

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD.AT JOHANNESBURG)

Reportable

CASE NO: JS175/07

In the matter between:

JOANNE VAN GREUNEN

Applicant

and

THE JOHANNESBURG FRESH

PRODUCE MARKET (PTY) LTD

Respondent

Judgment

Molahlehi J

Introduction

[1] The applicant in this matter claims that she was constructively dismissed by the respondent. She contends that the alleged dismissal was due to the unfair discrimination based on the fact that she was a white person.

[2] The respondent opposed the claim and contends that the applicant has failed to lay a basis for her claim and accordingly this Court does not have jurisdiction to entertain the claim.

The background facts

[3] It is common cause that the applicant had previously resigned her employment with the respondent during 2003 but was reemployed at the beginning of 2004 in the office of the Chief Executive Officer (CEO). At the end of 2005, she was promoted to the position, manager in the office of the CEO.

[4] It seems common cause that the responsibilities of the applicant as the manager in the office of the CEO, included providing “*secretarial and administrative support to other executive officers, assisting in planning, co-ordinating, executing and communication of project programs and promotions, maintain the communications data base, design and implement the process of all sponsorship and donations requests and co-ordinating all site visits and maintaining a professional record thereof.*”

[5] Towards the end of 2006, the then CEO resigned his employ with the respondent and Mr. Ramokgopa (the new CEO), was appointed in that position.

[6] On Friday, the 17th of November 2006, Mr. Sello Mashilwane (Mashilwane), the HR Executive of the respondent, who was also the only witness that testified on behalf of the respondent, approached the applicant in her office and had informal discussions with her. The discussion between the two were recorded in a memo as follows:

- “2.3.1 That the new CEO would be interviewing candidates for her position,*
- 2.3.2 That interviews would be with external candidates which took place on the 20th of November 2006,*
- 2.3.3 Should a candidate be found that the Applicant would forthwith relinquish her position and duties?*
- 2.3.4 That the Applicant was not aware of the advertisement for the position, nor requested to apply for her position which included all the duties of the personal assistant;*
- 2.3.5 Two positions in HR were offered to the Applicant, namely:-*
 - 2.3.5.1 Performance Monitoring Specialist; and*

2.3.5.2 *Organizational design.*

2.3.6 *The Applicant requested documentation concerning the positions offered, (job descriptions and key performance areas, etc.) to enable her to make an election; and*

2.3.7 *The availability of other positions should she not elect either of the two HR positions.”*

[7] According to the applicant she was approached by Mashilwane during November 2006 and requested to contact Ms Linda Lubisi (Lubisi) of a certain employment placement agency to request her (Lubisi), to forward three more CV's. She was further, according to her, instructed to arrange for the interview's of the candidates. In support of this allegation the applicant relied on the email from Lubisi and the three CV's which were attached thereto. The applicant further indicated that one of the candidates who was appointed was one of those whose CV was submitted by Lubusi.

[8] Mashilwane, denied ever requesting the applicant to obtain CV's from anyone including requesting her to arrange the interviews of candidates. He contended in this respect that he had his own PA, and therefore there was no reason for him to ask the applicant to make the

alleged arrangements. He further stated that the respondent has in its employ a person responsible for recruitment and selection who would have been responsible for making the arrangements relevant to the recruitment for the position in question.

[9] The applicant testified that in the light of the above she approached her attorney for advice because she felt discriminated against because she was not given an opportunity to apply for that position. She was advised by her attorney to file a grievance regarding her complaint.

[10] Thereafter, the applicant filed her grievance in which she stated the following:

“The nature of grievance

My position as Manager: Office of the CEO which includes all aspects of running of the office of the CEO’s office as well as all personal assistant duties is the nature of my grievance in that it has been given to at least one placement agency for filing and interviews have taken place and am aware the any actions I have taken that have resulted in the above occurring, whilst I am in the position.

I was informally advised that the above would happen and was verbally given two options in the HR department. Those

positions being Organization Design and Performance Management. To date, I have received nothing in and am not happy about being removed from my current position.

To my knowledge I have always performed all my duties exceptionally well and always given both the CEO and the company 100% and see no reason for my position to outside institutions for interviews and appointment of a new person.”

[11] The grievance hearing which was chaired by the chief operating officer of the respondent was convened on the 29th November 2006. The applicant testified that the outcome of the grievance hearing was that Mashilwane would provide details of the offer of alternative positions in the HR department, which had been offered to her so as to enable her to make an election.

