IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA 12/13

In the matter between:

NATIONAL HEALTH LABORATORY SERVICE **Appellant**

and

MANDISA YONA **First Respondent**

FEIZAL FATAAR N.O. **Second Respondent**

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

Heard: **26 February 2015**

Delivered: **12 May 2015**

Summary: Constructive dismissal – employee's subordinate appointed in an acting position for which employee previously acted on a number of times – as a result employee suffering from severe depression and generalised anxiety disorder – employee booked off sick – employer forming the view that employee not communicating about her absence – evidence showing employee submitting leave forms for every absence – employee exhausting her sick leave cycle – employer advising employee to apply for temporary incapacity leave – application for temporary incapacity leave dismissed – employer considering employee's absence as unpaid leave – employee resigning and alleging constructive dismissal – commissioner finding that employee constructively dismissed. Appeal - principle that *onus* on employee

to prove that employer rendering employment relationship intolerable restated - evidence showing that employer through its HR Manager failed to advise employee to apply for extended sick leave benefits – employer failing to accord fair and compassionate treatment to employee at the time of desperate need when she was suffering from a severe work-related mental illness – decision to enforce employee's absence as unpaid leave unfair – employer's conduct rendering the employment relationship unbearable – employee constructively dismissed - commissioner's decision falling within the ban of reasonableness – Labour Court's judgment upheld – Appeal dismissed with costs.

Coram: Waglay JP, Ndlovu *et* Landman JJA

JUDGMENT

NDLOVU JA

[1] This appeal is against the judgment of the Labour Court (Lallie J) in which the Court a *quo* dismissed with costs the review application launched by the appellant against the arbitration award issued by the second respondent (the commissioner), acting under the auspices of the third respondent (the CCMA), concerning disputes of the commission of unfair labour practice (relating to non-promotion) and constructive dismissal.

[2] In his award, the commissioner found in favour of the appellant on the unfair labour practice dispute and in favour of the first respondent (Ms Yona) on the constructive dismissal dispute. Hence the appellant launched a review application against the award only in respect of the constructive dismissal dispute, which is the subject matter in this appeal. Leave to appeal having been declined by the Court *a quo* on 23 September 2013, was granted, on petition, by this Court on 19 February 2014.

[3] The appellant, The National Health Laboratory Service (the NHLS or the appellant) is a juristic person established in terms of the National Health

Laboratory Service Act[1] (the NHLS Act) and has its offices situate at Sandingham in Johannesburg. Ms Yona was formerly employed by the appellant for a broken service totalling 21 years – having initially served for six years and later for 15 years, the latter period commencing from 1 May 1995 – until she tendered her resignation on 1 June 2010. She gave the appellant one month's notice, thus her last day of work was 30 June 2010.

[4] On 28 July 2010, Ms Yona referred a dispute to the CCMA claiming that her resignation constituted a constructive dismissal in terms of section 186(1)(e) of the Labour Relations Act[2] (the LRA), due to the fact that the resignation was inspired by the appellant's unfair conduct that resulted in her continued employment with the appellant being rendered intolerable. Together with the referral of a dispute concerning constructive dismissal, Ms Yona also referred an unfair labour practice dispute in respect of which, however, the commissioner found in favour of the appellant. Hence, that part of the award was not challenged on review and is therefore not part of this appeal.

[5] At the time of her alleged constructive dismissal, Ms Yona was employed in the capacity of what was known as the Complex Laboratory Manager at the appellant's Port Elizabeth branch. When she resigned, her salary was R34 000 per month. In terms of the appellant's organogram, Ms Yona reported to the Business Unit Manager (Business Manager), a position which, before the dispute arose, was held by Mr Patrick Lucwaba, who in turn reported to the Executive Manager for the coastal region. Ms Yona had a few subordinate junior managers who reported to her. It was common cause that one of those was Mr Igshaan Gamieldien. It was also not in dispute that for some unspecified period, Ms Yona acted in the position of Mr Lucwaba whenever the latter was not available.

[6] At some point during 2009, Mr Lucwaba was promoted to the position of Executive Manager, a situation which left the position of Business Manager vacant. On or about 4 May 2009, Mr Lucwaba called a staff meeting at which he announced that he had appointed Mr Gamieldien to act as Business

[1] Act 37 of 2000.
[2] Act 66 of 1995.

