REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA15/2013

In the matter between:

METROPOLITAN HEALTH RISK

MANAGEMENT **Appellant**

~~and~~And

MALEBO MAJATLADI **First Respondent**

KAREN KLEINOT N.O **Second Respondent**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **09 September 2014**

Delivered: **16 October 2014**

Summary: Constructive dismissal- Employee refusing to continue working in temporary position after expiry of agreement- Employer suspending employee and holding disciplinary hearing- employee found guilty on some of the charges. Employee continuing refusing to work in temporary position - employer subjecting employee to second disciplinary hearing on charges for which employee was previously found not guilty - employee resigning. Labour Court finding employer's conduct rendering employment relationship intolerable.- Appeal - no exceptional

circumstances justifying second disciplinary hearing- evidence showing employer pressurising employee for refusing to work in temporary position- employee's resignation attributed to employer- employer rendering employment relationship intolerable- employee constructively dismissed- Labour Court's judgment upheld – appeal dismissed with costs.

Coram: Davis JA, Hlophe *et* DLODLO AJJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against a decision of the court *a quo* which upheld an application to review the second respondent's decision that the first respondent had not been constructively dismissed by the appellant.

Factual Background

[2] Much of the factual narrative is common cause and can be summarised briefly as follows: First respondent was appointed as a medical advisor in the Qualsa Business Unit of the appellant. In November 2011, a senior manager in another business unit, the Government Employees Medical Scheme Business Unit ('GEMS BU') resigned. This unit was appellant's biggest business unit, earning annual revenue of approximately R 22 m. Appellant was keen to consider the first respondent as the successor to manage this unit. While a recruitment process was still in place, appellant asked first respondent to act in that position. She agreed and she was seconded to an acting post with effect from 15 November 2011. Of significance was the contract letter that she signed on 16 November 2011 which reads:

'Dear Malebo

> We hereby confirm you temporary appointment to the position of Head Advisory Services in the Clinical Services Department, Admin Business Unit from 15 November 2011 to 31 January 2012.'

The letter then continues:

> 'In recognition of the additional responsibilities you will assume in this capacity, you will be paid a taxable acting allowance of R 10, 000 per month which will be incorporated into your monthly salary.
>
> Your willingness to undertake these additional responsibilities is much appreciated and we wish you success in taking up this challenge.
>
> Please sign in the space provided below indicating your acceptance and understanding of the offer and conditions associated with it.'

[3] First respondent signed this contract which was also signed by the senior human resources business partner of appellant Dr Nathan Pillay.

[4] Before this temporary contract expired, first respondent informed appellant that she was not prepared to continue acting in the temporary post after the expiry of the contract. On 28 January 2012, she sent appellant an email advising of her intention to return to her previous position as medical advisor in the Metropolitan Health Risk Management Business Unit from effect from 1 February 2012. She also obtained approval from her superior in that business unit to take annual leave from 1 February 2012.

[5] On 1 February 2012, first respondent was called to a meeting with her superiors in GEMS BU, Dr Safwan Desai, the Human Resources Manager for the unit and Kaya Gobinca. Again the first respondent confirmed that she was not willing to continue acting in the post. On 3 February 2012, while she was on annual leave, Dr Pillay sent her an email in which he cancelled her leave for February 2012 and informed her that she had to report to Dr Desai on Monday 6 February 2012.

[6] To this, first respondent replied in an email: “As you are aware that my period in the GEMS Business Unit ended on 31 January 2012 and I have not extended my acting period contract.” A meeting did take place on 6 February 2012 at which Drs Desai and Pillay sought to persuade first respondent to continue in her acting position. According to first respondent, another human resources manager, Ms Bongi Safile, informed first respondent that if she did not sign a fresh temporary contract she would be fired. First respondent was steadfast in her position and confirmed that she was not willing to act beyond the three month period to which she had agreed in terms of the temporary contract. On the same day, Dr Pillay suspended the first respondent. He addressed a letter to her informing her of immediate suspension and that she would be called to a disciplinary inquiry at a date that would be communicated to her. The letter then said the following: “This suspension is based on your refusal to obey a reasonable instructing relating to an acting role as HIV Advisory Service within the GEMS BU”.