[12] The points which were discussed at the grievance meeting and which are common cause are recorded as follows:

“2.10.1 The Applicant persisted with wanting to retain her position in the CEO's office;

2.10.2 The Applicant was prepared to take a demotion and a salary reduction,

- 2.10.3 *The Applicant was not given an opportunity to compete for the PA's position;*
- 2.10.4 *External candidates were interviewed;*
- 2.10.5 *The Applicant had not made an election to accept or reject the HR positions offered to her,*
- 2.10.6 *The Applicant did not have the details regarding the two positions in order for her to make an informed election;*
- 2.10.7 *The Respondent persisted with it's stance that in terms of its practice, the new CEO is entitled to appoint his own Personal Assistant;*
- 2.10.8 *Mr. Mashilwane advised that the relationship between the Applicant and the new CEO had been soured due to the grievance.”*

[13] The applicant testified that the reason why she declared the dispute was because of the following:

“2.17.1 *The Respondent did not consider the marketing co-ordinator Position vacant as the incumbent had declared a dispute, which dispute was still not finalized. The Applicant had in mind that should*

she declare the dispute, that likewise the Respondent would not fill her position-,

2.17.2.1 The Respondent had rejected the Applicant's grievance and the Respondent was proceeding to engage the Personal Assistant;

2.17.2.2 Mr. Mashilwane again proposed the two vacant positions in HR without providing any form of detail, which the Applicant required to make an election-, and the letter was unsigned which, according to the Applicant, did not constitute a proper offer in any event.”

[14] Mashilwane disputed having acknowledged during the grievance meeting that the applicant substantially performed the duties of a PA in the CEO's office.

[15] On the 30th November 2006, the applicant received the letter from the respondent about the outcome of the grievance process. The letter reads as follows:

“Dear Ms Van Greunen

Following the Grievance hearing meeting we had on the 29th November 2006 regarding your current position as Manager:

CEO's office, we confirm that the Company does no longer need the Manager: CEO's Office function. As indicated to you in the meeting, the Company proposes that you be transferred to the Human Resources Department within the JFPM.

We wish to record that, we have considered your proposal that you be transferred to the Marketing department to serve as Promotions coordinator. As indicated to you the Company does not regard the coordinator position vacant as there is still a dispute going on with regard to the said position.

We further wish to record that the relief sought by you that the Company stop the process of appointing the PA to the CEO and maintain you on the current position in the CEO's Office has been rejected. We wish to record that it is not possible for you to continue serving in the CEO's Office as your current position involves duties that are not purely PA. As a result of that the Company has decided to engage the PA to serve in the CEO's Office.

Pursuant to the request you made, we have made inquiries from the Marketing Executive with regards to any available vacant

positions and unfortunately we were unable to find any position within the marketing department.

As indicate to you in our meeting, we are still committed to offering you one of the two alternative positions we have within the Human Resources Department.

We once again propose that you consider taking one of these positions as they are the only available position at the moment..

The vacant positions are Manager: Organizational Design and Manager: Performance Management system.”

We would like to reiterate that this transfer will not affect any of your terms and conditions of employment and that your salary will not change.

Please indicate your acceptance of this offer by signing and indicating the position that would best suit you.”

[16] Following the above letter advising about the outcome of the grievance hearing the applicant submitted her letter of resignation dated 8th December 2006. The letter reads as follows:

“Human Resources Executive

Johannesburg Fresh Produce Market (Pty) Ltd

8 December 2006

Dear Sir

Forced Resignation

The situation at work has become totally unbearable to the extent that I cannot tolerate continuing employment any longer.

The reasons for this are the following: -

- 1. the position, which I held, was unilaterally taken away from me, candidates were interviewed (all black ladies) and I was not given an opportunity to compete for my own position. This resulted in me formulating a grievance to you which was dismissed on the basis that the new CEO wanted his own person in my position. The clear indication was that he wanted a "black person" in my position.*
- 2. Subsequent to the grievance meeting, I had not (sic) option but to declare a dispute with the CCMA for residual unfair labour practice based on discrimination. This matter is still pending.*
- 3. Subsequent to me having lodged the dispute against yourselves with the CCMA, I have been moved out of my office, from the executive floor to the 5th where I now sit.*

When I arrived in my "new" office, the telephone had been moved for reasons unbeknown to me. I had to arrange with the switchboard as a favour, supply me with a telephone, Due to the manner in which I been; treated up until then, I had to seek medical treatment for reactive depression. I am still being treated for this condition for more than a week now. All management has ignored me, nobody has enquired as enquired as to how I was doing and in fact nobody really cares. I, on Wednesday, needed to attend my doctor's rooms. Not knowing to whom I report, forwarded a request to HR seeking permission to go to my doctor. I enquired whether or not I was to submit a leave application, which is normally the policy. However HR merely said it was ok if I go. The impression I got is that they don't real care whether I am at or not.

4.1 I have always been constructively busy doing my work for which I remunerated. I cannot sit in a situation not having duties to perform. Nobody cares whether or not I

am at work. Nobody cares what I do and as indicated, nobody has enquired as to what I am doing.

