant’s unchallenged evidence was that Tuswa maginalised her. He did not allocate work for her and the applicant found herself doing nothing for months. The situation affected the applicant’s health and she was admitted in a psychiatric institution for 3 weeks in 2013. In early 2014 and with assistance of her husband the applicant sought the intervention of the applicant’s Superintendent – General, Dr Mbengashe, who recommended a number of solutions including reassigning the applicant to the

² 15 (2015) 36 ILJ 2259 (LAC) at para 30

³ (2008) 29 ILJ 1369 (SCA) paras 65 – 66

Extended Public Works Programme (EPWP) for 6 months. At the end of the reassignment period no further solutions were implemented. The applicant reverted to her old situation of being without work. She was given no work station and sat in the passage. Her further complaints and grievances about her working conditions and the failure to assist her perform her KPAs received no attention. On employment, the applicant had a diploma in Horticulture and a postgraduate diploma in Project Management. In an effort to develop herself she even furthered her studies instead of sitting idly as a result of not being allocated work.

[9] Based on the applicant's position the first respondent had an obligation to ensure that she was given work in order to develop her expertise. Paying the applicant her monthly salary was not enough. The applicant proved that the cumulative effect of the first respondent's conduct through its employees made her continued employment intolerable. The first respondent's conduct therefore constituted an unfair constructive dismissal of the applicant.

[10] The applicant sought compensation. Compensation is *solatium* for unfair dismissal. The applicant's dismissal resulted from the first respondent's conduct. The first respondent cannot be allowed to use affording the applicant an opportunity to study as a defence because the main reason the applicant joined the first respondent was to work. She had already obtained a postgraduate diploma. It is just and equitable in all the circumstances of this matter to order the first respondent to pay the applicant compensation equivalent to 10 months' remuneration.

[11] I was given no reason to grant a costs order in this matter.

[12] In the premises, the following order is made:

Order:

1. The arbitration award issued by the third respondent under case number PSHS 838-16/17 dated 2 March 2017 is reviewed and set aside and substituted with the following:
 - 1.1 The applicant was constructively dismissed by the first respondent.
2. The first respondent is ordered to pay the applicant compensation equivalent to remuneration she would have earned over a period of ten (10) months calculated at her rate of remuneration on the date of her constructive dismissal.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

Adv. Le Roux

Instructed by

Bax Kaplan Russell Inc.

c/o Joubert Galpin Searle

For the First Respondent:

Ms. Govender of the State Attorney, Gqeberha

LABOUR COURT