IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: JR1327/06

In the matter between:

STANLEY JABULANI FAKUDE	Applicant
AND	
SPOORNET	1st Respondent
THE DIRECTOR OF TRANSNET	
BARGAINING COUCIL	2nd Respondent
ARBITRATOR L. DREYER N.O.	3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application by the applicant in terms of which the applicant seeks to have the award issued by the third respondent under case number BC Fakude/ SP (APS) MP 9242 and dated 15 April 2006 reviewed and set aside.

Background facts

[2] The applicant was prior to his dismissal employed as a security officer of the first respondent (the respondent) at the Durban branch.

[3] After working for the respondent for a period of over ten years the applicant applied for a position of the depot manager during July 2002. He was successful in his application and was appointed a deport manager for the Natal Region and responsible for the Natal Coast Region.

[4] On the 9th October 2007, the applicant received a letter from the respondent, which reads as follows:

> *"As discussed with you, Safety and Internal Investigation however required the services of Depot Managers (Junior Managers) at Ladysmith and Nelspruit.*
>
> *It would be appreciated if you advise whether you are prepared to relocate to one of these positions. Please note that if two or more applications are received for the same (including Durban), LIFO would be used as the criteria to decide who would be placed at which centre.*

Should you be prepared to relocate the following relocation assistance will be available to you.....

If you are not prepared to relocate and you fail to secure placement in an alternative position elsewhere in Spoornet or Transnet, consideration will be given to the termination of your services by means of a package by mutual consent.

You are requested to advice the Manager (Human Resources), Ms Lesego Ramutloa of your decision in writing, by not later than 24 October 2003."

[5] The applicant respondent as follows:

"I responded by the letter dated 14 October 2003...as follow:

"After careful consideration I have decided that I am not prepared to relocate to either Nelspruit or Ladysmith. However, I am prepared to accept my current position as Depot Manager in Durban as per my original appointment letter. Furthermore, no new structure has been communicated to me prior to me receiving the said letter

*from my Executive Manager, except the **proposal** that was presented to me on 10 September 2003."*

[6] In the light of the applicant having indicated that he was unable to relocate, the respondent indicated its intention to terminate the employment of the applicant as of the 1st February 2004. On receipt of this letter the applicant changed his view regarding relocating. He indicated that he was willing to relocate to Nelspruit as of the 1st April.

[7] The applicant says that on arrival at Nelspruit, he found that he had not been allocated support staff and office furniture. He also had difficulties with finding cheaper accommodation. He stayed in a hotel for 4(four) months and therefore he was told to find his own accommodation. He had difficulties in finding accommodation resulting in him having to stay in his vehicle. He informed his superiors about this problem but no support or assistance was received from them.

[8] On 4 June 2004, the applicant addressed a letter to the respondents head office and stated the following:

"I am very disappointed with the way I have been treated from time to time of Spoornet restructuring in Asset Protection till the date of my redeployment at Nelspruit

I have raised this issue with my HR Manager, Lesego Ramutloa in the presence of my union representative, which it was explained that the new structure required me to be relocated to this new post.

The relocation has affected my health and my family life severely as I am currently under medication. To rub salt into the wound, I find myself in a new job that I am like a redundant person.

My position in Nelspruit is very frustrating and seeks to undermine my position as the Manager. Currently I don't have an office and support staff since the new structure has been approached.

I appeal for your urgent intervention by office in this matter as every means to address this matter to my authorities has been in vain."

