

ARBITRATION AWARD

Panellist: ZG Fihla

Case No: GPBC 1167/2024

Date of Award: 27 June 2025

In the ARBITRATION between:

PSA obo AJ ROOY-BRANDT

(Union / Applicant)

And

DEPARTMENT OF PREMIER- WESTERN CAPE

(Respondent)

Union/Applicant's representative: Ms AILEEN MOSETIC

Union/Applicant's address: N/A

Respondent's representative: Mrs NAIDENE BENJAMIN

Respondent's address: N/A

Telephone: N/A

Email: N/A

DETAILS OF HEARING AND REPRESENTATION

[1]

The arbitration hearing was held on 17, 18 February 2025, 22 April 2025, and 03 June 2025 at the offices of the respondent at no 4 Dorp Street Cape Town. The applicant was represented by Ms Aileen Mosetic an official from the Union PSA. Mrs Naiden Benjamin, a Labour Relations Officer represented the respondent party the Department of Premier.

ISSUE TO BE DECIDED

[2]

Whether the applicant was dismissed by the respondent in terms of Section 186 (1) (e) of Labour Relations Act 66 of 1995.

BACKGROUND TO THE MATTER

[3]

The applicant was in the employ of the respondent as of 1 March 2023, at the Western Cape Commissioner for Children's Office. On 31 May 2024 the applicant tendered his resignation which was accepted by the respondent. The applicant is alleging that the respondent made continued employment intolerable, and he suffered from mental illness hence he resigned and referred a dispute to the Council which is the subject matter. Applicant was earning a salary in the region of R 373 413 per annum.

[4]

The Applicant is seeking twelve months compensation as relief.

[5]

Summary of evidence and arguments

[6]

Although I have considered all the evidence and arguments, because section 138 (7) of the Labour Relations Act 66 of 1995 requires that the reasons for my decision be stated briefly. I shall refer only to the evidence and arguments which I regard necessary to substantiate my finding and the determination of the dispute. The parties agreed to the admission into evidence bundles A B and C of documents and that the documents are purported as what they appear to be, neither party disputed the validity of the documents.

Applicant's Case

[7]

Mr Aubrey Van Rooyen – Brandt testified he was employed by the respondent as a Children Commission Officer, at Western Cape Commissioner for Children's office since 01 March 2023. He testified that he was the only Children Commission Officer employed at the Children's Commissioner Office. He testified the office was headed by Commissioner Chirtina Nomdo, and that he was reporting to Mr Cameron Cyster. He testified his duties entailed investigating children complaints received by the office, and provide advice.

[8]

He testified his scope of work included four provincial departments, namely Department of Health, Department of Education, and Department of Social Development and the Department of Cultural affairs and Sport. He testified he would liaise with any officials of these departments when tasked with investigations relating to children complaints received by his office. Applicant testified he was called to a meeting by Commissioner Nomdo and his supervisor Cameron Cyster.

[9]

In the meeting Commissioner Nomdo informed applicant that she had a meeting the head of department of social development Dr Robert Mc Donald who told Commissioner Nomdo that he knew applicant very well and applicant must not come near close to his officials and social workers. Applicant testified he informed both Commissioner Nomdo and Cyster that he knew Dr Mc Donald as former union representative on one occasion he organised social workers to demonstrate against the former MEC of the Social Development Department.

[10]

Applicant testified he also informed Commissioner Nomdo and Cyster that Dr Robert Mc Donald's action was not in compliance with section 17 (2) of the Western Cape Commission for Children's Act 2019, which states that " No person or organ of state may body interfere with or obstruct the functioning of the Commissioner or his or her staff". Applicant testified that both Nomdo and Cyster allowed Dr Robert Mc Donald to interfere with the work of the Commission's office by instructing him not to work with officials and social workers in the department of social development.

[11]

Applicant testified the instruction given to him by Nomdo and Cyster left him shocked as he only had to work with three departments out of four provincial departments. He testified he is a social worker by training and he also holds an LLB degree, and that both Nomdo and Cyster knew his passion lies in advocating for children's rights. He testified he previously worked as a social worker at the department of social development and at the family advocate office. He testified he asked Cyster to ascertain from Dr Mc Donald if there were any disciplinary actions taken against him while he was working at his department and Cyster gave him feedback that there was no disciplinary action against him.

[12]

He testified the reason to enquire about if there were disciplinary action against him was because he holds no grudges against Dr McDonald. He testified he felt victimised , disappointed by the conduct of Nomdo and Cyster which allowed the HOD of a department to interfere with the work of the Commisison.He testified he lodged a grievance against Dr Mc Donald, he wrote an email to the national assemble and to the premier of the western cape reporting the conduct.

