IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

CASE NO. 55/2012

In the matter between:-

NICHOLAS MOTSA **APPLICANT**

AND

OK BAZZARS (PTY) LTD T/A SHOPRITE **RESPONDENT**

Neutral citation : *Nicholas Motsa v OK Bazaars (Pty) Ltd t/a Shoprite* **[2015]***SZIC 06/2015 (05March 2015)*

CORAM : **DLAMINI J,**
(Sitting with D. Nhlengetfwa & P. Mamba Nominated Members of the Court)

Heard : **17 October 2014**

Delivered : **05 March 2015**

Summary: ***Labour law – Constructive Dismissal – Absolution from the instance*** *- The test for absolution from the instance is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might [not should or ought to] find for the Applicant. Applicant has to make out a prima facie case.*

1. This present matter is a claim for constructive dismissal by the Applicant, Nicholas Motsa. Motsa alleges that the conduct of his former Employer, the Respondent in these proceedings, rendered his continued employment intolerable, as a consequence of which he resigned. He is now suing his former Employer for constructive dismissal. At the close of the case for the Applicant, the Respondent's representative moved an application that the case of constructive dismissal brought to this Court by Motsa be dismissed because he had failed to make out a *prima facie* case. The argument advanced herein being that this Court, applying its mind reasonably to the evidence, cannot find in favour of the Applicant, hence this present *absolution* application. The application by the Respondent is opposed by the Applicant, who through his representative, Attorney Zwelethu Jele, vigorously counter argued that the Applicant had presented *prima facie* evidence upon which a case of constructive dismissal had been established. This ruling of the Court now determines whether indeed the Applicant has presented sufficient evidence for his claim of constructive dismissal for the Employer to be called to its defence.

2. In summarising the case of the Applicant, his evidence under oath was as follows; He was first employed by the Respondent in 1994 as a Casual Shop Assistant. From Shop Assistant he was promoted to the position of Supervisor and then later to that of Sales Manager, based at the Manzini

branch of the Respondent. This was between the years 2004 and 2005. A while later he was again promoted to the position of Branch Manager tenable at the Piggs Peak branch of U-Save store. Then in the year 2006 he was transferred from Piggs Peak to Mbabane to be branch Manager, a position he held for two years up to 2008.

3. After 2008 he was again transferred from Mbabane to Manzini, where he held the reigns for a year before again being transferred to the Siteki branch of the Respondent, still as Branch Manager. And it was whilst he was stationed at the Siteki branch that he resigned from his employ citing constructive dismissal. Motsa's evidence was that for his last two transfers (Mbabane to Manzini and subsequently to Siteki), no reasons were forth coming except that he was just informed that he was transferring to another branch, and he never bothered to ask why he was being so transferred. It was only in the Piggs Peak to Mbabane transfer that he was informed that he was being transferred to boost the Mbabane branch since it was not performing well.

4. In his evidence in chief, Motsa testified that his ultimate decision to resign from his position was as a result of a number of incidents which compelled him to do so. These incidents apparently started immediately after his transfer from the Mbabane to the Manzini branch. First was a disciplinary

hearing he was subjected to for an offence which allegedly occurred whilst he was Manager at the Mbabane branch and when he had already been transferred to the Manzini branch. This was in relation to empty containers of perishables that had been consumed and were found in the ceiling at the Mbabane store. The Applicant was charged for his failure to report about these empty containers and he went through a disciplinary hearing. He was found guilty and a received a written warning for this transgression. It was Motsa's testimony that when the empty containers of consumed stock were discovered on the ceiling this was reported to him, he investigated and even called a staff meeting to get to the bottom of the incident. However, whilst in the process of investigating he was then transferred to Manzini hence he did not get an opportunity to make an official handover on this incident. Apparently, after this incident his relationship with his immediate Supervisor, a Mr. Fannie Schoeman, deteriorated to its lowest level.

