National Bargaining Council for the Road Freight Industry

NBCRFI

ARBITRATION AWARD

Arbitrator: B J van Niekerk
Case Reference No.: MPRFBC 3711
Date of award: 12 May 2009

In the arbitration between:

RAHLAGANE, JOHN MADILE Union/Employee party

And

MACTRANSCO (Pty) Ltd Employer party

Union/Employee's representative:	Adv. S. Matime
Union/Employee's address:	P. O. Box 13197 The Tramshed 0126 Tel: 084 854 3312 Fax: (012) 840 – 3498
Employer's representative:	Mr. H. Lee (Snyman Attorneys)
Employer's address:	P. P. Box 466 Musina 0900 Tel: (015) 534 – 2171 Fax: (015) 534 – 2629

1 DETAILS OF HEARING AND REPRESENTATION

The dispute was referred for arbitration proceedings in terms of section 191(5)(a)(i) of the Labour Relations Act 66 of 1995. The hearing was held at the Witbank offices of the National Bargaining Council for the Road Freight Industry (the Council) on the 22nd of January 2009 and the 9th of March 209. It was completed at the Council's Arcadia offices on the 4th of May 2009. It was agreed that the parties furnish me with closing arguments in writing on the 11th of May 2009 and that the award would then follow within 14 days. Both parties submitted undisputed paginated bundles of documents.

2 PRELIMINARY ISSUES

No preliminary issues were raised.

3 ISSUE (S) TO BE DECIDED

Whether the Applicant's resignation amounted to a constructive dismissal.

4 SURVEY OF EVIDENCE AND ARGUMENT

Arbitrator's note: For the sake of brevity, I will not repeat the whole of the evidence led and submissions made by the parties verbatim, especially insofar as it was common cause or remained undisputed. The complete record of the proceedings is, however, available from the Council.

It was common cause that the Applicant commenced employment as a Human resources Manager at a basic monthly salary of R15 000,00 on or about the 3rd of April 2008. He had previously been employed by the Council at its Witbank offices for 12 years and was, on his own version, a "specialist in labour relations".

Although a number of offers and counter-suggestions were bandied about during the initial discussions between the Applicant and the Respondent's Group Human Resources Manager, Mr. Norman N. Nembanzheni, the following terms relevant to the present dispute were offered in writing on the 4th of February 2009 and duly accepted:

1. The provision of a "company car";
2. The provision of a "Cell phone" to the value of R450,00 per month;
3. The provision of fuel for "all business related travel".

Clause 2.2 of the contract of employment entered into between the parties (page 14 of Bundle "A") made it clear that these items were regarded as benefits in addition to the Applicant's basic salary.

It was common cause that the Respondent did not provide the Applicant with either a company car or a contract cell phone during the period of his tenure (a vehicle was indeed bought, but had not been delivered at the time of the Applicant's resignation). He utilised his private vehicle and experienced some difficulty in receiving R450,00 per month from the Respondent as a "cell phone allowance",

The Respondent did, however, provide the Applicant with fuel, albeit that the method of provision (initially with a petrol card and, subsequently, per request) did not completely carry the Applicant's favour. For reasons best known to themselves, the parties expended a considerable amount of time and energy on this point. Suffice to say that the Respondent was never in material default of providing (or reimbursing) the Applicant with fuel and it was not argued to be a material motive for his resignation.

An equal amount of energy was spent on the vexed question of whether or not "business related travel" included the journey from the Applicant's residence to his place of work. However that may be, this was an issue first raised after the dispute had been referred, the Applicant having enjoyed the use of fuel on the Respondent's expense for this purpose for the whole of his tenure without any objection from the Respondent.

I will therefore not labour the award with a comprehensive survey of the parties' submissions in this regard.

It was common cause that the Respondent moved premises during the period of the Applicant's tenure. He eventually resigned on the 3rd of July 2008 by handing Mr. Nembanzheni a written letter of resignation (page 1 of Bundle "A") and immediately leaving the premises. At the time, the Directors of the Respondent were present on site.

4.1 Applicant's evidence

Mr. John Madile Rahlagane *(Applicant)*

The Applicant confirmed the submissions already stated as being common cause. He testified that he raised the issue of the Respondent's failure to provide him with a company vehicle with Mr. Nembanzheni on a number of occasions since the start of his tenure.

When he again raised the issue on the 3rd of June 2008, Mr. Nembanzheni responded that the Respondent had arranged for two vehicles (bakkies) to be acquired, and that the Applicant's designated vehicle was in Musina. He could not, however, confirm when the vehicle would be delivered to the Applicant, although the one designated for the Workshop Manager arrived in Witbank in mid-June 2008.

He again confronted Mr. Nembanzheni towards the close of June 2008 regarding the cell phone and company vehicle that were still due to him. Mr. Nembanzheni seemed surprised that the Respondent had (again) not paid the Applicant the R450,00 cell phone allowance and instructed him to "be patient" with regard to the vehicle.

