REPORTABLE

CASE NO: LCA 26/2011

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

MIKE RATOVENI K KAVEKOTORA **APPELLANT**

and

TRANSNAMIB HOLDINGS LIMITED **1ST RESPONDENT**

LABOUR COMMISSIONER **2ND RESPONDENT**

CORAM: **SMUTS, J**

Heard on: 20 January 2012

Delivered on: 3 February 2012

JUDGMENT

SMUTS, J

[1] This is an appeal against an arbitrator's dismissal of the

appellant's unfair dismissal complaint. The arbitrator essentially found that the appellant had not been dismissed and had in fact resigned from his employment with the first respondent.

[2] Many of the facts which gave rise to the complaint are common cause. The appellant was employed as General Manager: Marketing and Sales of the first respondent, a large parastatal, at remuneration of N$728,000.00 per annum. He was appointed to this position on 18 April 2008 for a period of 5 years pursuant to an employment agreement between the parties.

[3] On 14 September 2009 the appellant addressed a written request to the Chief Executive Officer of the first respondent. In it, he requested that he be granted unpaid leave for 2 months as he had accepted nomination as a candidate in the forthcoming national elections for the National Assembly of the Republic of Namibia. The appellant further stated in this request that if he were to be successful in his quest for election, he would relinquish his position with the first respondent but would wish to return to his position after the 2 month period of unpaid leave should his efforts prove to be futile.

[4]

[5] The Chief Executive Officer responded to the request for unpaid leave on 14 September 2009. He stated that it had been discussed by the first respondent's Board on the previous day and that the Board had resolved that clarification should be obtained from the appellant

as to whether he had accepted nomination for election to the National Assembly and whether he was aware of Transnamib Policy SPIA1025 dealing with Transnamib employees accepting candidacy as public office bearers and requesting an urgent response from the appellant. The policy was attached. It was on a heading of Transnamib Limited and provided that whenever an employee is either appointed to fill a seat in the National Assembly or has accepted nomination as a candidate for election to the National Assembly, that employee would be deemed to have resigned from the employ of Transnamib with effect from the date of such appointment or acceptance of such nomination.

[6]

[7] The appellant responded to this enquiry and confirmed that he had accepted nomination as a candidate for election to the National Assembly. He also stated that he had read the attached policy, SPIA1025, and expressed the view that it did not apply to him. This he explained in the following terms:

> *"A cursory look at my employment contract signed on April 18, 2008 indicates that the SPIA1025 was never incorporated into my contract of employment. If Transnamib so intended it should have done so as it did with the grievance and disciplinary procedure in clause 12 of the employment contract."*

[8] He concluded:

> *"In the light of the above, I submit that I do not need to resign and am hereby reiterating my application for unpaid leave.*
>
> *I reserve all my rights herein."*

[9] Significantly the appellant referred to his employment with Transnamib, even though his contract of employment is with the respondent, Transnamib Holdings Limited.

[10]

[11] The Chief Executive Officer responded to this letter on 5 October 2009. He referred to the Policy SPIA1025 and quoted the relevant portion to the effect that upon nomination as a candidate or appointment to the National Assembly, an employee is deemed to have resigned from his / her employ with Transnamib. The Chief Executive Officer proceeded to point out that the appellant's employment contract in clauses 2 and 19 indicated that the policy applied to him. The letter further stated:

- *"You are therefore considered to have resigned from the employment of Transnamib Holdings (Ltd) effective from 25 September 2009, which nullifies your request for unpaid leave.*

- *The company accepts your resignation effective 25 September 2009.*

- *You will be entitled to your 3 (three) months notice payment and any other further benefit as calculated by the Human Resource Office.*

Kindly ensure that all company properties as provided for in clause 17 of your contract of employment in your possession are returned to the company by close of business on 7 October 2009.

Allow me to thank you for the contribution you have made to Transnamib Holdings Ltd in your role at GM: Marketing and Sales, and wish you all the success in your future endeavours."