5. Motsa also testified on a polygraph test incident in Durban. He stated that sometime in September of 2009, Branch Managers travelled to Durban for a Christmas conference. After the conference, the Applicant retired to his hotel room whereat he was summoned by Schoeman to his room (Schoeman's). Schoeman informed him that there was an allegation against the Applicant to the effect that he was sexually harassing a certain female employee. He then showed him a letter with the allegations against him,

which the Applicant was seeing for the first time in Durban. Schoeman also informed him that he (Applicant) was to undergo a polygraph examination to test if the allegations against him were true or false. He was then taken to the head office of the Respondent in Durban where he underwent this test. A while later he was informed by Schoeman that the polygraph test had exonerated him. Motsa informed the Court though that he was not happy and greatly disturbed with the manner in which Schoeman dealt with the allegations against him up to the time when he was made to undergo the polygraph test. So much, so that he was traumatized by the whole incident, and was subsequently booked off sick for 7 days. It was after this incident that he was then transferred to the Siteki branch and no reasons were forthcoming for this transfer.

6. Another incident he testified on occurred sometime in the year 2008. He was accused of having released some male employees to attend a soccer match. He was hauled before a disciplinary hearing for which he received a final written warning. He explained that as a Manager he used his discretion to release the employees to attend a soccer match as compensation for the long hours they were working (overtime) without any monetary remuneration.

7. There was yet another incident Mr. Motsa testified on. This was in relation to him allegedly bad mouthing Mr. Schoeman. The allegation here was that Motsa had said to other Managers he (Motsa) did not want the Company to renew Schoeman's work permit because he was troublesome. Schoeman confronted Motsa about this allegation and Motsa denied having said such. Schoeman again confronted him about this bad mouthing allegation at a meeting of Managers at Kapola Guest House and again the Applicant denied having ever bad mouthed him. Thereafter the bad mouthing incident was never raised again. After this incident however, Motsa made up his mind that Schoeman did not like him.

8. Then the final straw was the charges he was slapped with when he was stationed in Siteki. The charges against Motsa were that he had used his staff credit card to purchase goods for certain customers in exchange for cash. He testified that the alleged customers were not mentioned and that he did not even know them. He complained that he was not even involved in the investigation of this matter or even asked if he knew of the allegations against him.

9. Motsa further testified that on receiving the notification of the charges against him, he was shocked and confused. Thereafter he made a decision to resign as an employee of the Respondent. He stated though that his decision

to resign was not because he was avoiding the disciplinary hearing but was because of the harsh life he was enduring at the hands of Schoeman. When questioned by his Attorney if he ever raised a grievance against the treatment he was receiving at the hands of Schoeman, Motsa stated that he could not report such grievance because Schoeman was the highest authority in Swaziland. Interestingly though, Motsa had earlier testified that there was a certain Mr. Haunlun who was the Divisional Manager for the Respondent Company, to whom Schoeman reported, who paid regular visits to the Respondent's branches in Swaziland which were under his supervision.

10. Under cross examination by the Respondent's representative, Advocate Bingham, Motsa confirmed that the essence of the charge he was facing in respect 'football inquiry' was that he had 'ghost employees' who were football players. He also confirmed that the Chairperson had returned a guilty verdict with a recommendation that he be dismissed, however, it was Schoeman that was against the recommendation of dismissal hence he had him retained.

11. It was also put to the Applicant that when he transferred from Manzini to Mbabane he did so without any complaint and he confirmed that to be the correct position. He was also referred to a clause in his contract of

employment which stipulated that he may be required to accept transfers to other branches and he confirmed knowledge of such clause. However, Motsa's concern was that he was not given reasonable time and reasons for his transfer.

12. In relation to the empty containers of consumed stock found on the ceiling, Motsa confirmed that the charge he was facing was that of dereliction of duty, in that he neglected to report this discovery to senior management of the Respondent. When referred to the minutes of the disciplinary hearing against him on this charge he confirmed that he had informed the hearing that he thought he had informed Schoeman about the incident and that it was only after being questioned by him (Schoeman) that he realized that he had forgotten to do so. It was also pointed out to Motsa that in mitigating, he still stated that he thought he had reported to Schoeman but because he was stressed, due his bad stock-take results, he ended up forgetting to do so.