5. *the final straw occasioned this morning, when the HR Executive, Mr Sello Mashilwane, aggressively brushed passed me in the reception area ignoring me totally. In the past and prior to all of the above happening, we always had a good relationship and most certainly enquired as to one another's well being. Clearly, I am not wanted here any longer.*

6 *Therefore, you are advised that in order to protect my rights, I am forced to resign.*

7 *In light on the fact that I am not fulfilling any form or function and/or duty, have nobody to report to, that it is irrelevant whether or not I report for duty in the morning or not, or whether I am at work or not, I suggest that I be allowed to leave immediately and that the company waives it's right for me to work my notice period. Should you require me to continue working the notice period, then and in that event, I advise that my resignation is effective immediately.*

Yours faithfully”

The applicant then referred the dispute to the CCMA.

[17] The applicant moved out of her office on the 30th November 2006.

The applicant testified that she was moved into an office that only had a desk and a chair without anything else. Mashilwane on the other hand testified that the office was fully equipped with a telephone and computer.

[18] The applicant testified that she resigned after the outcome of the grievance hearing because the working situation had become intolerable because of the following:

- *She had been moved out of her office,*
- *the respondent persisted in employing a PA into her position,*
- *she had no duties to perform,*
- *she was taking her frustrations out on her children and was booked off sick from work from the 15th December because of the situation at work and*
- *she was diagnosed with depression by the psychologist.*

[19] *The applicant further testified that* on her return to work on 4th December 2006 she went to her office but had nothing to do and as indicated earlier the office only had a chair and a desk with no computer or telephone. According to her the phone had been moved out of the office for some unknown reasons.

[20] The applicant testified that she took the decision to resign on the 8th December 2006 when she met Mashilwane in the reception area and he ignored her and “*aggressively brushed past her*”. The applicant stated that Mashilwane, “*gave her a filthy look and his whole attitude was one of total unacceptable.*” The applicant testified that prior to her grievance, she and Mashilwane had a very good working relationship, always enquiring as to one another's well being.

[21] In responding to the facts as stated by the applicant in her testimony Mashilwane briefly testified as follows:

- That the new CEO is entitled to appoint his new PA in terms of the policy;
- That it was not the applicant's position that was filled but rather that of a PA. Her position was a Manager with a higher salary;
- That there is nothing wrong in only interviewing black candidates for a position;

- Conceded that the applicant did not have an opportunity to compete for the position of PA.
- Confirmed that the Applicant was moved out of her office and that on her return from leave, she was handed a set of keys for her new office.

The law on constructive dismissal

[22] Constructive dismissal law is defined in terms of section 186(1)(e) of the Labour Relations Act 66 of 1995 (the LRA) as follows:

“An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

[23] Grogan in the Workplace Law (Ninth Edition) in discussing the concept of constructive dismissal states as follows:

"It seems that on this view any form of serious and continuing misconduct conduct constitutes 'repudiation in the wide sense' by the employee or employer. In either case, the employment relationship is rendered 'intolerable'. An employer can also repudiate in this sense by making it impossible for an employee

to endure the employment, a situation now recognized by the concept of 'constructive dismissal'. "

[24] It has been accepted that unilateral alteration of terms and conditions of employment may constitute constructive dismissal. See in this regard *Van Wyk v Albany Bakeries [2003] 12 BLLR 1277 (LC)* and *Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC)*. However, the learned author, in *Workplace Law*, states that:

"A unilateral variation of the contract by the employer will not in itself justify a claim of constructive dismissal,- the variation must be such as to evince an intention on the employer's part to repudiate the contract, if it is to warrant the conclusion that the employee could not reasonably be expected to endure the situation, or be such as to go to the root of the employment relationship. If the employer's conduct renders it impossible for the employee to work, a constructive dismissal will have taken place."

[25] In *Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC)*, (at 985A-C) *the Court* framed the test for determining the existence of constructive dismissal in the following terms:

"The enquiry [is] whether the appellant, without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it."

[26] The Court went further at 984D-F to say:

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

employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

[27] Grogan in the Employment Law observes further (at page 118-119) that:

"In other words, a constructive dismissal is not inherently unfair a court will consider the circumstances with a view to establishing whether the employer's conduct was justified."

[28] In assessing the existence of constructive dismissal the courts have adopted an objective approach. It is not the employee's perception of the events that will establish intolerability, the employer's conduct in this regard, must be viewed in an objective sense. Van Niekerk et al in Law@work (2008) at page 213 states that:

"The courts have endorsed the principle thatt the remedy of constructive dismissal, being one in which the employee seeks to obtain resignation, should be narrowly interpreted as against the employee. This implies not only that the test should be objective but that it should be set at a high standard, and that the act of resignation should be an act of final resort when no alternatives remain".