[12] Clause 2 of the employment contract provided:

"The parties agree that all the terms and conditions of employment are:

2.1 *specified in this agreement; and*

2.2 *those conditions of employment not specified in this agreement shall be in terms of the Employer's Rules,*

Regulations and Procedures and the Labour Act, Act No 6 of 1992 or as amended from time to time."

[13] Clause 19.1.1 of the agreement, also referred to in the Chief Executive Officer's letter, provided:

"It is agreed that the employee will, upon assumption of duty, acquaint himself with the remaining rules of employment not covered in this agreement, but equally applicable to all Transnamib Holdings Ltd staff members."

[14] The employment contract thus contemplated that there were further rules of employment not expressly referred to or specified in the agreement and which were applicable to the first respondent's employees.

[15]

[16] The appellant's application for unpaid leave having thus been turned down, he proceeded to campaign for election. Unfortunately for him, he was unsuccessful in his bid for election to public office. Although not fully canvassed in the proceedings or the pleadings, I enquired as to whether the appellant had tendered his services after receipt of the Chief Executive Officer's letter of 5 October 2009 and the response on his behalf was in the negative. The appellant instead proceeded to file an unfair dismissal complaint in January 2010, contending that he had been unfairly dismissed and claimed

reinstatement alternatively remuneration for the remaining duration of his contract in a sum exceeding N$2,2 million and costs. In both his particulars of complaint and in his evidence, the appellant claimed that he had been constructively dismissed. He contended that SPIA1025 did not apply to his employment relationship with the first respondent.

[17]

[18] In the alternative, he claimed in his particulars of claim that SPIA1025 had been superseded by a different policy which had applied to one of the first respondent's subsidiaries prior to the restructuring of the first respondent which had resulted in the subsidiaries becoming dormant companies and the first respondent taking over all of their operations. This alternative basis was not relied upon when he gave evidence in the arbitration proceedings.

[19]

[20] The appellant's claim instead shifted to claiming that the then Chief Executive Office of the first respondent Dr P. Shipoh had not been authorised to apply SPIA1025 to employees of the first respondent when the restructuring and amalgamation of the operations had occurred under the first respondent.

[21] There was reference to a circular which had been issued by the then Chief Executive Officer of the first respondent on 3 February 2000, more than 8 years before the appellant had entered into the employ of the first respondent. This circular was addressed to senior

managers and managers and was entitled “validity and interpretation of SPIs”. It stated the following:

> *“During the process of consolidating the management structures and operations of the subsidiary companies into Transnamib Holdings Ltd the following guidelines will apply to the application of Standard Practice Instructions (SPIs) in the company:-*
>
> 1. *Validity of SPIs*
>
> *Transnamib Holdings Ltd adopted all Transnamib Ltd SPIs at the time of its transition from Transnamib Ltd to Transnamib Holdings Ltd on 1 April 1999. Unless superseded by a later amendment approved by the Chief Executive Officer these SPIs remain valid and in force.”*

[22] The circular then referred to certain specific SPIs of the subsidiary, TransNamib Transport (Pty) Ltd which were adopted and then stated that all other SPI’s of Transnamib Transport (Pty) Ltd would no longer be valid.

[23] The circular also referred to the new job titles which had been introduced to the management structure and set out certain delegated authorities for management at different levels.

[24] The appellant during the arbitration contended that this circular had not been authorised by the first respondent's Board at the time the then Chief Executive Officer had issued it. He contended as a consequence that SPIA1025 was invalid and a nullity and did not apply to him.

[25] The appellant accepted that he had not been employed by Transnamib Ltd but by its successor, Transnamib Holdings Ltd. It was also not disputed that the subsidiary companies no longer operated after the amalgamation and restructuring which had occurred in 1999 / 2000 and that all of their operations were conducted under the first respondent in these proceedings and the appellant's employer. The appellant also did not dispute that the consolidation resulted in the rights, benefits and conditions of employment of employees of Transnamib and the subsidiaries being taken over by the first respondent. The appellant did not call any other witnesses.

