REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D62/09

In the matter between:

INDIRA KRISHNA **Applicant**

and

UNIVERSITY OF KWAZULU NATAL **Respondent**

Heard: **24 to 28 October 2011**

Delivered: **January 2012**

Summary: **Applicant alleging unfair dismissal for operational reasons; failing to establish that she was dismissed.**

JUDGMENT

GUSH J

[1] The applicant in this matter was employed by the respondent in July 1990 in the capacity of an assistant administrative officer in the Department of Microbiology which was part of the respondent's School of Medicine. The Department of Microbiology included state laboratory services which were operated by the respondent on behalf of the Department of Health. At all times during her employment by the respondent the applicant's salary was subvented by the Department of Health.

[2] Pursuant to a decision to establish a single national public health laboratory service, the National Health Laboratory Service (NHLS) Act was promulgated. This required the transfer of the laboratory service which had been operated by the respondent on behalf of the Department of Health to the newly established National Health Laboratory Service (NHLS). During 2007, in accordance with the NHLS Act, the respondent commenced consultations with staff members employed in its Department of Microbiology with a view to their transfer to the NHLS along with the laboratory service.

[3] The applicant, being such an employee, was one of the employees who were consulted. The consultation process culminated in August 2007 when the applicant signed a document which reads as follows:

'University KwaZulu-Natal/

National Health Laboratory Service

I, Indira Krishna, 6804000125089 ID number advised that with effect from September 2007 I wish to transfer to the employment of and the conditions of service of the National health laboratory service (NHLS)

and was duly transferred to the NHLS with effect from 1 September 2007.'

[4] On 12 September 2008, the applicant referred a dispute to the CCMA in which referral the applicant alleged that a dispute concerning her unfair dismissal had arisen on 1 September 2007 (the date on which the transfer took place). The applicant described her dismissal as being 'dismissal based on operational requirement resulting in applicant being transferred to a new employer. Applicant now aware that her post is not made redundant and has been advertised'.

[5] This dispute was conciliated and a certificate of non resolution issued. Pursuant to this certificate, the applicant referred this dispute to this Court. In her statement of case, the applicant sought 'the restoration on the same terms and conditions of employment no less favourable to those enjoyed by the applicant prior to 1 September 2007' (sic) or put more simply: on the strength of the averment that the applicant had been unfairly dismissed the applicant

applied to be to be reinstated in the employ of the respondent. The applicant described her cause of action as follows:

'The applicant contends that the transfer was both substantively and procedurally unfair in that:

22.1 there was no valid reason therefore;

22.2 it was presented to the applicant as a fait accompli*;*

22.3 the respondent was actuated by ulterior motives and/or reasons;

22.4 the respondent, told the applicant to transfer on paying of an operational termination when in reality the respondent knew that it intended to replace the applicant as soon as she vacated her position (sic) '[1]

[6] In response to the applicant's statement of claim, the respondent opposed the applicant's application on the merits and averred that the Court did not have jurisdiction to hear the matter. The averment regarding jurisdiction was based on two issues raised in *limine* which it referred to as 'special pleas'. The essence of the two issues or 'special pleas' was:

6.1 Firstly a denial by the respondent that it had dismissed the applicant. The respondent pleaded that the applicant had been transferred to the NHLS consequent upon the transfer of the laboratory service as a going concern in accordance with the provisions of section 197 of the LRA and therefore not only had the applicant not been dismissed but that specifically there was no retrenchment nor had the respondent implemented any retrenchment procedures in respect of the laboratory staff who had been transferred to the NHLS; and

6.2 Secondly that the transfer had taken effect after a series of consultations following which the applicant had signed a consent to be transferred and that accordingly the applicant had not been dismissed and that there was no "employment relationship"

[1] Statement of claim paragraphs 22 and 23 pages 12 and 13 of the indexed pleadings.

between the applicant and respondent which could give rise to a claim for unfair dismissal .

[7] Immediately before the matter commenced, the parties filed a further pre-trial conference minute which recorded the primary matters in dispute as being:

7.1 'The applicant maintains that she was not transferred in terms of section 197 of the Labour Relations Act.

