IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT PORT ELIZABETH)

CASE NO: P504/07

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, EASTERN CAPE	**Applicant**
and	
DR J P ODENDAAL	**First Respondent**
MARION FOUCHE	**Second Respondent**
THE PUBLIC HEALTH AND WELFARE SECTORAL BARGAINING COUNCIL	**Third Respondent**

JUDGMENT

AC BASSON, J

Introduction

[1] The Applicant in this matter is the Department of Health Eastern Cape (I will refer to the Department of Health interchangeable as "the Department"

or the Applicant*)*. The Respondent is Dr. JP Odendaal (I will refer to him interchangeably as “Odendaal” or “the Respondent”)

[2] This is an opposed review application in terms of which the Applicant seeks to review and set aside the decision by the Second Respondent (hereinafter referred to as "the Arbitrator") in terms of which she found that Odendaal had been constructively dismissed. The Applicant seeks the substitution of the decision of the Arbitrator with an order that it be declared that Odendaal was not dismissed, alternatively that his dismissal was fair. At the arbitration proceedings Odendaal claimed that he had been constructively dismissed on 30 November 2005 and that his constructive dismissal was unfair. The Arbitrator upheld Odendaal's claim and concluded that Odendaal’s constructive dismissal was unfair. He was awarded compensation in the amount of six month’s salary.

[3] As to the evidence to which the Arbitrator was bound to have regard, the parties had reached agreement which was embodied in a pre-trial minute on a number of common cause facts pertinent to the dispute. Only Odendaal testified during the arbitration proceedings. Both parties filed extensive heads of argument in these proceedings and I have relied freely on them in summarizing the relevant background facts.

Issues to be decided

[4] The crux of the present review concerns the conclusion reached by the Arbitrator that Odendaal was constructively dismissed and that his constructive dismissal was unfair. In brief it was the case of Odendaal that he was constructively dismissed after the Applicant had not paid his salary for a period of approximately 17 months. It is clear from the papers that the non-payment of the salary was as a result of Odendaal's failure and refusal to sign a new contract of employment that was presented to all district surgeons in the region in June 2004. In brief it was the contention on behalf of Odendaal that the new contract that was presented to him amounted to a unilateral amendment of his conditions of employment. He insisted that he remained bound by his old contract.

The two issues before the Court

[5] Although the constructive dismissal issue was the main issue before the Court, I raised a further issue which could well be decisive in this matter and dispose of the necessity to decide whether or not Odendaal was in fact constructively dismissed in November 2005: Did an employment relationship continue to exist between Odendaal and the Applicant after June 2004 (after Odendaal refused to sign the new contract of employment)? The parties have, however, urged this Court to decide the constructive dismissal issue in order to bring finality to this dispute but at

the same time conceded that parties cannot, by consent, confer jurisdiction on this Court that it does not have. I will therefore decide both issues in the alternative if necessary. I have also been made aware of the fact that there is another pending application before this Court which may be affected by the decision of this Court in respect of the question whether or not an employment relationship did in fact exist between the parties as from April 2004 after Odendaal had refused to sign the new contract. Whether or not an employment relationship continued to exist after June 2004 is, of course, a jurisdictional issue. If no employment relationship continued to exist after the middle of 2004, it will not be necessary to decide the constructive dismissal dispute which only arose in November 2005.

Test on review

[6] Before turning to the two issues, it is necessary to briefly confirm the test on review in this particular matter. A Commissioner or Arbitrator, when deciding whether or not an employee has been dismissed in terms of section 187(1) – (f) of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA") rules on whether or not the CCMA or Bargaining Council has in fact jurisdiction to entertain the unfair dismissal dispute that has been referred to it. It has been made clear in the decision of the Labour Appeal Court in *SA Rugby Players' Association (SARPA) & Others*

v SA Rugby (Pty) Ltd & Others; SA Rugby Pty Ltd v SARPU & Another [2008] 9 BLLR 845 (LAC) that the question before the court in reviewing such a ruling, is whether objectively speaking the facts gave the CCMA jurisdiction to entertain the dispute. The review test as laid down in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) therefore does not find application in reviewing a jurisdictional ruling:

> *"[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.*
>
> *[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In Benicon Earthworks & Mining Services (Pty) Ltd v Jacobs NO & others (1994) 15 ILJ 801 (LAC)2 at 804C–D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act.*

The court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts, but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived at on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has jurisdiction. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter, provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon's case, the court said:

> *"In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be faint-hearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit." (At 804C–D.)*

In my view, the same approach is applicable to the CCMA.