Manager pending the appointment of a permanent incumbent in the post. Ms Yona was aggrieved by that development and felt very humiliated. According to her, this was because (1) Mr Gamieldien who was her junior would essentially become her senior; (2) she did not understand why she was not appointed into the acting position, especially because she had always "acted" in that position in Mr Lucwaba's absence; (3) there was no transparency in the acting appointment process, since Mr Lucwaba did not consult with her prior to appointing Mr Gamieldien; and (4) she felt that when applications for the permanent position of Business Manager were considered in due course, Mr Gamieldien would stand at an advantage over her, given that he had been officially appointed as acting business manager.

[7] Consequently, Ms Yona initiated an internal grievance procedure against Mr Lucwaba in which she complained about the issue referred to above. A misconduct enquiry was held against Mr Lucwaba and presided over by an independent chairperson, who concluded that Mr Lucwaba should apologise to Ms Yona for not consulting with her on the issue of acting appointment of Mr Gamieldien. However, the chairperson endorsed Mr Gamieldien's acting appointment which he said must stand. Significantly, Mr Lucwaba did not tender any apology to Ms Yona, reportedly saying that he did not find the need to do so since it was within his right, authority and prerogative to appoint Mr Gamieldien as Acting Business Manager and that he was not obliged to have consulted with Ms Yona before doing so.

[8] In the meantime, an advertisement was issued by the appellant, in or about July 2009, inviting applications for permanent appointment to the position of business manager. Both Ms Yona and Mr Gamieldien applied for the position. However, they were both unsuccessful and were advised accordingly per letters dated 20 August 2009. Ms Yona further complained that prior to them being officially advised of the results of their applications, the Human Resources (HR) Manager, Mr James Abraham, openly discussed the matter at a managerial meeting held on 19 August 2009, which included managers from outside Port Elizabeth. According to Ms Yona, at that meeting, Mr Abraham praised Mr Gamieldien for his performance at the interview, even

pointing out that Mr Gamieldin's only shortcoming was his lack of experience in the position of business manager. In other words, from the point of view of Ms Yona, Mr Abraham had implicitly suggested that she had performed poorly at the interview.

[9] The successful candidate for the position of Business Manager was Mr Pascal Karuhige. Surprisingly, Mr Karuhige subsequently declined the post for some personal reasons. As a result, the post remained vacant. In the circumstances, Mr Lucwaba extended Mr Gamieldien's acting appointment, which meant that Mr Gamieldien was set to continue being in charge over Ms Yona. This situation exacerbated Ms Yona's frustration.

[10] Shortly thereafter, Ms Yona fell ill and was continuously absent from work, with effect from about 9 November 2009. She submitted medical certificates or sick notes to cover her period of indisposition. The initial sick note was issued by a general medical practitioner and the subsequent ones by a specialist psychiatrist, Dr Jan Taylor of Port Elizabeth. According to all medical certificates Ms Yona was diagnosed as suffering from **"*severe depression and generalised anxiety disorder.*"** She remained absent on sick leave for an uninterrupted period of some five months till the end of May 2010. As stated, to cover her absence she submitted several sick notes (each covering about a month or less) – one after each time the other expired.

[11] On 17 February 2010, Mr Abraham addressed a letter to Ms Yona which read as follows:

'Dear Ms Yona

ABSENCE FOR ILL HEALTH REASONS.

We have received your faxed sick note on 16 February 2010 and note for the record that this note means that you will have been absent from the workplace for a significant period of time without following the necessary NHLS Conditions of Employment Policy and Procedures:

.1. You have not made telephonic contact with your Manager, Mr Igshaan Gamieldien, Acting Business Manager, to inform him of your absence

or the reason for your absence and we have subsequently had no choice but to process your absence as “absence without leave”.

2. You have exhausted all forms of leave with the NHLS and due to you[r] lack of communication with the NHLS, we are unable to determine your future operational obligations with the NHLS.

3. We are concerned that due to your lack of communication with the NHLS that we cannot determine the future status of your health, your presence at work within a reasonable time frame and/or the need to ensure that operational requirement required of you as a senior employee will be fulfilled and needs to be address[ed] by the NHLS as a matter of urgency.

To be able to comply with the NHLS Conditions of Employment, your personal needs for recuperation and the NHLS Health Insurers requirements, I lodge this friendly request with you to please complete the attached application for disability and return the completed documents to the Human Resources Office, Port Elizabeth at your normal place of work as a matter of urgency. May we request that you send these documents back to us by no later than Wednesday, 24 February 2010 to enable the NHLS to apply for further health assistance on your behalf. Please find attached the application forms to be completed by yourself.