[9] The applicant addressed another letter to one of his seniors on 6 October 2004 wherein he stated the following:

> *"I would like to put this matter to rest I have move my furniture from Durban to Johannesburg with my own coast. Where is the company have promise to move the furniture to even the person have be appointed to but to me it was not appointment it was re-allocation without my will I was forced to make the decision at short time and I want to remind your whilst I was in hospital. I was serve with dismissal package. That shows there was a reason that was not know to me. Because all that my family was put on the dilemmas as to what is tomorrow hold for them and myself.* ***Depression stress as resulted of the attitude have change sickness come in as body and the mind was not strong.....*** *I never received a reply to this letter."*

[10] The applicant was during January 2005, hospitalised due to depression. It would appear on his return to work after his leave, he was allowed to employ temporary employees as support staff but furniture was still not made available. He was told to find furniture on his own and had to look for furniture from the

premises of the respondent. However the employment of temporary staff was stopped few months thereafter because their posts had not been approved.

[11] The other complaint of the applicant is that he was treated with arrogance by one of his subordinates. He formulated a charge against that employee and requested the respondent to convene a disciplinary hearing but nothing came out of that request.

[12] The applicant says that although he did not want to resign, he resigned on 12 October 2005. After submitting his resignation he was offered a position which he refused because he no longer had faith in the respondent.

Grounds for review

[13] The applicant attacks the arbitration award on the following grounds that:

> *"The conclusion is neither justifiable nor rational;*
>
> *The findings are inconsistent with the submissions made;*
>
> *The arbitrator ignored the material evidence presented before him.*
>
> *The arbitrator committed gross irregularities."*

[14] The arbitrator in his analysis and evaluation of arguments says the following:

> *"It should be clear from the above that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the other two requirements present. There is also no constructive dismissal if an 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.*

The fact that Nelspruit and all the ramifications of his relocation to Nelspruit did not suit the applicant cannot be attributed to any conduct on the part of the respondent."

Principles governing constructive dismissal

[15] One of the elements of the definition of dismissal in terms of s 186 (1) (e) is that:

"(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

[16] It is trite that in a constructive dismissal claim the onus rest with the employee to show the existence of dismissal. In determining the existence of a dismissal the first factual enquiry is to determine whether or not in resigning the employee had the intention to terminate his or her employment contract or put differently, such resignation was induced by the conduct of the employer. The factual enquiry into the intention of the employee revolves in a sense around the issue of, but for the unbearable or interolerable conditions or environment created by the employer the employee would not have resigned. Failure by the employee to discharge his or her onus on the balance of probabilities would deprive the court

or the CCMA, the jurisdiction to entertain the alleged unfair dismissal dispute. See *Jooste v Transnet Ltd t/a South African Airways (1995) 16 ILJ 629 (LAC)*.

[17] In the case where the employee discharges his or her onus of showing that the resignation does not represent an intention to terminate the employment relationship, then the next inquiry is to determine whether or not the dismissal was constructive.

[18] An objective assessment is conducted in the determination of whether or not the dismissal was constructive. The enquiry at this stage entails a determination of whether or not the facts, objectively evaluated, reveals that it cannot be expected of the employee to have continued with the employment relationship because of the conduct of the employer. The conduct of the employer is assessed in its totality including the circumstances surrounding the resignation. It has to be noted that the enquiry goes beyond the conditions at work being intolerable but includes whether or not on the facts of the case it can be said that the employer behaved in a deliberate manner to induce the resignation by the employee. *See Grogan "Workplace Law" (9th Edition) page 152*. In other words an employee claiming constructive dismissal

must show that the circumstances that made employment intolerable, is the making of the employer and it was because of those circumstances that he or she had to resign. Put differently, the employee in a constructive dismissal claim must establish the nexus between the conduct of the employer which created the intolerable circumstances and his or her resignation. See *Mafomane v Rustenburg Platinum Mines (ltd) (200) 3 10 BLLR 999 (LC)*.

Evaluation

[19] It is common cause that the key issue which was before the commissioner in this matter was whether the resignation by the applicant amounted to constructive dismissal as contemplated by s 186 (1) (e), of the LRA.

[20] It seems to me that the key complainant of the applicant is that the commissionerfound that there was constructive dismissal despite having found that he should be re-employed at Isando. In this respect the applicant says the following:

> *"During the conclusion of the hearing, the arbitrator made a finding in my favour that I must be re-employed at the Isando branch of the First Respondent because a vacancy*

existed in Isando. A finding was thus already made during the hearing. However, in the Arbitration Award, the Arbitrator found that no constructive dismissal took place."