[41] The question before the court a quo was whether, on the facts

of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary. "

The applicant's case

[7] It is the Department's case that the Arbitrator committed a number of material errors of law and fact which in turn had the effect of vitiating the award in terms of which it was held that Odendaal was constructively dismissed and that it was unfair. It was submitted that:

(i) Firstly, and by way of a preliminary point, having found that the *Department* had terminated Odendaal's contract of employment and had effectively dismissed him, the Arbitrator overlooked the fact that by definition there could not have been a constructive dismissal.

(ii) Secondly, the Arbitrator failed to appreciate that on Odendaal's own version, he did not subjectively regard his employment as intolerable at the date of his resignation.

(iii) Thirdly, and in any event, the Arbitrator failed to give any or proper consideration to the fact that, viewed objectively, Odendaal's employment could not have been regarded as having been intolerable at the time he resigned given that: (1) there existed reasonable alternative remedies available to him other than that of resigning, (2) Odendaal somehow "*tolerated*" the conduct of his employer (which he described as intolerable) for an inordinate period of time.

(iv) Fourthly, it was submitted that even if it be found that there was a constructive dismissal, the Arbitrator failed to appreciate that the evidence demonstrated that the dismissal was fair.

(v) Fifthly, having regard to the reasons contained in the arbitration award it is clear that the Arbitrator conducted the wrong enquiry which resulted in the Department not having a fair hearing.

(vi) Sixthly, and in the alternative, the Arbitrator failed to take cognisance of the fact that Odendaal was not correctly to be regarded as an employee.

The Respondent's case

[8] The grounds raised by Odendaal as the causes of his ultimate resignation are the following:

(i) The failure of the Applicant to pay him his remuneration for an extended period of time, namely a period of about 17 months;

(ii) The failure of the Applicant to communicate with Odendaal in relation to the employment relationship and the future thereof;

(iii) The Applicant's failure to interact with the First Respondent in general concerning his employment and his duties, so that the Applicant effectively abandoned him and the employment relationship;

(iv) The failure of the Applicant to revert to him concerning his employment, even when specifically put to terms; and

(v) The routing of state patients away from his practice to alternative service points.

[9] It was submitted on behalf of Odendaal that these aspects go to the root of the employment relationship. It was further pointed out that Odendaal had worked for the Applicant for more than twenty years in his capacity as District Surgeon and that he mostly attended to indigent so-called "state" patients. Without work to perform and without payment of remuneration and with no meaningful response to Odendaal’s repeated attempts to engage the Applicant about the employment relationship, there was, so it was argued, nothing left of that relationship by the time of Odendaal’s resignation on 30 November 2005.

Brief exposition of the relevant background facts

[10] Odendaal is a doctor who was engaged by the Department as a part-time district surgeon. He had been engaged since May 1985 when the parties entered into a standard contract of employment for district surgeons (I will refer to this contract as the "old" contract). The district surgeons were appointed on a *sui generis* basis. Odendaal did not work at the Department's premises nor was he under any sort of supervision from the Department as to the standard at which he performed his obligations. Odendaal operated autonomously from his rooms in Patensie and Hankey. He is part of a practice containing four doctors and divided his time between his private medical practice and his State duties as a district surgeon.

[11] It is common cause that in November 2003, the Department embarked on a rationalisation exercise in terms of which it sought to *"normalise"* the basis on which the district surgeons were engaged by integrating them into government structures. The rationalisation process was conducted on a national level and the Eastern Cape Department of Health was one of the last provinces, if not the last province, to have its district surgeon system so rationalized. The operational reasons underlying the rationalisation exercise were not placed in dispute by Odendaal. It was agreed as follows:

"12.1 The system of district surgeons has been operational for at least twenty years throughout the Republic of South Africa and was inherited by the new Government.