Yours sincerely

JAMES ABRAHAM

HR Manager Coastal’

[12] It is common cause that Ms Yona completed the application forms for temporary disability and submitted them to the appellant for consideration. However, on 19 April 2010, Mr Abraham addressed another letter to Ms Yona, in which Mr Abraham, *inter alia*, advised as follows:

‘Also, may I take this opportunity to inform you that your application for temporary incapacity/disability was not approved by our insurers (Alexander Forbes). Therefore, ‘extended sick leave’ is not an option as we have no record of you applying for an extension of sick leave apart from the

> information submitted in your application for 'temporary disability' and the decision to process your absence as 'unpaid leave' remains in force.'

[13] Ms Yona's final sick note issued by Dr Taylor (with the same diagnosis of "*severe depression and generalised anxiety disorder*") booked her off-sick for the period 28 May 2010 to 2 July 2010. The sick leave was again processed as leave without pay. During May 2010, Ms Yona realised that her nett salary for that month was, due to deductions for leave without pay, came to about R1000,00. She found this situation unbearable. Consequently, on 1 June 2010, whilst on sick leave she tendered her resignation in order, according to her, to be able to access her funds from the provident fund. In her letter of resignation, she stated, *inter alia*, the following:

> 'Following the treatment I have endured during my illness I hereby tender my resignation as the PE Complex Lab Manager. This is an official month's notice. This will give me time to peacefully recuperate. My last day as the employee of the NHLS will be 30th June 2010.'

[14] Ms Yona was very unhappy with the situation that she found herself in. She believed that she was treated unfairly by the appellant. On 28 July 2010, she referred her constructive dismissal dispute to the CCMA for conciliation. The dispute remained unresolved and, on 26 August 2010, the CCMA issued a certificate to that effect. The matter proceeded to arbitration before the commissioner.

<u>The arbitration proceedings</u>

[15] At the arbitration hearing, Ms Yona gave evidence; after which, Mr Lucwaba and Mr Abraham testified on behalf of the appellant.

[16] At the conclusion of the arbitration hearing, the commissioner stated as follows:

> 'An employer may not act in a manner which causes the employment relationship to become intolerable. In this case, the respondent, through the actions of Abraham had caused that (sic) the employment relationship between the applicant and itself to become intolerable. This was done

through a combination of arrogant and 'don't give a damn' attitude towards the applicant and a deliberate failure in his duty to uphold the respondent's employment policies. I say this for the reasons that follow hereunder:

In his letter dated 17 February 2010, Abraham states that the applicant had failed to communicate with the respondent as to her absence and the reasons for her absence and that her absence should be treated as AWOL. Abraham initially maintained this statement. During cross-examination, he conceded that at the time of the letter, he was aware that the applicant had sent in her sick certificate informing the respondent that she had been booked off ill. In my view, he could not give an explanation why, if he knew of the medical certificate, he would still write something that is false!

Abraham, in his letter dated 19 April 2010, continues with making false statements. He writes that as per his letter dated 17 February 2010, the applicant has maintained a lack of communication regarding her absence. Yet, he knew full well that the applicant has been medically booked off and despite the fact that she had applied for temporary disability in the interim.

In his letter dated 17 February 2010, Abraham only mentions to the applicant that she could apply for temporary disability cover. He fails to mention and highlight the respondent's policy on extended sick leave and that she could apply for it. When questioned about this, he stated that he had not done this as he believed that by paying the applicant for the sick leave [it] would be fruitless expenditure. According to him, it was his duty to keep the respondent within its budgetary confines.'

[17] The commissioner issued his award on 21 December 2010, in terms of which he found that the conduct of the appellant toward Ms Yona was such that it rendered her continued employment intolerable and that, therefore, her resignation constituted a dismissal as envisaged in section 186(1)(e) of the LRA, which was unfair. The commissioner awarded Ms Yona with compensation in the amount equivalent to three months' salary which she earned at the time of her constructive dismissal, namely R102 000 (i.e. R34 000 x 3). The appellant was ordered to pay this amount not later than 14 January 2011.

[18] The appellant was not satisfied with the outcome of the arbitration proceedings. Hence the appellant took the matter up on review, in terms of section 145 of the LRA, with the Labour Court.