[7] On 9 February 2012, first respondent lodged a grievance pertaining to her suspension and the proposed disciplinary action. She did not receive a response thereto and again wrote to a superior, Dr Thoko Potelwa, on 16 February 2012. This time she received a response which reads thus:

> ‘We acknowledge receipt of the grievance letter lodged on the 9th and the 16th of February 2012. In terms of the MHG grievance procedure you will be invited to attend a formal grievance discussion, in an attempt to resolve your grievance.
>
> Kindly note, you will be contacted by no later than Monday the 20th of February, to notify you of the date of the above mentioned meeting.’

[8] In a further letter on 22 February 2012 Dr Potelwa wrote as follows:

> ‘In relation to your suspension, our labour laws allow an employer to suspend an employee. In your instance, the aforementioned suspension precedes a formal disciplinary hearing which my opinion is in fact a formal process which should be conducted fairly, and which will provide you with an opportunity to respond to the

allegations made against you. This process should, after taking its course satisfy you of the need or reason for the actual suspension.

In relation to the pending disciplinary enquiry, this was initiated by the GENS business unit, for reasons known to the unit. As your previous line manager I do not have the full facts to this matter. The presiding chairperson will need to assess the evidence presented at the enquiry and make a finding based thereon. As discussed yesterday, the disciplinary process is separate from the grievance process and I suggest that it be treated as such the disciplinary enquiry will be the appropriate forum to state your case and to refute this facts presented by the initiator.'

[9] Eventually on 24 February 2012, a disciplinary hearing took place. The charges which were brought against the first respondent were set out in a letter written by Mr Rizwan Salasa on 20 February 2012:

'You will be called to answer allegations on the following charges:

CHARGES

Charge 1: GROSS INSUBORDINATION

In that you refused to obey a reasonable instruction from the company to continue acting in the capacity of HOD: Clinical Advisory Services in the GEMS Business Unit as of 1 February 201.

Charge 2: CONDUCT UNBECOMING

The company take a dim view of the manner in which you have conducted yourself. In respect of the above matter and views your conduct as unbecoming of a person with your status and position within the company.'

[10] At the end of the hearing, the chairperson found that first respondent had not committed the misconduct as contained in Charge 1 but found her guilty of Charge 2. Pursuant to this finding, he imposed a sanction of a final written warning. On 1 March 2012, first respondent appealed against the outcome of this hearing and thus the imposition of a final written warning. On 5 March 2012, first respondent met with

the senior human relations business partner, Mr Trevor Damons, who agreed that first respondent could escalate her grievance to the chief executive officer of appellant, Mr Blum Khan.

[11] In the interim, on 7 March 2012, appellant's human resources executive Ms Odette Ramsingh issued an instruction to the first respondent to report for duty to Dr Desai and to continue acting in the position of HOD – Clinical Advisory Services "until the position has been filled and are required to hand – over period as been successfully completed." Ramsingh then warned first respondent that "should you not adhere to this reasonable and lawful instruction, the company reserves its rights to take disciplinary action against you".

[12] First respondent was booked off sick on 8 to 30 March 2012. During this period, appellant appointed Dr Anuschka Coovadia to the vacant position of HOD – Clinical Advisory Services with effect from 1 April 2012. The first respondent only became aware of this appointment when she arrived back at work on 2 April 2012. When she reported for duty at her permanent post, she was suspended again and told to attend a second disciplinary hearing three days later on 5 April 2012. In this letter the following was said:

> 'The suspension is due to you intentionally and deliberately refusing to obey a reasonable and lawful instruction, issued to you by the head of Human resources on 7 March 2012, duly mandated by the CEO of Metropolitan Health, that you report for duty in the position of HOD: Clinical Advisory Services in the Managed Care (GEMS) Department on 2nd April 2012 at 08h00.'