[13]

He testified the grievance outcome was not satisfactory because the grievance was not adequately investigated, the investigator only took Nomdo and Cyster denial that they were not instructed by Dr Mc Donald to change his duties at the Commission's office. He testified the conduct of Nomdo and Cyster led to a breakdown work relationship. He testified among other things he was denied a stipend and excluded from a work related camp which he was tasked to organise, and that his performance scoring was manipulated, probation was unjustifiably extended by Nomdo without pointing and addressing any shortcomings on his part.

[14]

He testified Cyster told him he could not sleep because he did not know how he would relate to him the decision by Nomdo to extend his probation. He testified he was removed from the work whatsapp group while he was admitted at Crystal clinic, and he was diagnosed with stress related disorder and was booked off sick from 18 to 19 March 2024. He testified Cyster delivered a letter at his home while he was booked off sick, and he emailed Cyster prior that he did not want to interact directly with any official, they should rather use emails to communicate.

[15]

He testified he was hospitalised at a mental health rehabilitation clinic from 01 to 18 May 2024, and he was later booked off sick again for a month. He testified he tendered his resignation on 31 May 2024 and left the office on 30 June 2024. He testified he is still under treatment by a psychologist and psychiatrist.

[16]

Respondent's Case

[17]

Ms Christina Nomdo testified she works as a commissioner for the children in the Western Cape, she testified her past work experience include working as an advisor to the president for national planning. She testified the Commissioner for Children which she is heading is the first to be established in South Africa. She testified her colleagues and staff have an open relationship because they never worked with each other before, and they work in a safe environment in the office and the children.

[18]

She testified applicant had disclosed in the interview that he had childhood trauma which was manageable. She testified as the commissioner she had to establish relationships with all provincial heads of departments, and that each head of department had to be approached differently. She testified she had a meeting with Dr Mc Donald the head of department for social development which she cannot disclose. She testified Mr Cameron Cyster was not part of the meeting with Dr Mc Donald, and that Cyster would only communicate with head of departments following her instruction to do so.

[19]

She testified Dr Mc Donald enquired from her if it was standard for her official to contact a non-profit organisation, and she her response was no her office has a standard operating procedure . She testified it was a matter of applicant's approach to the non- profit organisation which was a concern from Dr Mc Donald. She testified the camp which applicant organised was not compulsory and applicant was on leave and had to catch with his work bag lock as he was often absent from work.

[20]

She testified applicant was a case manager and responsible processing and capturing of cases and that he called Cyster to ask why he was excluded from the camp, and he was told to come to the camp and do his work but he refused to come. She testified applicant was very passionate about his work but had to it probably and applicant would not take constructive criticism hence his probation had to be extended in order to allow his to accustom with the office. She testified the best person to talk about applicant work performance was his direct supervisor Cyster.

[21]

She testified she knew no grievance lodged by applicant about victimisation besides his dissatisfaction about probation extension. She testified applicant was absent for 50 days in a year as he had mental health challenges and one of the reason to extend his probation. She testified she had a meeting with applicant regarding him getting assistance from employee's assistance programme EAP to deal with trauma, and Cyster would have assisted him regarding referral. She testified applicant was removed from the work whatsapp group to protect him from being concerned with sensitive cases while he was admitted at the clinic. She testified applicant was on Pillar leave which he signed for using her discretion.

[22]

Mr Cameron Cyster testified he was a direct supervisor of the applicant. He testified the head of department of social development Dr Mc Donald had requested a meeting with Ms Nomdo as the office had to establish a relationship with him. He testified after the meeting with Dr McDonald, Ms Nomdo convened a meeting with him and applicant and related to them that Dr Mc Donald had a discomfort with applicant because of their previous history.

[23]

He testified because there was no memorandum of understanding in place Ms Nomdo told applicant he was no longer required to work with officials in the social development department. He testified he had to take over applicant's duties to ensure diplomacy prevails in the relationship with social development department. He testified Ms Nomdo did not explain to the applicant the discomfort Dr Mc Donald complained about.

[24]

He testified he visited applicant while on sick leave to deliver a letter from the HR office, the letter required applicant to provide medical examination because the medical certificates he submitted contained no diagnosis. He testified prior to the visit he contacted applicant via whatsapp informing him about the visit and he was guided by the labour relations office and HR office.

[25]

He testified he was accompanied by Ms Tesla Goldsmith and assistant director in investigations and advice. He testified the visit took two minutes, applicant saw them coming, and he came thought the garage and signed and they left him.

[26]

He testified applicant was removed from the work whatsapp group while he was admitted at crystal clinic for mental health, applicant was reading the messages and he informed him he was going to be removed from the whatsapp group in order to focus on his health. He testified there were three whatsapp groups to discuss cases and the applicant was removed only from the group containing graphic sensitive and traumatic content and he remained active on the two other groups.