13. Still under cross questioning, Motsa was further referred to correspondence directed to him from Schoeman relating to results of a February 2008 stock take exercise (see page 8 of 'R1'). In that letter Schoeman raises serious concerns on the Mbabane branch's stock take results which revealed that the store had a shrinkage result of 3.94%. This apparently translated to a cumulative loss of more than E2 467 838 (Two million, four hundred and

sixty seven thousand, eight hundred and thirty eight emalangeni). In this letter, it was put to the Applicant, Schoeman was in essence informing Motsa that his stock losses were too high and he needed to do something about it, and the Applicant, in response, confirmed this fact. Motsa also confirmed that the charge of consumed stock found on the ceiling was a serious one and could have led to his dismissal had the company wanted to so terminate him. But in his case he got a written warning and he accepted it and that was the end of the matter.

14. In relation to the polygraph test issue, Advocate Bingham referred Motsa to a statement by a certain Nel'siwe Gadlela dated 25 August 2009 (see page 80 of 'R2') in which she detailed her alleged harassment at his hands (Motsa's). Bingham also referred Motsa to another statement by a certain Melusi Dlamini dated 28 August 2009, in which he was also detailing the harassment incidents by Motsa on Gadlela which he had witnessed. He (Bingham) then put it to the Applicant that if indeed Schoeman had wanted Motsa out of Company he could have proceeded to charge him and have him dismissed using the statements alluded to herein above, instead of having him undergo the polygraph testing process. After a long pause, Mr. Motsa confirmed that indeed if Schoeman wanted to have him dismissed he could have easily done so using these sexual harassment statements against him from the cleaning company employees contracted to the Respondent

Shoprite. The Respondent's Counsel further pointed out to the Applicant that because Schoeman wanted to find out if indeed the allegations against him (Motsa) had any semblance of truth, he made Motsa undergo the polygraph testing, which ultimately cleared him. And in fact, so the argument proceeded, after the polygraph test cleared Motsa that was the last of this matter, meaning that nothing of significance happened in relation to it. This the Applicant confirmed to be true.

15. The next issue to be probed was the bad mouthing incident. In relation to this issue, the contention of Bingham was that when Motsa informed Schoeman that he was innocent of the allegation of bad mouthing his boss (Schoeman), Schoeman accepted that he was innocent and did not pursue the matter any further. Again Motsa confirmed this contention by the Respondent's representative.

16. Finally, the last issue in relation to Mr. Motsa's resignation was that of the staff credit card. He was referred to the staff buying rules at page 64 of document 'R1'. To start off, he confirmed full knowledge of the rules. Advocate Bingham brought it to his attention that the evidence against him in relation to this issue was that; two Teller Controllers (Phindile Mthimkhulu and Njabuliso Vilane) stated that Motsa asked them to use his staff credit card to make purchases on behalf of members of the public

(customers). They were then supposed to take the cash from those transactions and give it to him (Motsa). When asked if the signature on the till generated slip in relation to these transactions was his, Motsa confirmed that indeed it was his. He also confirmed that his staff credit card was used in the transactions in question.

17. Motsa further confirmed that receiving the notice to attend the disciplinary hearing in relation to the staff credit card transactions. He also stated that he read that notice and knew and understood what it was and was not confused by it. When questioned further on what really then confused him in relation to the notice to attend the disciplinary hearing, his response was that he knew that the company was going to dismiss him and this was going to ruin his future job prospects hence the decision to resign. That was the Applicant's case, which then prompted the Respondent's representative to move the absolution from the instance application.

18. The test for determining whether or not an employee was constructively dismissed as set out in authorities is; whether the Employer without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relations of confidence and trust between the parties (Employer and Employee). It has been held that it is not necessary to show that the Employer intended any repudiation of the

contract. Instead, the function of the Court is to look at the Employer's conduct as a whole and determine whether, when judged reasonably and sensibly, it is such that the Employee cannot be expected to put up with it. (See in this regard the case of ***Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at page 985***)

15. Therefore in this application for absolution from the instance, as moved by the Respondent's Counsel, the paramount question to be exclusively considered by this Court is whether: 'At the close of the case for the Applicant, is there evidence upon which a reasonable man might find for the Applicant, Mr. Motsa'? ***(See Gascoyne v Paul & Hunter 1917 TPD 170).*** In considering the Respondent's absolution application, the Court needs to consider if the Applicant has produced sufficient evidence on his own case so far, to at least reasonably establish the *prima facie* existence of constructive dismissal. In deciding this issue, the Court in ***Motaung v Wits University (School of Education) (2014) 35 ILJ 1329 at para 13***, said;