Proceedings in the Labour Court

[19] The appellant's grounds of review can be summarised as follows:

1. The commissioner failed to take into account, *inter alia*, that Ms Yona was a senior managerial employee and that by reason of her ability, experience, insight and knowledge, she was able to judge for herself and take the necessary steps without the assistance and intervention of Mr Abraham.

2. The commissioner lost complete sight of the real issue before him in that the commissioner attributed the anxiety and depression suffered by Ms Yona to the conduct of Mr Abraham. The appellant submitted that the conduct of Mr Abraham was appropriate, reasonable and sensible in the circumstances. The commissioner's criticism of Mr Abraham was, therefore, unduly harsh.

3. The commissioner misconstrued the appellant's sick leave policy as allowing for an automatic six months' paid sick leave, subject to approval by a committee or a panel of individuals whereas the true position was that the extended sick leave application was subject to the approval of the appellant's Chief Executive Officer (CEO).

[20] In conclusion, the Court *a quo* stated, *inter alia*, as follows:

> 'A reading of the record and the award proves that the commissioner expressed in very strong language, the unacceptable way in which Abraham, as a human resource manager, failed to assist the first respondent when her health condition called for his assistance…The commissioner's decision is consistent with the definition of constructive dismissal as interpreted by our courts…Viewed through the constitutional standard the applicant acted unfairly in making the applicant's and the first respondent's employment relationship intolerable. Abraham's failure to assist the first respondent when,

by virtue of his position he could, at a time she was ill and heading for not having a salary, destroyed the relationship of confidence and trust between the applicant and the first respondent…It violated her right to fair treatment at [the] workplace…[S]he was forced to resign to access money in her provident fund.'

[21] Accordingly, the Court *a quo* found that the commissioner's decision fell within the bounds of reasonableness and the Court had no basis to interfere with it. As a result, the Court dismissed the review application with costs.

The appeal

[22] In its grounds of appeal, the appellant submitted that the Court *a quo* erred in a number of respects, including the following:

1. In failing completely to take into account and/or ignoring the fact that Ms Yona herself testified that she was a senior managerial employee who had knowledge of the appellant's extended sick leave policy and that she should have made an application for such benefits without the assistance and intervention of Mr Abraham.

2. In failing to find that the commissioner was wrong in his interpretation of the appellant's extended sick leave policy in that, *inter alia*, it was not a committee that decided on the extended sick leave but the appellant's CEO.

3. In failing to find that the sole cause of Ms Yona's anxiety and depression was the fact that, other than herself, she did not want anyone else to act in the position of business manager.

4. In failing to take into account that, at the arbitration hearing, *"the appellant was represented by a lay representative who required the assistance of the commissioner from the outset in respect of clearly outlining the terms and conditions of the appellant's extended sick leave policy as was apparent from Mr Abraham's evidence in chief as compared with his (Mr Abraham's) re-examination whereas the commissioner had provided such assistance to [Ms Yona] who was*

legally represented. The failure to do so resulted in the commissioner unreasonably and unjustifiably criticising Mr Abraham."

[23] Mr *Ram*, appearing for the appellant, submitted that Ms Yona was in fact advised to apply for extended sick leave, which she did not do. At any rate, counsel submitted, it appeared that even if she had applied for extended sick leave, the appellant's insurer (Alexander Forbes) would have refused the application, given the fact that her application for temporary disability was also refused. It was further clear from the doctor's report that the cause of Ms Yona's depression was simply because she was not appointed to act as business manager.

[24] Mr *Le Roux*, appearing for Ms Yona, submitted that there could be little doubt that, considered objectively, Ms Yona had good cause to be aggrieved about the acting appointment of her subordinate, Mr Gamieldin, without prior consultation with her and without an indication why her subordinate was appointed ahead of her.

[25] Counsel further submitted that matters worsened considerably for Ms Yona when Mr Abraham openly announced the outcome of the applications for the position of Business Manager in the manner that Mr Abraham did, which was bound to humiliate Ms Yona even further. It was submitted that Ms Yona also wanted to understand what, if anything, was lacking on her part in terms of the skills and attributes that would have qualified her to act in the position of business manager.

[26] It was further submitted that the appellant never directed Ms Yona's attention to the possibility of applying for extended sick leave. Instead, Mr Abraham, in his letter dated 17 February 2010 only advised Ms Yona about applying for temporary disability and in the second letter of 19 April 2010, he only informed her that "*extended sick leave"* was "*not an option"* for her.