[27]

He testified applicant was on extended sick leave from 01 June 2024 to 30 June 2024, and he was advised by the HR office that there was no need to conduct an annual review as applicant resigned on 31 May 2024. He testified the reason to extend applicant's probation was because he was often off sick from work and his performance was not consistent. He testified he was guided by the HR office to extend the probation period exhausted the 36 days leave cycle.

[28]

He testified applicant was tasked to organise the camp, and attendance to the camp was not compulsory to the staff. He testified that at times also he would be tasked to organise an event for the office but would not automatically attend such event just because he organised it. He testified applicant called him on the first day of the camp and enquired why he was excluded from the camp, and he conveyed the message to Ms Nomdo who then said applicant should come and join them but applicant refused to come.

[29]

He testified applicant was not denied stipend to attend a week course at UCT, because he was allocated a state vehicle to attend the course.

[30]

He testified he contacted the course administrator at UCT to ascertain clarity regarding the stipend, and he was informed the R 10 000 stipend provided for 30 social workers by UCT. He testified he was further informed that the stipend was for travelling and accommodation for social workers not living around Cape Town, and applicant lives in Kuilsriver and was not eligible for the stipend.

ANALYSIS OF EVIDENCE AND ARGUMENTS

[31]

It is common cause between the parties that applicant resigned and his resignation was accepted by the respondent. Section 186 (1) (e) of the LRA provides “an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”. It is trite that an employee claiming constructive dismissal must prove that (a) He or she terminated employment, (b) because continued employment had become intolerable, (c) and that the circumstances that rendered continued employment intolerable were of the employer’s making.

[32]

In this matter what appears to be a central or nodal point of departure is the allegation made by applicant, relating to interference by the head of department of social services and development department to the functioning of the office children’s commission. The respondent vehemently refutes that the head of department uttered these words to Ms Nomdo “I know him too well he must come to my social workers”. What the respondent is not disputing a fact that the head of department had a discomfort with applicant because of their history. It is also the respondent’s evidence that it had to change applicant’s way of working by instructing him not to contact any officials of the social development department. The applicant’s supervisor Cyster had to take over his duties to maintain diplomacy with social development HOD.

[33]

In grappling with the allegation of interference by the HOD, it would seem the pertinent question to ask is whether the maintenance of diplomacy is consistent with Western Cape Commissioner for Children Act 2 of 2019. In paragraph 17 of the Act under the heading “Functioning of Commissioner” it states (1) Other provincial organs of state must assist the Commissioner to ensure the independence, impartiality, dignity and effectiveness of the Office of the Commissioner. (2) No person or organ of state may interfere with or obstruct the functioning of the Commissioner or his or her staff.

[34]

The evidence which is not disputed by the respondent is that the reason for decision to instruct applicant not to contact officials at social development department was because of the discomfort felt by the HOD. At this juncture one is at pains on how both Nomdo and Cyster could not see through the cotton wool, that the discomfort felt by the HOD amounted to interference with the functioning of their office.

[35]

I say this because the discomfort complained of by the HOD flows from the performance of showteward duties by applicant, when he organised social workers to demonstrate at the department of social services and development which led to the dismissal of then MEC. The respondent did not even try to challenge this part of evidence tendered by applicant. Furthermore Cyster accepted applicant’s email citing personal issued the HOD had with him, Cyster merely thanked applicant for his insight.

[36]

It matters not in what form the HOD narrated his discomfort, the fact of the matter both Nomdo and Cyster yielded to his interference in term of the functioning of their office.

[37]

Had there been no meeting with the HOD, the HOD would not have known about applicant's appointment in the commission office, and applicant would have continued to maintain contacts with officials at the department of social services and development, but Ms Nomdo was bound to contact departmental HOD's to establish relationships.

[38]

It cannot be accepted that establishment and maintenance of relationships with other organs of state should comprise the independence of children's commission office. The CCMA maintains relationships with organised labour and business and employer organisations, but the commissioners appointed by the CCMA to adjudicate disputes between organised labour, business and employer organisations are expected to maintain their independence in line with the requirements of LRA, it matters not who appear before them.

[39]

Similarly if institutional independence is not preserved or not jealously guarded upon, the NPA, Judiciary, chapter nine institutions and so on would not be functional by now. It suffices not to say any more about institutional independence so as to not bombard the award with case laws relevant to it. The evidence led by the respondent relating to applicants mental illness is that, the applicant had disclosed his childhood trauma during the second interview with Ms Nomdo. Furthermore in cross examination Cyter's evidence was that applicant had a financial problem and his was once allocated a state vehicle as his car needed repairs, and was going dealing with post-divorce matters which were stressful.