> ***'In view of the nature of the Applicant's claim, it has to be established whether the Applicant has adduced sufficient evidence supporting the facts required to back up her claim, and upon which this Court might give judgement against the Respondent'***

16. To start off, the Court refers to Mr. Motsa's resignation letter. It is crafted as follows;

> ***"…RESIGNATION FROM WORK.***
>
> *Frustrations in my line of duty are forcing me to resign with immediate effect.*
>
> *The decision to resign follows your concerted effort to force me out of your employment and I am giving you what you wanted and I want you to pay me all what is due to me including benefits for unfair dismissal and maximum compensation.*
>
> *I have diligently served the company for Fourteen (14) years where the last Three (3) years were just hell in my working life.*
>
> *Thank you.*
> *Yours faithfully*
> *(Signed Nicholas Motsa).*
> *Cc: Mark Beauchamp"* (Sic)

17. The Court points out that in his resignation letter, the Applicant omitted to list what exactly the frustrations which were forcing him to resign with immediate effect were. In his pleadings and evidence under oath though, he listed them as the polygraph test incident, his transfers from one branch to another without notice, the allegation of bad mouthing the Regional Manager – Schoeman, the issue of the consumed empty perishables containers found in the ceiling of the Mbabane branch and that of the soccer

players whom he allowed to attend as soccer match during working hours. The final issue was that of the staff credit card.

18. In effect, the evidence of the Applicant was that the ill-treatment and hostility towards him started after the arrival of Schoeman in 2008. Motsa though conceded under cross examination that in the hierarchy of the Respondent there were other officials who were above and therefore senior to Schoeman. One such official he mentioned was the Divisional Manager, a Mr. Huenlen, with whom, according to his own evidence, he (Motsa) had a warm and cordial relationship, who was responsible for the Respondent's affairs in Swaziland. However, in all the grounds he relied on in support of his case for constructive dismissal, the Applicant conceded under cross examination that he did not report any of them to either the Divisional Manager or through the Company's formal grievance procedures. In other words, he did not exhaust his rights.

19. In the ***Pinky Toi Mngadi v Conco*** case, this Court reiterated and re-emphasized that the principle in respect of constructive dismissal is that where a reasonable alternative to resignation exists, there can be no constructive dismissal. It is incumbent upon an Employee alleging constructive dismissal to prove that the Employer deliberately rendered the employment relationship intolerable and that resignation was an act of last

resort. It is considered to be opportunistic for an employee to resign out of the blue, so to speak, without even raising an issue with the employer and giving the employer the opportunity to remedy the cause of complaint, thus giving it a chance to remedy any errant ways. (See ***Albany Bakeries LTD v Van Wyk & Others (2005) 26 ILJ 2142 (LAC) para 28***).

20. In this case, the reality is that the Applicant, Nicholas Motsa, neglected and/or failed to utilize the reasonable alternatives available to him by not reporting his alleged dispute with Schoeman to higher authority or management before he resigned. In this matter, the Applicant had a remedy against the alleged ill-treatment he was subjected to by Schoeman, and this remedy was clearly not to resign and then scream constructive dismissal. Instead it was to let management know about and deal with it, not what he did. Indeed senior positions, like that occupied by Mr. Motsa, come with considerable, and in some instances, quite high levels of frustration, irritation and tension. Managers are expected to put up with 'ambiguity, conflict in relationships, power struggles, office politics and the demand for performance.' (See ***Moyo v Standard Bank of SA Ltd (2005) ILJ 563***). It has also been held that with an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. But none of all these are sufficient to make a case for constructive dismissal. Indeed the adage that constructive dismissal is not for the asking

holds true for cases that end up before our Courts such as this of the present Applicant. ***(See Jordaan v CCMA [2010] 12 BLLR 1235 (LAC) quoted in Asara Wine Estate & Hotel (Pty) Ltd v JC Van Rooyen & Others (2012) ILJ 363).***

21. Lord Denning in the ***Western Excavating*** case (1978 1 All ER 713 at 717 D-F) authoritatively stated that; 'where the Employer exhibits conduct which is in breach of the contract of employment or which shows that such employer no longer intends to be bound by such contract, the employee is bound to there and then treat himself as constructively dismissed.' At page 717 paragraph E Lord Denning stated thus; *'But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'*.