[21] In her response to the above the commissioner says the following:

"In respect of Points 9.19 and 11.1.4 in the Applicant's Notice of Application: No ruling was made that the Applicant should be reemployed at Isando. I merely enquired into the existence of suitable vacant post in an attempt to possibly conciliate the matter as I am entitled to in terms of Section 138 (3) of the Labour Relations Act."

[22] It is clear from the above that the commissioner does not deny having raised with the parties the possibility of re-employing the applicant at Isando. The commissioner is indeed correct that she was entitled even during the arbitration proceedings to try and test the possibility of mutually acceptable settlement for the parties. This the commissioner can do at any stage of the arbitration proceedings. Paragraph 9.19 of the applicants founding affidavit reads as follows:

> *"At the end of the Arbitration hearing, responding to a question of the Arbitrator, Mr N Naidu, stated that there was currently one vacancy in Isando. The* ***Arbitrator then ruled that the Applicant must be re-employed in this*** **vacant post.** *Mr N Naidu then responded by saying the post is not available. My response to that was that this was the exact reason why I did not trust or believe the First Respondent anymore."*

[23] It is quite clear that even the applicant himself did not belief that the commissioner in transversing the possibility of resolving the dispute by way of consensus was rendering a final determination of the dispute.

[24] I am of the view that even if it was to be found that the commissioner did make a finding in relation to the re-employment of the applicant in Isando this would have amounted to a mistake of law. The question that then arises is whether such a mistake would have amounted to gross irregularity. In my view the answer has to be in the negative.

[25] It is trite law that for a mistake of law or facts to constitute a gross irregularity, it must be of such a nature that it can be said that the

applicant was denied a fair hearing or the commissioner failed to deal with the issues which had been put before him or her.

[26] It is also clear that if the commissioner regarded this as finding upon his conclusion was to be based on whether or not she would have proceeded with the determination of the matter. She proceeded after making what I regard as a suggestion to the respondent to make findings on the evidence and the material which was properly presented before her and finally issued an award.

[27] I now proceed to deal with whether or not the applicant has made out a case justifying interference with the arbitration award. I will in doing so apply the test of a reasonable decision maker test as enunciated in the case of *Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 2405 (CC).*

[28] In my view the conclusion reached by the commissioner cannot be said to be unreasonable. It is clear from the reading of the arbitration award that after setting in details the evidence and the submissions of the representatives of both parties the commissioner correctly came to the conclusion that the evidence presented by the applicant did not discharge the onus of showing

that the resignation by the applicant amounted to a constructive dismissal. In arriving at this conclusion the commissioner took into account all the relevant facts and the circumstances that led to the resignation of the applicant.

[29] It is apparent from the reading of the arbitration award and summary of the notes taken during the arbitration proceedings that the applicant's complaint concerned his transfer from Durban to Nelspruit. This combined with the unsatisfactory circumstances he found himself on arrival in Nelspruit made him to resign.

[30] Although the applicant sought in his papers to show that there was no need for the respondent to restructure its Durban offices which was staffed by three managers, the facts suggest otherwise. His own version indicates that at some point the three of them were consulted by the respondent and arising from that consultation they made a proposal, which was rejected by the respondent. It is not suppressing that the respondent rejected their proposal because in his own words the proposal was that the three of them must remain in their positions and be responsible for "the 3 divisions as previous", a situation which the respondent had already indicated, did not serve its operational needs.

[31] The transfer of the applicant as I see it occurred in the context of avoiding his possible retrenchment. The transfer to Nelspruit was part of an alternative to dismissal for operational requirements. Had he not taken the transfer he would in terms of the letter of 9th October 2003 from the respondent been dismissed. This is the hush reality which was faced by both parties which was avoided by the applicant finally accepting the transfer.