7.2 The applicant contends that the post did not become redundant.

7.3 Whether Anita Pillay was employed in the applicant's post or in a new post.

7.4 The respondent maintains that a transfer of the applicant took place in terms of section 197.

7.5 Whether the dismissal alleged by the applicant was unfair.'

[8] The parties agreed that the applicant bore the onus to establish a dismissal and that the respondent bore the onus of establishing its so-called 'special pleas'.

[9] The issues raised by the respondent in *limine* were neither special pleas nor properly points in *limine*. The basis of the so-called points in *limine* or special pleas was that the respondent:

9.1 Firstly placed in dispute the existence of a dismissal which simply had the effect of requiring the applicant to establish the existence of the dismissal[2]; and

9.2 Secondly that a transfer effected in accordance with the provisions of section 197 of the Labour Relations Act (LRA),[3] does not constitute a dismissal as defined by the LRA.

[10] The intention of behind section 197 is to preserve the employment contract and to provide for its transfer in specific circumstances. The transfer of a contract of employment pursuant to transfer of a business does not terminate the contract of employment and accordingly cannot be a dismissal.

[2] See section 192 of the LRA.
[3] Act 66 of 1995.

[11] Section 197 specifically records that the consequences of a consequential transfer of a contract of employment where a the transfer of a business or part thereof takes place thereof are as follows:

'(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.'[4]

[12] The applicant having referred the dispute as an unfair dismissal and the as the respondent denied that the applicant was dismissed the onus as provided for in section 192 of the LRA applies. And the applicant had to establish the existence of a dismissal. The provisions of section 192 of the LRA reads as follows:

'Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

[13] Accordingly, therefore, the parties in their pre-trial minute correctly agreed that the applicant bore the onus to first establish that she had been dismissed.

[4] Section 197 (2) (a)-(d) of the LRA.

[14] As regard the Court's power to hear the matter, in light of the provisions of section 158(2)[5] of the LRA, (as opposed to the CCMA) Counsel appearing for the applicant, both at the commencement of the trial and on a number of occasions during the trial, confirmed that it was the applicant's case that she had been dismissed for operational reasons[6]. Mr Manikam repeatedly confirmed that the applicant's claim was based on the submission that the applicant's dismissal was for operational reasons which he was at pains to describe as a 'dismissal in the guise of a transfer'. It was, he somewhat startlingly explained, the applicant's case that 'the applicant had agreed to the transfer in order to avoid her dismissal for operational reasons and that therefore the transfer constituted a dismissal for operational reasons'

[15] Only the applicant gave evidence. Despite the crisp nature of the dispute viz. that in order to succeed, applicant had to establish that not only had she been dismissed by the respondent but that her dismissal was for operational reasons. The evidence of the applicant was largely irrelevant as were many of the vast number of documents handed in by both parties.

[16] The applicant's evidence concentrated largely on the situation that prevailed in the respondent's Department of Microbiology and the relationships between her and various members of the Department where she performed her duties and the duties performed by the various members of staff which existed prior to the consultations which culminated in her consenting to be transferred. None of this evidence was relevant to the issue in question.

[17] The applicant confirmed that the respondent had consulted with staff members regarding the transfer of the laboratory service from the respondent to the NHLS prior to the actual transfer taking place.

[18] The applicant explained that the respondent had applied a number of criteria to determine which staff should be transferred with the laboratory

[5] Section 158(2) provides that if at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may-

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.

[6] See section 189 read with section 191(5)(b)(ii) and (12) of the LRA.

service. The criteria included identifying those staff members whose salaries were subvented by the Department of Health and the amount of time the staff member spent on laboratory service work as opposed to university work.

[19] It was the applicant's evidence that she spent more time on university work than laboratory work and that it was her subordinate who performed more laboratory work. She conceded however firstly that she was aware of the fact that her post was entirely subvented by the Department of Health and secondly that while her subordinate performed work for the laboratories she was ultimately responsible for the work her subordinate performed.

[20] What was crucial was that during her evidence, the applicant on more than one occasion confirmed that she had consented to be transferred in order to avoid being retrenched (dismissed based on operational requirements[7]).

[21] Unfortunately, the applicant's own evidence established beyond any shadow of doubt that she had not only been transferred in accordance with the provisions of section 197 when the laboratory service was transferred but that she had agreed to this transfer as an alternative to her possible dismissal for operational reasons should she not have been transferred.