[40]

This evidence by both Ms Nomdo and Cyter is not corroborated by any medical evidence, even during the period when applicant was admitted at Crystal Clinic.

[41]

It is nowhere to be found that applicant suffered mental illness due to childhood trauma, divorce, and financial problems. The irony in terms of evidence tendered by applicant from his treating doctors is that the stress he suffered resulted from his work. The applicant's medical report written by a psychiatrist states that applicant have no previous history of psychiatric treatment and his depression is directly related to stressful circumstances at his workplace.

[42]

In response to this medical finding Cyster stated under cross examination that did not come to applicant's work place to inspect the circumstances he based his finding on. In my little knowledge when the medical report from a medical professional is questionable for whatever reason by the employer. The employer ought to have referred an employee for second medical opinion which would encompass medical examination by another medical professional on the same field in order to compare medical findings relating to both diagnosis and prognosis.

[43]

In the matter between Sanlam Life Insurance Limited vs. Nkosinathi Magomatsi and others, case no CA12/2022 the Labour Appeal Court held at paragraph 32, 33. "In constructive dismissal disputes, a two stage approach is normally followed. First the employee must prove the employer effectively him or her by making her or his continued employment intolerable.

[44]

It is an objective test. The employee need not prove he had no choice but to resign, all that is required is to prove that the employer made continued employment intolerable.

[45]

The conduct of the employer towards the employee and the cumulative impact thereof must be of such that, viewed objectively the employee could not reasonable be expected to cope with it. Second after the dismissal had been established, the court will then evaluate whether the dismissal was unfair. The two stages may overlap and be interrelated. I agree with the court a quo that mental ill health may be a justifiable reason to terminate an employment relationship, provided it is done fairly. However is irrelevant for present purposes. Here the dispute is not an unfair dismissal in the conventional sense, relating to conduct or capacity, but a constructive dismissal.

[46]

To prove a constructive dismissal, the facts of the case must point to the employer having been aware or ought to have been aware of the mental distress of the employee. If an employer is aware of an employee's psychiatric illness and the employer is indifferent or insensitive with regard to the employee's mental illness or vulnerability and thereby making continued employment intolerable a proper case for constructive dismissal might be established".

[47]

The respondent averred that it supported applicant's mental health which means it was aware of it, on the other hand it says applicant had a pre conceived mental health condition. This stance by the respondent is not supported by medical evidence and it's insensitive, in other words the respondent is blowing hot and cold.

[48]

It is the respondent evidence that it removed applicant from the whatsapp group containing sensitive and graphic content, while he was admitted at crystal clinic because it wanted him to focus on his recovery.

[49]

This shows that the respondent was acutely aware of applicant's mental illness before he resigned. It is further corroborated by the evidence relating exhaustion of 36 days sick leave, and by the evidence of Nomdo that she used her discretion to support pillar application to extend applicant's sick leave. It is worth noting the conclusion on prognosis written by the psychiatrist Dr Chris George, which states "In my opinion, if his problems at work can be resolved, Mr Van Rooyen Brandt's psychiatric condition is unlikely to influence his future fitness to function in role as Children Commissioner Officer".

[50]

In the Sanlam matter referred to somewhere in the award, the labour appeal court considered the medical evidence let at arbitration by employee claiming constructive dismissal and the link thereof. It dismissed the appeal on the basis that there was no medical evidence linking the employer as the source of employees mental ill health. In this matter the medical evidence linking employer as the source of mental illness is chilling for the lack of a better word.

[51]

In *Strategic Liquors Services vs Mvumbi and Others*, Case no: CCT 33/09 [2009] ZACC 17, the Constitutional Court held at paragraph 4 that "There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason anyhow. This means there was no "choice". The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable".

[52]

In this matter the respondent's contested evidence in relation to applicant's medical mental illness is not supported by any cogent evidence. At this juncture it would seem superfluous to make findings to each every piece of evidence tendered, such as denial of UCT stipend, unwanted home visit, and performance scoring and probation extension. I say this because the applicant has successfully discharged the required onus to prove intolerability in terms of constructive dismissal.

[53]

In circumstances when the hyena is the prosecutor, the wolf is the witness, the jackal is a defence lawyer and the leopard is the judge, there are no prospects that a goat would get justice thus role all players are carnivorous.

[54]

AWARD:

The respondent, Department of Premier is ordered to pay applicant compensation equivalent to 12 months, calculated at his basic salary less statutory deductions. Basic Salary R 376 413 divide by twelve months equals to $R\ 31\ 367.75 \times 12 = R\ 376\ 413$. The respondent is further ordered to make such payment before 31 July 2025 to the applicant.

Name: Zukile Fihla.

(GPSSBC) Arbitrator.