[13] Notwithstanding that the temporary position had now been filled permanently, appellant formally charged first respondent. The charges are contained in a letter on 2 April 2012, this letter having been written by Mr Trevor Damons. To the extent that it is relevant, the letter reads as follows:

> 'You will be called to answer allegations on the following charges:
>
> **GROSS INSUBORDINATION**

> In that you intentionally and deliberately refused to obey a reasonable and lawful instruction, issued to you by the Head of Human Resources on 7 March 2012, duly mandated by the CEO of Metropolitan Health that you report for duty in the position of HOD: Clinical Advisory Services in the Managed Care (GEMS) department on 2nd April 2012 at 08h00.

[14] First respondent responded to this letter by way of a detailed letter entitled "Continued Harassment and Victimisation". Of particular relevance is the following paragraph:

> 'As indicated in my earlier letter to you, this instruction under the guise of operational requirements is not reasonable or valid. In fact the Company is unlawfully forcing me to accept a demand under the threat of being disciplined. Stemming from your conduct it is apparent that the Company has always sought to harass and victimize me to a point of no return. Your conduct in this matter continues to show me that you no longer wish to continue an employment relationship with me. In fact your conduct has created a hostile and intolerable environment in the workplace.'

[15] On the same day 3 April 2012, Mr Khan responded to first respondent's earlier grievance. His letter read as follows:

> 'The grievance communication received via Email on the 14th March 2012 refers. Your grievance relates to you unhappiness with the outcome of the formal grievance process which Dr Thoko Potelwa communicated to you on 22 February 2012.
>
> Upon the perusal of all of the documentation it is my view that the Company has conducted itself fairly in relation to suspension and subsequent disciplinary enquiry.
>
> In the light of the above, I uphold the decision as communicated to you on 22 February 2012 by Dr Thoko Potelwa.'

[16] Pursuant thereto, on 04 April 2012 appellant advised first respondent that the disciplinary enquiry would proceed on the following day. She immediately resigned. She claimed that there had been a constructive dismissal. After an arbitration hearing, the second respondent disagreed and found that the first respondent had

been the "author of her own fate given her intransigence about position (and that) there is thus no causal connection between the work environment and Dr Majatladi's resignation".

The court *a quo*

[17] Steenkamp J found that the charges brought at the second hearing were the same as the charges in the first hearing and of which the first respondent had not been found guilty of "gross insubordination". The learned judge considered that it would have been advisable for the first respondent to have participated in the second disciplinary hearing and to have raised her concerns yet again. However, he held that the present dispute as one of those exceptional cases where the hearing would have been so obviously unfair that it amounted "to the proverbial straw that broke the camel's back". The employment situation had become so intolerable over the previous months, as the appellant repeatedly sought to pressurise first respondent to continue in the acting position. Hence, it could not be held against the first respondent that she had not attended the second hearing. Accordingly, he found that appellant was responsible for making the continued working relationship intolerable as it charged the first respondent with the same charge on two separate occasions and had made the continued employment relationship so intolerable that a finding of a constructive dismissal was justified. In the circumstances, he awarded compensation in the amount of six months' salary to the first respondent.

Appellant's case

[18] Mr Rautenbach, who appeared on behalf of the appellant, submitted that the inquiry in the present case turned on the following: whether in all the circumstances which pertained on 4 April 2012 when first respondent resigned, she in good faith could reasonably have perceived that the employer's refusal to withdraw the disciplinary proceedings and uplift the suspension made her continued employment intolerable. In his view, the reason why first respondent had been called to a disciplinary hearing at the beginning of April 2012 was because of the appellant's complaint that she had refused to assist the newly appointed head of the GEMS Unit, Dr Coovadia, by way of a proper hand – over of the post in which she has acted.