Evaluation

[27] To pass muster of judicial review for reasonableness under section 145 of the LRA, an arbitration award must be one falling within the range of decisions

which a reasonable decision-maker could have made, given the material presented to the commissioner.[3] This review test was restated and amplified by the Supreme Court of Appeal in the recent decision of *Herholdt v Nedbank (Cosatu as amicus curiae),*[4] in which the SCA held as follows:

> 'While the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions. ...A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[5] [Footnote omitted]

[28] Section 186(1)(e) of the LRA provides that a (constructive) dismissal occurs when *"an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."* On constructive dismissal, this Court, in *Jooste v Transnet Ltd t/a SA Airways*[6] stated the following:

> 'In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasised that a "constructive dismissal" is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer. As Lord Denning said *in Woods v WM Car Services (Peterborough)* [1982] IRLR 413 (CA) at 415 "The circumstances (of constructive dismissal) are so infinitely various that there can be, and is, no rule of law saying what

[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 110.
[4] 2013 (6) SA 224 (SCA).
[5] At paras 13 and 25.
[6] [1995] 5 BLLR 1 (LAC).

circumstances justify and what do not. It is a question of fact for the tribunal of fact…'[7]

[29] In *Murray v Minister of Defence,*[8] the Supreme Court of Appeal said:

> 'That substance, as was pointed before the 1995 LRA, is that the law and the constitution impose 'a continuing obligation of fairness towards the employee on … the employer when he makes the decisions affecting the employee in his work'. The obligation has both a formal procedural and substantive dimension; it is now encapsulated in the constitutional right to fair treatment in the workplace.
>
> … These cases established that the onus rest on the employee to prove that the resignation constitutes a constructive dismissal: in other word, **the employee must prove that resignation was not voluntary, and that it was not intended to terminate the employment relationship**. Once this is established, the enquiry 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 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 keep up with it**.'[9] [Footnote omitted]
>
> **(Emphasis added)**

[30] In other words, a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee. Ms Yona terminated her employment relationship with the appellant, by resigning with a month's notice. She alleged that the resignation

[7] At 9 E-F.
[8] (2008) 29 ILJ 1369 (SCA).
[9] At paras 11 and 12. See also: *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC) at 725A-C; *Metropolitan Health Risk Management v Majatladi & others* [2015] 3 BLLR 276; (2015) 36 ILJ 958 (LAC) at para 21.

constituted a constructive dismissal in terms of section 186(1)(e) of the LRA. The appellant denied that Ms Yona was dismissed at all. Ms Yona bore the *onus* to prove her alleged constructive dismissal. The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.

[31] Mr *Ram*'s submission that Ms Yona was advised to apply for extended sick leave was not borne out by the evidence presented to the commissioner. Nor was it supported by the objective evidence in the appellant's letters to Ms Yona dated 17 February and 19 April 2010, in which Mr Abraham, respectively, asked Ms Yona to apply only for temporary disability and informed her that *"extended sick leave [was] not an option."* There is, accordingly, no basis for this submission.

[32] Mr *Ram* further submitted that it was clear from the facts of this case that the cause of Ms Yona's anxiety and depression was that she was not appointed to act as Business Manager when Mr Lucwaba was promoted. He pointed out that this fact was also confirmed by Dr Taylor, the specialist psychiatrist, in his report dated 8 March 2010 in which he, *inter alia*, recorded the following:

> 'Her illness arises solely from work. Above her was the business manager. He got a senior position and was transferred but before he left, he appointed one of Ms Yona's junior above her head to be business manager. This was a tremendous shock and she feels she is being victimised. She lodged a grievance and the business manager was told to apologise which he did not.
>
> Ms Yona applied for the post but was told in a meeting that someone else was appointed. She lodged a grievance but this was ignored and then Ms Yona went to the CCMA.'

[33] Of course, it was not in dispute that the origin of Ms Yona's medical problem had its genesis from the time that her junior and subordinate, Mr Gamieldin, was appointed ahead of her to act as business manager, after the then

business manager, Mr Lucwaba, was promoted to the position of Executive Manager for the coastal region. In my view, the appellant was within its right, as the employer, to appoint anyone from its staff to act in the position of Business Manager for the time being, pending the appointment of the permanent incumbent in the post. The fact that Ms Yona had previously always acted in that position whenever Mr Lucwaba was temporarily not available, did not accord her with any vested right to lay claim on the acting appointment as Business Manager or promotion to that position. Hence, this part of her complaint – the unfair labour practice claim – was correctly dismissed by the commissioner.