[22] The applicant suggested that she had been coerced into agreeing to be transferred. It was the applicant's evidence that she had agreed to be transferred in the face of a threat that she would be dismissed for operational reasons if she did not agree. The applicant's evidence was that the following documents, which formed part of her bundle, constituted the threat that forced her to consent to being transferred:

22.1 The minutes of a meeting held on 2 July 2007 conducted by respondent's director labour relations, human resources, Mr. Paul Finden, and attended by the applicant. This document recorded that the business operation of the laboratory service was to be transferred from the respondent to the NHLS. The staff were advised that they would be requested to exercise their choice as to whether they wished to transfer to the NHLS and to consider

[7] Section 189 LRA

this decision very carefully. They were advised that if they chose not to transfer to the NHLS and if the respondents could not find alternative employment for them the respondents would have to consider the possible termination of employment or operational grounds. The staff were advised that the NHLS was offering continued employment which was a genuine alternative to the possibility of a retrenchment; and

22.2 a letter sent by e-mail from Mr Finden dated 13 August 2007. This letter reads:

'I did explain in detail, clearly and succinctly to all the staff concerned that we could not create posts for them in UKZN, that if they elected not to be transferred that we would have to immediately serve them with notice of possible termination of employment for operational reasons. The UKZN would then enter into a consultation process with them in terms of section 189 of the LRA, determining inter alia, if a genuine alternative existed for their placement within UKZN. If not they ran the risk of having their employment services terminated. Therefore, one would have to look at posts available within an operationally possible timeframe for the UKZN. A genuine alternative can only be a vacant established post with the necessary funding.'

[23] By no stretch of the imagination can these documents be deemed to constitute a threat. They did no more than advise the applicant of the possible consequences should she not be transferred. In fact by doing the respondent did nothing less than would be expected of an employer in such circumstances.

[24] Little of the applicant's extensive evidence inter alia concerning the various staff employed in the Department of Microbiology and their respective responsibilities was of relevance to the cardinal issue viz whether the applicant was dismissed by the respondent or whether she consented to the transfer to the NHLS.

[25] It was incumbent upon the applicant not only to establish the existence of her dismissal but that she had been dismissed for operational reasons. She did neither.

[26] At the conclusion of the applicant's evidence, the applicant called no further evidence and closed her case. Unsurprisingly, the respondent indicated that it did not intend calling any witnesses and too closed its case.

[27] It was clear from the evidence of the applicant that she had previously referred a dispute with the NHLS, as her employer, to the CCMA but had elected not to pursue this dispute. It was also the applicant's evidence that the referral of this dispute citing the respondent as the employer who had dismissed her was precipitated by her becoming aware of an advertisement published by the respondent in 2008 for the position of administrative officer in the respondent's Department of Microbiology a position similar to that she had occupied at the time the laboratory service was transferred to the NHLS. The applicant indicated that she regarded this as being 'her post' and that it was the act of advertising this post that established that she had been unfairly retrenched. What clearly escaped the applicant (and her counsel) was firstly and most importantly that she had consented to her transfer. She had clearly not been dismissed for reasons based on operational requirements or at all.

[28] It was clear from the applicant's evidence that she was unhappy that she had been transferred to the NHLS. Her evidence however did not establish that she was dismissed let alone dismissed for operational reasons. Despite her evidence, the applicant's counsel remained adamant at all times that the applicant had been dismissed 'dismissal in the guise of a transfer' and that it was an operational reasons dismissal and not a transfer or even a constructive dismissal. .

[29] Having failed to establish that she was dismissed, the applicant's claim cannot succeed and falls to be dismissed.

[30] As regards costs, it is just and equitable, taking into account the fact that the applicant was transferred to the NHLS on 1 September 2007, ceased to be employed by the respondent from that date, continues to be employed by the NHLS; the nature of the applicant's claim; and the extensive delays in bringing this action that the applicant pay the respondent's costs.

[31] In the circumstances, I make the following order

The applicant's claim is dismissed with costs.

_____

D H Gush

Judge

APPEARANCES

APPLICANT:	Advocate M Manikam
	Instructed by T Giyapersad and Associates
RESPONDENT:	Advocate S Govender SC
	Assisted by Advocate D Pillay
	Instructed by Pillay Nichols and Hlalane