[19] Mr Rautenbach submitted further that there was no evidence by first respondent that she did not understand the instruction given to her to assist in the hand – over. In this connection, he referred to the disciplinary hearing and the following passage of evidence:

> 'Mr N van Zyl: Now, would I be correct, Dr Majatladi, that this was the essence of the task which your employer required you to fulfil, with effect from the 2nd of April and which you refused to do?
>
> Dr M Majatladi: 'This' being what exactly?
>
> Mr N van Zyl: To assist in the handover of the post which you had filled on a temporary basis when, is it, I forget now the lady's name, is it Govadia (sic)?
>
> Dr M Majatladi: That's right
>
> Mr N van Zyl: When Govadia was appointed?
>
> Dr M Majatladi: The letter has clearly stated.
>
> Mr N van Zyl: Right. And that was the role which you refused to fulfil.
>
> Dr M Majatladi: I refused to fulfil that role.
>
> Mr N van Zyl: Right. Now, this was why the company initiated disciplinary action against you. Not so?
>
> Dr M Majatladi: The company initiated disciplinary action because I refused to obey that instruction.
>
> Mr N van Zyl: That's right.
>
> Dr M Majatladi: And because they wanted me to fulfil it despite somebody being appointed in that role.'

[20] In Mr Rautenbach's view, she understood the charges that had been brought against her and furthermore appreciated that she had a contractual duty to render the assistance to a newly appointed colleague to ensure that the latter understood

the portfolio and could therefore deliver a quality service to a primary client of appellant.

[21] Viewed accordingly, Mr Rautenbach submitted there was no case which the first respondent had made out which justified her allegation of constructive dismissal. In this regard, he referred to the approach set out by Nicolson JA *in Pretoria Society for the Care of the Retarded v Loots:*[1]

> 'The enquiry then becomes 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 determined whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. I am also of the view that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed.'

In his view, appellant's conduct did not fall within the scope of this *dictum*.

Evaluation

[22] In the *Loots* decision, Nicholson JA also said that when an employee "'proves the creation of the unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation when the contract comes to an end."[2]

[23] Mr Rautenbach conceded that, were two charges to have been the same, then the act of charging the first respondent a second time on the same charge would have been a major factor in favour of justifying the first respondent's case of constructive dismissal. It was a wise concession. In *BMW (South Africa) (Pty) Ltd v Van der Walt,*[3] this Court considered the employer's entitlement to subject an employee to

[1] [1997] 6 BLLR 721 (LAC) at 725A-C.
[2] at 724G-H
[3] [2000] 2 BLLR 121 (LAC).

more than one disciplinary enquiry on the same charge. Conradie JA, with whom Nicholson JA concurred, appeared to take the view that fairness alone would be the yardstick to determine whether a second disciplinary enquiry may be conducted against an employee.[4] He held that it would probably not be considered to be fair to hold more than one disciplinary enquiry, save in rather exceptional circumstances. The learned judge of appeal then explained what he meant by "rather exceptional circumstances" when he referred to a situation whereby the employer acted *bona fide* throughout the proceedings but the employee had concealed what he had done so that only after the first disciplinary hearing had been conducted and completed had the full import of the deception been appreciated and understood at the time of the first hearing.

[24] Zondo AJP (as he then was) adopted an even stricter approach to this question, in finding that the correct test must take account of the interests of the employer as well as the employee and balance them within the context of labour law. It would amount to an unfair labour practice, were a second enquiry to take place.[5] However, Zondo AJP did not rule out an alternative approach to the question which was similar to that adopted by the majority, which is that an employer could prove exceptional circumstances before justifying a dismissal of an employer on the base of the second disciplinary enquiry.

[25] It appears to me that, given the kind of exceptional circumstances envisaged by Conradie JA, where the first disciplinary enquiry could never have arrived at a fair decision for want of fraudulent non-disclosure by the employee, a second disciplinary enquiry in which the hearing was fully informed of all the facts would be justified. But that is not the case which confronts this Court in the present dispute.