[26]

[27] The first respondent called 2 witnesses. There was firstly its General Manager: Human Resources and Administration, Mr Albertus Naruseb. He testified that if the appellant had decided not to proceed with his candidacy, he would have remained in the employ of the first respondent. He also referred to the circular of April 2000 as providing for the continuation of employment conditions for employees of Transnamib Ltd and the continuity of the employ of

employees of the subsidiaries, subject to adjustments to certain conditions. He also testified that two other employees had also applied for unpaid leave at about the same time as the appellant for the same purpose (of running for national office). After these employees had been referred to the same policy, SPIA1025, they had elected not to run for office but rather to continue their employment with the first respondent. His evidence in that regard was unchallenged.

[28] The erstwhile Chief Executive Officer of the first respondent, Dr P Shipoh, also testified for the first respondent. He referred to his circular of April 2000 and explained it in the context of the restructuring and consolidation of the operations which had previously been conducted by the first respondent's predecessor and some subsidiaries which were thereafter consolidated under the first respondent. He oversaw that process. He was questioned about the continuation of SPIs after the consolidation and amalgamation and he referred to his circular. He further stated that he was authorised at the time to issue that circular which thus provided for the continuation of conditions of employment for employees of what was formerly TransNamib Limited and its subsidiaries with Transnamib Holdings Ltd which took over such employees. He was repeatedly asked in cross-examination as to whether he could provide a resolution which authorised him to issue and send out the circular. He was thus unable to refer to one but repeatedly reiterated that he was authorised to do

so. He was unable to pinpoint a specific resolution passed some 10 years before but expressly stated that he was authorised to have issued the memorandum in question. He reiterated that he, in his erstwhile position gave effect to the overall restructuring by informing employees of their transfer with the retention of employment conditions and benefits to the first respondent.

[29] Despite the fact that the appellant's representative in the course of those proceedings would appear to have accepted that the memorandum or circular was giving effect to the transfer of employees from the 3 entities the first respondent, the appellant's representative contended that the circular stating that the SPIs would continue to apply to employees was not authorised and that it was invalid on the grounds of the Chief Executive Officer having exceeded his authority. That was essentially the appellant's case, namely that SPIA1025 was invalid *vis a vis* the appellant and that he had been constructively dismissed as a consequence.

[30]

[31] The arbitrator in this instance was the Labour Commissioner. He found that the appellant had not established that he had been constructively dismissed and he dismissed the appellant's complaint.

[32]

[33] The approach of the appellant would seem to me to be flawed in a number of different respects. Firstly, the contention that the circular of Dr Shipoh was unauthorised and was invalid because he

exceeded his authority, would not seem to me to be sound. This is quite apart from the fact that this was not the basis set out in the appellant's letter to the first respondent in contending that the policy did not apply to him. His basis then was that it had not been expressly included in his employment contract, unlike the reference to the disciplinary and grievance procedure to which there was express reference. Therefore, he said it did not apply to him. That approach was correctly not persisted with subsequently, given clauses 2 and 19 of the contract which referred to a further range of employment rules and the like which were not included in the employment contract but which would also apply to the appellant's employment with the first respondent.

[34] On the issue of the authorisation of the circular to management, the appellant, some 10 years later, contends that it is invalid because the signatory, the erstwhile Chief Executive Officer at the time is not able to pinpoint a resolution which specifically authorised it. This resort to formalism, quite apart from the other difficulties with the appellant's case which I refer to below, does not in my view avail him. The appellant had in the course of the proceedings, accepted that there had been a restructuring of 3 entities, namely Transnamib Ltd and its subsidiaries, Transnamib Property and Transnamib Transport. Their operations were then consolidated and amalgamated into the first respondent with the subsidiary companies then becoming dormant. This exercise

preceded his employment by more than eight years.

[35]

[36] The appellant did not question whether that the restructuring and amalgamation was or was not authorised. Having correctly not done so, I fail to see a basis upon which he could question the authority of the erstwhile Chief Executive Officer of Transnamib Ltd and thereafter Transnamib Holdings Ltd to have informed employees concerning the continuation of their conditions of employment and employment benefits. Once it is accepted that the entities were restructured and the employment of employees taken over by the first respondent, it would in my view follow that the employment conditions and benefits would continue to apply unless otherwise stated. It would seem to me that the erstwhile Chief Executive Officer would have been authorised to have sent such a circular. When he gave evidence, he confirmed that. The fact that he could not pin point a resolution which expressly authorised this would not in my view assist the appellant. Once employees were so transferred and their conditions of employment continued, a chief executive officer would plainly be authorised to inform them.