The Applicant testified that, at this juncture, he believed that he had exhausted all internal ways of remedying his grievance and felt that it was now up to Mr. Nembanzheni to take the matter further with Senior Management.

On the 3rd of July 2008, he tendered his resignation. He testified that he had done so, because the Respondent had "denied (him his) benefits" and because he was "tired of knocking on doors" with regard to the R450,00 cell phone allowance. He felt convinced that the Respondent had acting deliberately and requested that he be compensated to the maximum amount.

During a lengthy and fairly robust bout of cross-examination, the Applicant confirmed the issues relating to the promised cell phone (allowance of otherwise) and the company vehicle to be the sole reasons for his resignation. He stated that he did not deem it prudent to lodge a formal grievance with the Directors of the Respondent (or approach them on the day of his resignation), because he had gathered from a conversation that he had with Mr. Nembanzheni that they were already displeased with his salary and because they had, in any event, been aware of his complaints for three months. He conceded that the Respondent had (via one of the Directors, a certain Mr. Van Zyl) endeavoured to contact him in an apparent attempt to coax him to return.

The Applicant could not provide a clear answer to the question as to why he had not referred his grievance to the Council as an unfair labour practice, apart from submitted that doing so would have "stretched" him even more and that it would have been a futile exercise, since the Respondent would not have heeded any attempt to resolve the issues.

Nothing of a contentious nature arose from Adv. Matime's re-examination.

4.2 Respondent's evidence

Witness 1: Mr. Norman Nanganini Nembanzheni *(Group Human Resources Manager)*

Mr. Nembanzheni confirmed the submissions already stated as being common cause. He testified that that he did not experience the Applicant's alleged grievances to be severe, because the Respondent indeed acquired a company vehicle for his use and, in addition, the R450,00 cell phone allowance was on the verge of being "sorted out". In this regard, Mr. Nembanzheni stated that he had arranged regular payment of the allowance with the Respondent's payroll division barely 8 days prior to the Applicant's departure. Since he himself wielded no clout with the Respondent's fleet management division, he advised the Applicant to be patient regarding the vehicle.

He submitted that, on the 3rd of July 2008, the Applicant refused to enter the premises to discuss his apparent problems with the Respondent's Directors. When the Applicant subsequently left, he reported the matter to Mr. Van Zyl, who immediately endeavoured to contact the Applicant.

In closing, Mr. Nembanzheni submitted that the Respondent had been caught unawares by the Applicant's departure and had been unable to fill his position for four months thereafter.

During cross-examination, Mr. Nembanzheni conceded that the Respondent had not provided the Applicant with all the benefits due to him in terms of his contract of employment. He disputed Adv. Matime's submission that said breach of contract was material, and stated that "in-house" arrangements had been made pending delivery of the vehicle. He added that the Applicant had seemed content with this and had not complained "every day". Nothing further of a contentious nature arose from Adv. Matime's cross-examination.

5 ANALYSIS OF EVIDENCE AND ARGUMENT

Section 186(1)(e) of the LRA defines constructive dismissal as meaning that-

> "*an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee*"

If an employee succeeds in proving that his or her employer had made continued employment intolerable, the onus then shifts to the employer, in terms of section 192(2) to prove that it had been fair in its conduct.

Just before the coming into law of the 1995 LRA, the Labour Appeal court, in **Jooste v Transnet Ltd t/a/ SA Airways** (1995) 5 BLLR 1 (LAC) introduced the notion of intolerability when the employer's conduct as a whole was scrutinized, taking its cue from the following Employment Appeal Tribunal's remarks in **Woods v WM Car service (Peterborough) Ltd** (1981) IRLR 347 at 350) which the LAC quoted with approval:

> *"It is clearly established that there is implied in a contract of employment a terms that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee…To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, **judged reasonably and sensibly**, is such that the employee cannot be expected to put up with it…(T)he conduct of the parties had to be looked at as a whole and its cumulative impact assessed."*

The principles and tests that the Labour Court had applied in determining whether a constructive dismissal has taken place were adequately summed up by Senior Commissioner John Grogan in **CWU obo Marele v Glas Centre** (1999) 8 CCMA 6.13.15, who suggested the following:

1. Did the employee intend to bring an end to the employment relationship (**Jooste v Transnet Ltd t/a/ SA** Airways (1995) 16 ILJ (LAC) at 638B) – if he or she had, constructive dismissal would not have taken place.

2. Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his obligations to work? (**Pretoria Society for the Care of the Retarded v Loots** (1997) BLLR 721 LAC)

3. Did the Employer create the intolerable situation?

4. Was the unbearable situation likely to endure for a period that justified termination of the relationship by the employee? (**Pretoria Society for the Care of the Retarded v Loots** (1997) BLLR 721 LAC)

5. Was the termination of the employment contract the only reasonable option open to the employee?

I will deal with the fifth point *supra* first, i.e. whether or not resignation was the only reasonable option open to the Applicant. In this regard, the Labour Appeal court has confirmed in **Lubbe v Absa Bank Bpk** (1998) 12 BLLR 1224 (LAC) that, when the employee has realistic alternatives, a decision to resign will not easily be seen as a constructive dismissal.

In the present matter the Applicant's case was firmly rooted in the claim that the Respondent had acted unfairly in the provisions of benefits. The Respondent, wisely, did not dispute this submission and I am quite satisfied, having considered both the contract of employment and the parties' submissions, that the Respondent had indeed failed to provide the Applicant with a number of contractual benefits. Having said that, I need to make reference to the provisions of section 186(2)(a) of the Labour Relations Act 66 of 1995, which states the following:

> ""*'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-*
>
> *(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;"*

Section 191(1)(a) states that, if there is a dispute about an unfair labour practice, the employee alleging the unfair labour practice may refer the dispute in writing to a Bargaining Council, if the parties to the dispute fall within the registered scope of that Council.

It is clear that the legislature provided the Applicant with an alternative to resignation, i.e. to allow the Council to determine the dispute and, if necessary, order the Respondent to provide the Applicant with the required benefits within a specified period of time. The question that now arises is whether or not such an alternative would have been reasonable (as per **Lubbe v Absa Bank Bpk**) under the circumstances.

The Applicant was confronted with a number of questions on this point, both from Mr. Lee and his own representative. Although his answers were, on the whole, somewhat incoherent, he did submit that opting for a referral in terms of section 191(1)(a) would have "stretched" him even more and it that would have been a futile exercise, since the Respondent would not have heeded any attempt to resolve the issues.

These contentions, subjective as they were, did not assist me in determining whether referring a dispute in terms of section 186(2) would have been, objectively speaking, reasonable. To baldly allege that the Respondent would not have heeded an arbitration award is neither here nor there. From the testimony before me, it is clear that nothing prohibited the Applicant from approaching the Council for assistance. Nothing in the evidence suggested that the Applicant had any material quarrel with the Respondent apart from taking issue with the delay in the provision of his benefits. Why he had not put his employer on terms and requested the Council to order it to provide such benefits remains unclear.

In the end, the Applicant needed to prove that it was unreasonable to expect of him to refer the dispute as an unfair labour practice. This, with respect, he has failed to do. I am therefore satisfied that resignation was not the only reasonable option open to the Applicant and that section 186(2) of the Labour Relations Act provided a realistic alternative to resolve all the specific qualms regarding his benefits.

Having determined that the termination of the employment contract was not the only reasonable option open to the Applicant, I do not deem it necessary to deal with the remainder of the factors listed above.

Even If I am wrong in my reasoning on this point, I am satisfied that the working relationship had not become so unbearable, objectively speaking, that the employee could not fulfil his obligations to work. A simple, yet lucid summary of the Court's reasoning in **Pretoria Society for the Care of the Retarded v Loots** would be to ask the following question, "*would being unemployed, with all the hardship and suffering that are associated with it, be preferable – objectively speaking – to a continuation of the current employment relationship*". In other words, would being unemployed and penniless be preferable to having to endure a "pay-as-you-go" cell phone and being long-suffering in awaiting the delivery of a a company vehicle already bought, whilst enjoying the statutory right to request the Council to order these benefits? In the present matter, I cannot but accept that it would not.

In any event I am satisfied, as stated, that the Applicant had a reasonable alternative to resignation and, as such, his claim cannot succeed.

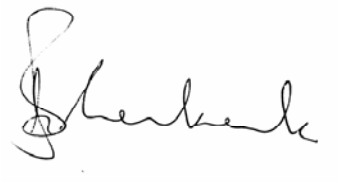
Arbitrator's note: During the course of the proceedings, Adv. Matime alluded that clause 15.1 of the Applicant's contact of employment should be interpreted so as to grant the Applicant the right to terminate the employment relationship in the event of a breach by the Respondent of any of its terms. The Respondent, of course, strongly opposed such interpretation and offered an alternative interpretation. Although accepting any one of the two interpretations would not, having considered the whole of the evidence led, have moved me to a different conclusion that the one I arrived at, I need to state that I am decidedly hesitant to engage the parties in interpreting the contract. In this regard I am bound by the Labour Court's decision in ***First National Bank Ltd (Wesbank Division) v Mooi NO 8 others*** *(2008) 17 LC 1.11.61 that Commissioners' powers to interpret agreements are confined to collective agreements in terms of section 24 of the Labour Relations Act.*

6 AWARD

6.1 The Applicant has failed to prove that he was constructively dismissed;

6.2 I make no order as to costs.

Signed and dated at Arcadia on the 12th of May 2009



B.J. VAN NIEKERK

ARBITRATOR