[26] Presumably, because the two letters which charged the first respondent, the first on 20 February 2012 and the almost identical letter of 3 April 2012, contained the same charges, the appellant was constrained to argue that a different charge had, in effect, been brought against the fist respondent, that is a charge of failing to

[4] At para 12.
[5] See paras 33-35.

facilitate the hand – over. For this proposition, Mr Rautenbach referred to a small portion of the cross-examination of first respondent which I have reproduced earlier in this judgment. But the fact remains that the charge brought on 2 April 2012 was in an almost identical form to that which formed the subject of the first disciplinary hearing and, in terms of which first respondent was acquitted on the charge of gross insubordination.

[27] It follows that it would be profoundly unfair to charge an employee twice for the same offence and then when a manifest error is raised, for the employer to seek to alter the very case which formed the basis of the charge which was invoked to summons the employee to a disciplinary hearing.

[28] However, this is not the only difficulty which confronts the appellant. The record indicates clearly that the appellant was dissatisfied with the result of the first disciplinary proceeding. Its representatives improperly approached the chair of the hearing and requested that he reissue the instruction which formed the basis of the charge on which she had been acquitted. The transcript of the proceedings which took place on 24 February 2012, reveals that Mr van Deventer, the chairperson, was approached by Mr Rizwan Salasa, the human resources industrial relations compliance officer who argued, notwithstanding the acquittal on gross insubordination, that it was still open to the appellant to reissue the instruction. As Mr Ackerman, who appeared on behalf of the first respondent, correctly observed this constituted grossly unfair and improper conduct. It clearly indicated that the appellant was prepared to continue to coerce first respondent in order to ensure that she continued in the temporary position which she had refused to occupy and on which refusal she had not been convicted of a charge of gross insubordination. Shortly thereafter, on 7 March 2012, Ms Ramsingh again instructed first respondent to return to this position, a further indication of appellant's coercion.

[29] In summary, there was a pattern of harassment of the first respondent which took place after the hearing and accordingly it is hardly surprising that this pattern of

harassment culminated in a second charge on the very same issue on which the first respondent had not been found guilty.

[30] It is this pattern of events which requires careful scrutiny in order to determine whether constructive dismissal has taken place. In this connection, Cameron JA (as he then was) in *Murray v Minister of Defence*[6] cautioned that resignation because work has become intolerable does not in itself justify a decision that constructive dismissal has taken place. The key question is whether the conditions, which are intolerable, had been of the employer's making and whether the employer is to be blamed therefore. In short as Cameron JA put it "the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the Courts have adopted) have lacked "reasonable and proper cause". Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case".

[31] When the factual narrative in this case is examined from the time that the first respondent indicated that she was not willing to continue in the temporary post beyond the three month period to which she had agreed in terms of the temporary contract, she was subjected to increasing pressure from the appellant. Even when a charge of gross insubordination in February 2012 was not upheld, the appellant continued to ratchet up the pressure on the first respondent after she continued to refuse and to which she was entitled to refuse to continue to act, given that she made it clear from the commencement that she was only prepared to entertain the temporary post for a three month period.

[32] The conditions which gave rise to her resignation were of the appellant's making and for which the appellant must be held to be culpable. Therefore the conduct of the appellant did amount to making the continued employment relationship intolerable and it follows that first respondent's resignation amounted to a constructive dismissal.

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[6] 2009 (3) SA 130 (SCA) at para 13.

[33] For all of these reasons therefore, the appeal is dismissed with costs.

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Davis JA

Hlophe AJA and Dlodlo AJA concur

APPEARANCES:

FOR THE APPELLANT:	Mr F. Rautenbach
Instructed by:	Louis van Zyl Attorneys
FOR THE RESPONDENT:	Mr L. Ackerman
Instructed by:	Bowman Gilfillan Inc.