[32] The second respondent filed a notice indicating that it does not maintain a record of the arbitration proceedings conducted under its auspices. It is important to note that the arbitration hearing itself was conducted under the auspices of the private dispute resolution institution. The applicant did not dispute or challenge the veracity of these notes.

[33] The notes which are fairly detailed in certain respect tell a full story as to what the underlying and objective reason for the resignation of the applicant was. It was not because the respondent had made his continued employment intolerable. It cannot be denied, as the commissioner herself noted, the work environment at Nelspruit was an ideal.

[34] The employee was asked during cross examination whether he had experienced a hostile conduct on the put of the respondent. His answer tells the full story behind his resignation. He answered "yes, I was transferred against my will".

[35] After the above answer the reason for his resignation was then read to him. And when asked as to when did the reasons mentioned in his letter of resignation became of such a nature that it made the continued employment relationship intolerable the applicant responded as follows:

"Since I was transferred to Nelspruit."

[36] The view that the resignation of the applicant was due to his transfer is further supported by the communication between him and Mr Naidu, immediately after his resignation. Mr Naidu addressed a letter to the applicant 5 days after his resignation. The letter which is quoted in the commissioner's arbitration award reads as follows:

"Dare Stanley,

I have perused your letter below and as discussed with you I felt that we should do everything to try and assist you if it is

all possible. I have looked at your situation and have decided to put a proposal for your comments.

You sub depot office is situated at Witbank and this area forms part of Spoornet's critical line and it is proposed that you be relocated to Witbank.

The advantages are that you will be at the heart of the coal operations and will suit you as it is less than one hour's drive from JHB.

Please consider and give me your feedback."

[37] The applicant response which is also quoted in the arbitration award, reads as follows:

"I have read your response carefully and communicated to my wife, and concluded that I must uphold my resignation as requested and I have noticed that you have try to resolve the issue of staying away from my family but I will stand by my decision to save my marriage. I hope you will accept my explanation."

[38] It is also important in the context of the above observation to note the nature of the dispute which the applicant had referred to the

second respondent. The nature of the dispute is stated in the notice which was filed by the second respondent and the relevant parts therefore reads as follows:

> *"Sir*
>
> *DECLARATION OF DISPUTE: MR SJ FAKUDE NO CDQ 036C: GRADE: MANAGER 610 (KRUGER LOURENS – MOELETSI): VERSUS SPOORNET, (ASSET PROTECTION SERVICES) MPUMALANGA REGION –Quote- ("A LOT OF PRESSURE WAS PUT ON ME BY MY EMPLOYER TO ACCEPT A TRANSFER AGAINST MY WILL. THIS PRESSURE MADE CONTINUED EMPLOYMENT IMPOSSIBLE FOR ME AND I HAD NO OPTION THAN TO RESIGN")."*

[39] In the light of the above, I am of the view that there is no basis to interfere with the arbitration award issued by the commissioner. Whilst I accept and so does the commissioner, that the circumstances under which he worked were not conducive, the applicant has failed to show that the first respondent deliberately created those circumstances and his resignation was as a result thereof. It is very clear that the applicant was unhappy with his transfer and facts on the balance of probabilities support the view that, that was in fact the reason for his resignation.

[40] Turning to issue of costs, s 162 of the LRA provides that costs must be granted based on the dictates of both law and fairness. The applicant indicated that the reasons why his attorneys were not present was because he could not afford to pay their fees. For this reason I do not belief that it would be proper to allow costs to follow the result.

[41] In the premises the following order is made:

1. The applicant's application to review the arbitration award issued on the 15th April 2006, is dismissed.

2. There is no order as to costs.

Molahlehi J

Date of Hearing : 1st November 2010

Date of Judgment : 9th December 2010

Appearances

For the Applicant: Mr S J Fakude (the applicant appeared in person

For the Respondent: Mr M Ramotlou of Maserumule Inc Attorneys