[34] However, the issue at hand was in relation to Ms Yona's alleged constructive dismissal claim and not about her unfair labour practice complaint concerning her non-promotion to the position of Business Manager and/or her non-appointment as acting business manager. It is clear that while her medical condition may have originated from Mr Gamieldin's appointment as acting business manager, this was not the direct cause of her resignation. Mr Gamieldin was appointed to act as Business Manager in or about May 2009. Ms Yona did not resign immediately or shortly thereafter. She resigned over a year later. I am inclined to accept, on the facts, that her resignation was a direct sequel to her not receiving the benefits of extended sick leave, which she was entitled to, or at least to apply for. She was unfairly denied the opportunity to apply for this benefit by the irresponsible conduct on the part of Mr Abraham who, wittingly or unwittingly, failed to explain to her in the letter of 17 February 2010 that she was entitled to apply for extended sick leave as well.

[35] The appellant's argument that Ms Yona, as senior managerial employee, had knowledge of the appellant's sick leave policy and that she should have made an application for extended sick leave benefits without the assistance and intervention of Mr Abraham is not sustainable. In my view, the argument completely and seemingly deliberately overlooks the fact that, at the time, Ms Yona was sick, suffering from a serious mental illness, described as "*severe depression and generalised anxiety disorder.*" She was in dire need for

assistance. At any rate, it begs the question why Mr Abraham decided selectively to explain to Ms Yona (in his letter of 17 February 2010) only about applying for temporary disability, if she knew everything about the appellant's sick leave policy.

[36] The appellant's so-called "sick leave policy" is contained in a document titled "Human Resources Standard Operating Procedure" (the sick leave policy), which, to the extent relevant to this matter, provides as follows:

> '1. **PURPOSE**
>
> Employees who exhausted their sick leave credits in a 3 year cycle and who according to the relevant medical practitioner, requires to be absent due to disability, may be granted additional sick leave with full pay in the event of serious illness. Measures will be taken to ensure that it is not abused.
>
> 2. **MANDATE**
>
> Employees whose degree of disability has been certified by a registered and competent medical practitioner, as temporary or permanent shall, with the approval of the CEO [or duly authorised designate] be granted additional sick leave.'[10]

[37] In his letter of 19 April 2010, Mr Abraham tended to suggest that Ms Yona was supposed to have made two separate applications – one for extended sick leave and the other for temporary disability. Indeed, in his evidence too, he suggested the same thing. This is what he said:

> 'Okay well, it's more complicated than what I have been speaking about here now … Our sick leave is underwritten by our insurers. So what happens with a temporary disability application and extension of [leave], will go hand in hand, is the company doesn't give the extension. … **[i]f we don't have the application for the extension first**, then we can't just go to the insurers and say well we have decided to do something now here is an application for temporary disability. **So the problem with Mandisa's application is she missed the first application** and it became very difficult to get everything

[10] Clauses 1 and 2 of the sick leave policy.

else, all the ducks in a row, to be able to coincide the temporary disability application which was now before the extension for sick leave application.'

(Emphasis added)

[38] Indeed, in the appellant's heads of argument, counsel reiterated that *"the extended sick leave policy was applicable in situations where an ill employee was awaiting the outcome of her/his application for temporary disability"*.[11] In other words, it was the appellant's case that there had to be two applications submitted by Ms Yona, the first application being for extended sick leave, and, the second being for temporary disability. According to Mr Abraham, as referred to above, Ms Yona "*missed the first application"* hence it became "*very difficult"* to assist her any further. I am unable to find any provision in the sick leave policy in support of this testimony.

[39] In my view, the ordinary reading of the sick leave policy makes it clear that there was no real differentiation between an application for temporary disability and the one for extended sick leave. This was all done in one application. The document simply stipulates that an employee who has exhausted his or her sick leave credits in a three year cycle, but who requires to be absent due to a medically certified disability (permanent or temporary), may be granted additional or extended sick leave with full pay, subject to the approval by the appellant's CEO or duly authorised designate. In my view, the policy does not envisage two applications to be submitted separately – first, one for temporary disability and later, the second one for extended sick leave, or vice versa. It should ideally all be done in a joint application. Ms Yona ought to have been advised accordingly by Mr Abraham in his letter of 17 February 2010.