[29] In the present instance there are several facts which the applicant relies on in alleging constructive dismissal. In essence she contends that her position as a PA in the office of the CEO was unilaterally taken away from her without her consent. She was moved out of the office she occupied in the office of the CEO and placed in an office of the 5th floor, which had only a desk and a chair. She however states that the telephone was installed into that office as soon as she raised the issue with the relevant person. The other complaint of the applicant is that she had no work to do after moving out of the office of the CEO. In terms of her resignation letter the incident that made her to submit her resignation was when contrary to her expectation Mashilwane went pass her at the reception without greeting. Included in the applicant's complaints is the allegation of discrimination.

[30] In determining whether or not the respondent had created an environment that rendered the employment relationship so intolerable that the applicant had no option but to resign, this Court has to assess the above facts and determine whether the situation in which the applicant found herself in was so intolerable, objectively speaking that she had no option but to resign. What has to be determined is therefore whether the employee's views regarding the effect that the

employer's conduct had on the employment relationship is reasonable under the circumstances.

[31] It would appear from the facts of this matter that the applicant was initially prepared to accept that she could be moved out the office of the CEO but proposed that she be moved to a position in the marketing department. The respondent did not accede to her proposal. There seem to have been no contestation on the part of the applicant about the reason, which was given by the respondent for not agreeing to her proposal.

[32] It is common cause that the respondent offered the applicant two positions to chose from in the HR department. The applicant did not out rightly reject the positions offered but required the details in relation to the functions to be performed in any one of them. Except for the verbal offer, nothing else came from Mashilwane as to the details about the positions offered.

[33] In relation to the position occupied by the applicant prior to his resignation and that of the appointment of the new CEO which was appointed after the PA, the two are distinctly different, specifically in terms of both the salary levels and the responsibilities. The applicant was a manager earning R250 000 whereas the position of the PA was

at R120 000, 00 per annum. The applicant was told that she was transferred laterally to whichever of the new position she was to choose and that she would maintain her position as a manager.

[34] There is no merit in the complaint that Mashilwane did not greet her when he went passed the reception area. There was no legal obligation on him to greet her and even if there was, the applicant did no take any reasonable step before resigning to establish from a person she prior to that day had such good relations with, as to the reason for his attitude that morning.

[35] The same applies in relation to moving to the office of the 5th floor. Assuming that the phone in the office on the 5th floor was removed prior to her moving in it, there is no evidence as to who removed the phone and whether it was done with an ulterior motive for doing that and also whether it was done with the view of undermining the applicant. The suggestion that the phone in the room was removed by the third respondent is not sustainable. If that was the case then one would have expected evidence showing that reinstalling the telephone took an effort or there was some debate about reinstalling or something in that line. The other point to note in this respect is that on the version of the applicant, Mashilwane indicated to her that whilst

there was an office available in the HR department he did not want to place her there, lest it appears as if he was forcing her to accept one of the positions offered to her.

[36] In my view taking into account the facts of this case and its circumstances, it cannot be said that objectively speaking the respondent had created an environment, which left the applicant with no option but to resign. Accordingly the applicant has failed to show that she had been constructively dismissed by the respondent.

[37] In relation to the allegation of discrimination the applicant has in my view failed to establish the basis for her complaint. Her case in this respect is based on the fact that she was requested to contact an employment agency and request them for CVs of three names of black persons. There is insufficient evidence showing how the applicant came to the conclusion that she was discriminate against. In her statement of case the applicant formulated the legal issue that needed to be determined as follows:

3.1 Whether the Respondent discriminated against the Applicant by only allowing black females to apply for the position which the Applicant substantially performed, the consequences whereof was that the Applicant was

unilaterally removed from her office as well as her functions and duties.”

[38] In support of her case the applicant introduced an email, which was sent to her by Lubisi. There is no mention in the email as to the kind of persons Lubisi was required to submit to the respondent neither is there any indication in it that suggest an element of discrimination. As indicated earlier, Mashilwane denied ever asking the applicant to contact Lubisi for the names of the candidates. The applicant did not call Lubisi to substantiate the allegation that she was required to submit names of only black candidates. The email does not assist the case of the applicant in that it does not indicate the alleged role played by Mashilwane in that regard neither does it support the allegation of discrimination. All what the email says is “*contact details for candidates.*”

[39] In the light of the above analysis I am of the view that the applicant has failed to make out a case of constructive dismissal and accordingly this court doe not have jurisdiction to entertain the applicants claim. I however do not belief that it would be fair to allow the costs to follow the results.

[40] In the premises the applicant's claim is dismissed with no order as to costs.

Molahlehi J

Date of Hearing: 14 May 2009

Date of judgment: 16th February 2010

Appearances

For the applicants: Martin Henning Attorney

For the respondent: Adv Malema

Instructed by: Baloyi Rikhotso Inc Attorneys