22. Now, in this matter of Nicholas Motsa, the conduct he complained of occurred between 2008 and the date of his resignation – March 2010. None of the issues or the conduct of the Schoeman he complains of were sufficiently serious for Mr. Motsa to make up his mind about leaving at once. In fact he continued working for a considerable period without even hinting to anyone in management that he was facing challenges in working

with Schoeman. By continuing to work as if nothing was bothering him and failing to raise same through the relevant company structures, he shot himself in the foot because he thereby lost his right to treat himself as constructively dismissed. Indeed the length of time between the conduct complained of and the date of resignation cannot be ignored. What the Applicant has done in this matter is to go back in history to make out a case for constructive dismissal, which the Court cannot countenance. And the Court points out as well that objectively viewed the Respondent's conduct cannot be said to been calculated to drive him away. The finding of the Court therefore is that there is no causal link between the conduct complained of by the Applicant in this matter and his ultimate decision to resign.

23. From the evidence before this Court at this stage, it would seem that the real reason behind the resignation of the Applicant was the staff credit card issue. According to Mr. Motsa, when he was served with notice to attend the disciplinary hearing he was confused. He stated under oath that he knew that he was going to be dismissed for this offence, which was going to ruin his future job prospects. Instead of going through the disciplinary process, he opted for the easy way out – he chose to resign. However, the problem he is faced with before this Court now is that the law prescribes that where an employee has the option of facing a disciplinary hearing but resigns,

there can be no talk of constructive dismissal. (See local decision of ***Glory Hlophe v Snip Trading Proprietary Limited Case No. 69/2002,*** see also ***Smithkline Beecham (Pty) Ltd v CCMA [2000] 21 ILJ 988 at 997).*** Indeed it is only logical that where an Employee is accused of any transgression, the first thing he would want to do is to exonerate themselves rather than take the easy way out of pre-emptying the outcome of the hearing and ultimately resigning. Unless he proves that the disciplinary hearing was itself a sham, which is not the case in this matter, the Court cannot come to his rescue. Instead the only reasonable conclusion the Court arrives at is that he resigned to avoid the disciplinary enquiry on the staff credit card fiasco. He second guessed the outcome of the disciplinary hearing and decided to avoid it by resigning, which is improper.

24. The test for absolution from the instance is whether there is evidence upon which a Court, applying its mind reasonably to the evidence before it, could or might find for the Applicant – not that it should or ought to. The Applicant must make out a *prima facie* case. The consideration of an absolution application is not done on the basis of simply accepting that all the testimony presented by the Applicant is true. The evidence must still be evaluated and compared to all available evidence at that stage. In this present matter therefore, the conclusion by the Court is that Nicholas Motsa has failed to provide sufficient evidence to establish a *prima facie* case that

he was constructively dismissed. The Court re-emphasizes that absolution at the close of an Applicant's case will, in the ordinary course of events, nevertheless be granted sparingly. But when the need so arises a Court should not hesitate order it in the interests of justice. This Court, in applying its mind reasonably to Mr. Motsa's own case and evidence, simply cannot conclude, at the conclusion of such evidence, that it could ultimately find in his favour, even in the absence of testimony from the Respondent. Having carefully evaluated the evidence at this stage, and further compared it to the agreed and accepted documentary evidence, as well as the pleadings, the Court is unable to find even a single reasonable inference in favour of the Applicant's case. In effect, this therefore means that the application for absolution from the instance must therefore succeed. That is the ruling of the Court.

25. On the issue of costs, while it is true that the Respondent has been successful in their application for absolution from the instance, which in effect defeats the Applicant's case, however, this Court has a broad discretion in issues of costs. Having carefully considered all the circumstances of this matter before us, we believe it to be fair and appropriate that we make no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 05th DAY OF MARCH 2015.

For the Applicant: ***Attorney Z.D. Jele (Robinson Bertram Attorneys)***
For the Respondent: ***Advocate A. Bingham (Instructed by Magagula Hlophe Attorneys)***