



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA7/16

In the matter between:

**NOKENG TSA TAEMANE LOCAL MUNICIPALITY**

**Appellant**

and

**KAREN LOUW N.O.**

**First Respondent**

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL: BENONI**

**Second Respondent**

**COMMISSIONER: MABHOKO MATHOLE**

**Third Respondent**

**Heard: 23 August 2018**

**Delivered: 17 October 2018**

**Summary: Constructive dismissal – employee failing to prove on a balance of probabilities that employer made continued employment intolerable – Appeal upheld and Labour Court judgment set aside.**

**Coram: Phatshoane ADJP, Davis JA and Murphy AJA**

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**JUDGMENT**

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MURPHY AJA

[1] This is an appeal against the judgment of the Labour Court (Snider AJ) in which it reviewed and set aside the arbitration award of the third respondent and ordered the appellant, Nokeng Tsa Taemane Municipality (“the

municipality”) to pay Mr. David Louw (“Louw”) three months’ compensation for unfair constructive dismissal.

- [2] Louw has since died and has been substituted in these appeal proceedings by Ms. Karen Louw, the executor of his estate.
- [3] Louw was employed by the municipality on 1 July 2001. At the time of the termination of his contract of employment, he was a manager of the income section in the finance department.
- [4] On 15 April 2008, Louw was issued with a notice of suspension pending an investigation into allegations of financial misconduct by him. About six months later, on 2 October 2008, he was furnished with a charge sheet in respect of a disciplinary hearing set down for 13 October 2008. It was alleged that Louw had caused the municipality financial losses by failing to implement a resolution of the municipality increasing rates and by authorising payment of approximately R20 000 to a colleague which was not due or payable to her. The disciplinary hearing was postponed to 12 November 2008.
- [5] On 11 November 2008, Louw’s attorneys directed a letter to the municipality indicating that Louw was prepared to resign on payment of between two-three months’ salary as a settlement of the matter. The municipality’s attorneys responded on the same day stating that the municipality was prepared to accept Louw’s resignation without any financial settlement. Paragraph 4 of the letter concluded:
- ‘Our client’s further instructions are that in the event of your client not tendering his resignation aforesaid the disciplinary enquiry will go ahead in full force. Then, and in that event our client considers to proceed to institute criminal proceedings against your client and/or bringing civil action to recover whatever financial losses your client has caused our client or both actions. Accordingly, and against the set-out above, client therefore rejects your client’s offer.’ (sic)
- [6] Louw’s attorneys immediately replied to the above letter stating:

'2. The threats contained in the abovementioned letter and specifically paragraph 4 thereof leaves our client with no alternative but to resign.

3. It is our instruction that in the light of the comments made by your client, the trust relationship between the parties has irretrievably broken down and your conduct amounts to the constructive dismissal of our client.'

- [7] Louw failed to attend the disciplinary hearing scheduled for the next day.
- [8] Louw then filed an unfair dismissal claim with the bargaining council (the second respondent). He testified at the arbitration hearing that he interpreted paragraph 4 of the letter of 11 November 2008 as a threat rendering his employment intolerable because he believed that he would be found guilty of the offences regardless of the merits. No other evidence was led to support his claim of constructive dismissal. On 4 February 2010, the third respondent ("the commissioner") handed down his arbitration award dismissing the application on the ground that Louw had failed to show on a balance of probabilities that the municipality had made the continuation of employment intolerable.
- [9] Louw then filed an application in the Labour Court to review and set aside of the arbitration award. The Labour Court properly held that the test was not one of reasonableness but an objective enquiry into whether the arbitrator was correct in reaching his conclusion.
- [10] The Labour Court construed the threat in the letter as intended to coerce Louw into resigning without compensation. It opined that the mere reporting of the applicant to the police and the institution of civil proceedings would have an "extremely deleterious impact on the applicant." It reasoned as follows:
- 'Guilt, innocence, criminal and civil liability are often not entirely straightforward to establish as anyone in the legal profession will attest. It is quite understandable that an individual would not want to become immersed in these potentially murky waters...It is highly undesirable in the context of an employment relationship that the third respondent (the municipality) should offer to excuse the applicant from reporting him criminally and suing him civilly in return for his resignation without recompense.'

- [11] The Labour Court then found that a reasonable man “guilty or not” would not want to face the “dangerous” prospects of criminal and civil proceedings and thus Louw had established that he was constructively dismissed. It, accordingly, reviewed and set aside the arbitration award and ordered the municipality to pay compensation equal to three months’ remuneration and the costs of the application.
- [12] The municipality argues on appeal that Louw was not dismissed but voluntarily resigned with the aim of avoiding the disciplinary hearing and that the commissioner was correct to dismiss the claim of constructive dismissal.
- [13] The test for determining whether an employee was constructively dismissed is well-established. The *onus* rests on the employee to prove that the resignation was not voluntary, constituted a constructive dismissal and was not intended to terminate the employment relationship. The enquiry is whether the employer 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 the employer and employee. The court must 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. The test does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.<sup>1</sup>
- [14] The question to be answered in this case, therefore, is whether paragraph 4 of the letter of 11 November 2008 constituted a threat which made continued employment intolerable.
- [15] The threat of civil and criminal proceedings in relation to financial misconduct cannot reasonably constitute a threat rendering continued employment intolerable. By posing the threat, the municipality aimed at avoiding what might have been a lengthy disciplinary hearing; but also quite legitimately signalled that it reserved its rights to pursue criminal or civil proceedings in the

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<sup>1</sup> *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* [2014] 10 BLLR 987 (LAC); and *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) at para 67.

event of financial impropriety being established at the disciplinary hearing. The municipality was entitled to adopt this stance in that it potentially had a legal obligation to follow such a course. Its conduct was legitimate, appropriate and defensible and of an order that an employee might reasonably be expected to put up with it. Any employee who is accused of illegal activities or financial impropriety may ordinarily expect that the employer has various options, be they disciplinary, civil and/or criminal.

[16] The standpoint of the Labour Court that the municipality acted unreasonably in posing such a threat is hence untenable. If Louw were innocent, he could have faced discipline and avoided criminal and civil proceedings. It is clear that Louw made an informed choice to resign in order to avoid discipline and any civil or criminal proceedings that could have followed upon his discipline. By resigning, he pre-empted the possibility of a proper investigation and determination of the misconduct by the municipality. Having made this choice, he was not entitled to seek relief by way of compensation. The appeal must accordingly succeed. However, the circumstances of this case do not justify awards of costs.

[17] The following order is made:

17.1 The appeal is upheld and the order of the Labour Court is set aside and substituted with the following:

“The application for review is dismissed”

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JR Murphy

Acting Judge of Appeal

Murphy AJA (which whom Phatshoane ADJP and Davis JA concur)

APPEARANCES:

FOR THE APPELLANT:

Adv TJ Machaba

Instructed by Ntanga Nkhuhlu Incorporated

FOR THE THIRD RESPONDENT:

Adv L Steenkamp

Instructed by Lionel de Villiers Attorneys

LABOUR APPEAL COURT