[40] It was further submitted on behalf of the appellant that there would have been no point, in any event, in asking Ms Yona to apply for extended sick leave, given the fact that her application for temporary disability was refused by the appellant's insurer. Indeed, in his letter of 19 April 2010, Mr Abraham informed Ms Yona that *"your application for temporary incapacity/disability*

[11] Appellant's heads of argument, para 39.

was not approved by insurers (Alexander Forbes)". I am perplexed by this statement, given the fact that there is nothing in the sick leave policy which purports to confer power on the appellant's insurers to approve the temporary incapacity leave. Of course, the insurers may have been responsible for paying out the sick leave benefit, but the approval thereof remained the responsibility of the appellant's CEO or duly authorised designate. In any event, counsel's submission in this regard was purely speculative because, as I have already alluded to, the sick leave policy envisaged a joint application, embracing both components of extended sick leave and temporary disability. Therefore, in that scenario, I do not visualise on what basis the refusal of one component of the application could have possibly been predicted.

[41] In my view, the appellant, through its HR Manager Mr Abraham, failed dismally to accord fair and compassionate treatment to Ms Yona at the time of desperate need - when she was suffering from a severe work-related mental illness and impecuniosity resultant from her denial by Mr Abraham of extended sick leave benefits. As if that was not enough, Mr Abraham, in his letters of 17 February and 19 April 2010 accused Ms Yona of failing to contact or communicate with the appellant, which was factually incorrect because the entire duration of her absence was covered by valid sick notes which were all submitted timeously to the appellant's HR department.

[42] Again, during his evidence, Mr Abraham finally revealed, seemingly unconsciously, that the reason Ms Yona was not asked to apply for extended sick leave was because granting her the extended sick leave would have entailed what he described as *"fruitless expenditure"* on the part of the appellant. As to how payment of legitimate extended sick leave under the present circumstances would have amounted to fruitless expenditure, remains mystery to me. The NHLS Act gives a clear mandate that *"all expenditure incurred by the Service under this Act must be defrayed from the funds of the Service".*[12] It seems to me that this was just the manifestation of the extent of lack of care and compassion on the part of Mr Abraham toward Ms Yona at the time. It is common cause that this desperate situation culminated in Ms

[12] Section 19 of the NHLS Act.

Yona being paid a paltry R1000.00 or so, as her nett salary for the month of May 2010, occasioned by "leave without pay" deductions. I am venturing to imagine that the extent that Ms Yona was mistreated at the hands of Mr Abraham, was such that she was "subjected to a psychological and traumatic degradation of her human dignity", particularly given the fact that she held a senior managerial position and, therefore, presumably well respected amongst the staff, generally – let alone those under her - in the work place.[13]

[43] One of the appellant's grounds of appeal was that the commissioner failed to assist the appellant's lay representative during the arbitration proceedings. Being an organ of state, I find it rather shocking and shameful that the appellant chose to be represented by a lay person. Anyway, that was its preference and, therefore, it was not expected of the appellant to moan about the performance of its chosen representative. I think it was prudent of counsel for the appellant not to pursue such flimsy, pathetic and petulant complaint.

[44] I am inclined to conclude, on the facts and circumstances of this case, that Ms Yona's resignation was neither voluntary nor intended to terminate her employment relationship with the appellant.[14] Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant (through Mr Abraham) toward her. Whether by his conduct Mr Abraham intended to repudiate the appellant's employment contract with Ms Yona, it is immaterial.[15] Suffice to hold that the appellant's unfair conduct toward Ms Yona rendered her continued employment with the appellant intolerable.

[45] To my mind, therefore, the commissioner's award fell within the range of decisions which a reasonable decision-maker could have made, given the material presented to the commissioner. That being so the appeal falls to be dismissed. In accordance with the requirements of the law and fairness, costs should follow the event.

[46] In the result, the following order is made:

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[13] Compare: *Dunwell Property Services CC v Sibande and Others* (2011) 32 ILJ 2652 (LAC); [2012] 2 BLLR 131 (LAC) at para 39.
[14] *Murray v Minister of Defence*, above.
[15] *Murray v Minister of Defence*, above.

The appeal is dismissed with costs.

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Ndlovu JA

Waglay JP and Landman JA concur in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:	Mr R Ram
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