[37] But there is a further difficultly which faces the appellant in this regard. When he applied for unpaid leave, the current Chief Executive Officer informed him that the Board had resolved to enquire whether the appellant was aware of SPIA1025 which applied to the position of employees running for national office. The Board thus in any event by

resolving to direct the Chief Executive Officer to make that enquiry clearly accepted the application of that policy to its employees when accepting nomination to run for election to the National Assembly. Even if there were to be any substance in the point that the circular was not at the time authorised, which in my view was not even remotely established, then the Board by directing its enquiry, accepted its application as a the policy in respect of its employees. It thus enjoyed the Board's authority.

[38]

[39] More fundamentally however, the appellant did not establish that he had been constructively dismissed in the circumstances. He had the onus to do so. This Court has followed South African authority which in turn had adopted employer induced termination as a species of dismissal. [1] This concept was eloquently explained by Cameron JA in the South African Supreme Court of Appeal in the following way: [2]

> *"[8] … In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South*

[1] Cymot (Pty) Ltd v McLoud 2002 NR 391 (LC) at 393, following Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC) at 638B which in turn cited English authority.

[2] Murray v Minister of Defence 2009 (3) SA 130 (SCA) at par [8]

African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal."

And:

"[12] In detailing this right, the parties freely invoked the carefully considered jurisprudence the labour courts have evolved in dealing with unfair employer-instigated resignations under the labour relations legislation of the past three decades. These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a

manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[13] It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances 'must have been of the employer's making'. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed. 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." [3]

[40] This approach of Cameron JA was recently reaffirmed by the South African Constitutional Court. [4]

[41] The appellant in this matter applied for unpaid leave for 2 months for the purpose of fighting an election. His application was essentially turned down on the basis of the first respondent's policy to the effect that employees who wished to do so would need to resign and that unpaid leave would not be granted for that purpose.

[42] The appellant did not challenge or even question that policy on the basis of any incompatibility with Article 17 of the Constitution or on grounds of unfairness but instead contended that it did not apply to him. (I express no view as to whether it would necessarily conflict with Article 17 of the Constitution, even though the first respondent is a parastatal and appellant occupied a senior position within that parastatal, and expressly leave that question open.) The appellant was thus alive to the terms of the policy provided to him at the instance of the first respondent's board, which stated that unpaid leave for that purpose would not be granted and that employees who did not render their services on the basis of accepting a nomination for the purpose of running for an election to the National Assembly

[3] *Supra* par [12] and [13]

[4] Strategic Liquor Services v Mvumbi N.O. 2010 (2) SA 92 (CC) at 94

are thus deemed to have resigned. The appellant was thus placed before an election to either proceed with his nomination and be deemed to have resigned or withdraw and continue his employment. He elected to proceed with his nomination and is bound by that election.

[43] In this context, there is the evidence of Mr Naruseb. It was not controverted that the other employees had also sought unpaid leave for the purpose of running for office in that same election but when apprised of the policy embodied in SPIA1025, had rather elected to continue their employment.

[44] It cannot thus be said that the first respondent had engaged in conduct which rendered the further employment of the appellant intolerable. It had relied upon a policy which it had applied to other employees. The first respondent was thus not culpably responsible for the appellant's resignation in the sense explained by Cameron JA.

[45] The arbitrator was in my view accordingly correct in finding that the appellant had not discharged the onus to establish that he had been constructively dismissed in the circumstances. It follows that the appeal is dismissed.

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SMUTS, J

ON BEHALF OF APPELLANT	G Hinda
Instructed by:	Hengari, Kangueehi & Kavendjii Incorporated
ON BEHALF 1ST RESPONDENT	S Shikongo
Instructed by:	Shikongo Law Chambers