12.2 The new Government took a strategic decision to rationalise the model within which the district surgeons Operated

12.3 Of particular concern to the Eastern Cape Department of Health was the fraud committed by district surgeons who, under the old system, were not subject to sufficient control or monitoring by the Department. The circumstance that the district surgeons operated out of their private practices (and not at public institutions) and the circumstance that the district surgeons' salaries were based on the number of patients treated (and not on a time basis) rendered the old *system extremely vulnerable to abuse and it was in fact abused and exploited by many district surgeons in the Eastern Cape. In this particular regard reports were received by Deloitte & Touche and the Special Investigating Unit which confirmed abuse being perpetrated by district surgeons.*

11.4 There were other circumstances which rendered the old system undesirable and which included the following:

11.4.1 Given the fact that in terms of the old system the district surgeons were remunerated according to how busy they were, this old system encouraged or gave incentive to district surgeons to

overload their practices and this impacted on the quality and cost effectiveness of the services rendered

11. 4.2 The district surgeons were not uniformly remunerated and were also not accommodated within the official post establishment of the Department. Thus they needed to be integrated into the Government structures.

11.5 There were also certain political and policy reasons which lent credence to a change in the system which now emphasises the provision of health care services to all citizens within the country.

(By way of illustration, the stigma attached to district surgeons for *their perceived role which they played in the apartheid regime, was further incentive to overhaul the system.)"*

[12] The Department then took it upon itself to create a new system of what were to be termed *"part-time medical officers".* As to the procedure followed by the Department in implementing the new system the issue was first raised with Odendaal at a meeting in November of 2003 wherein it was stated that changes to the present system would be affected. According to the Applicant this did not come as a surprise to Odendaal who was aware that changes would have to be made at some time.

Meeting of 18 March 2005

[13] It is common cause that on 18 March 2004 the Department formally convened a meeting at head office in Bhisho with the district surgeons which was attended by Odendaal and representatives of the Department. At this meeting the operational need for the amended policy with regard to the district surgeons was discussed. Odendaal, as one of the affected district surgeons, was given a copy of a draft policy dated 1 April 2004. The policy was a nine-page document which sought to provide for the: *"formal legal basis for the employment of Part-time Medical Practitioners who render public health services for the Department of Health in the province on a part-time basis".* The draft policy contained the envisaged changes to the terms and conditions of engagement of the district surgeons including Odendaal. It is necessary to point out that it is common cause that Odendaal had, at no stage, give any input in respect of this policy and never suggested any alternatives or amendments to the proposed changes. I will return to this point where I discuss the claim of constructive dismissal.

[14] During this meeting the district surgeons were informed about the new conditions of employment (I will refer to this contract as the “new contract”). It is common cause that Odendaal did not agree to be accommodated into the new system on the terms and conditions which were presented to him by the Department at this meeting of 18 March 2004. Some two months later and on 21 May 2004 the new dispensation

of part-time medical practitioners was approved by the Member of the Executive Council of the Department of Health: Eastern Cape.

Memorandum dated 12 May 2004

[15] The MEC issued a memorandum dated 12 May 2004. The memorandum reads as follows and formed part of the consultation process:

> *"BACKGROUND (WHY THERE IS NEED FOR A NEW POLICY)*
>
> *Due to shortage of full time medical officers in public health services, the Eastern Cape Department of Health has to seek services of part-time medical officers (PTMOs) to effect health services. Most of the part-time medical officers are general practitioners having their private practices. The participation of these part-time medical officers in the public health service not only shares the load of public health service, but also promotes 'public private partnership'. The common term used for these medical officers is 'District Surgeons'. Although the District Surgeons are working for a single department (ECDOH), there has been no proper co-ordination of the services rendered by District Surgeons with resultant 'fragmentation'.*
>
> ○ *The terms and conditions of employment, system of*

payment as well as the scope of District Surgeon services has been diversified and fragmented.

- *There have been frequent complaints about non- or delayed payment to District Surgeons and also non-attendance to the health service is common practice.*
- *There have been concerns from stakeholders regarding non-cooperation on part of district surgeons to attend to medico-legal cases.*

Thus there has been overdue need to unify and rationalize the District Surgeon services. In order to improve service delivery to our communities, this policy document strives to rationalize and unify the District Surgeon services.

WHAT IS NEW IN THE POLICY

1. *The term 'District Surgeon " will be eliminated and will be called Part time Medical Officers.*
2. *All Part time Medical Officers will perform their work form (sic) Hospitals and or clinics and not from their Private facilities.*
3. *To attract more part time medical officers to public service, they will be offered maximum notch of level-12. The maximum number of sessions will be increased from 20 to 40 per week. "*

[16] As already pointed out, Odendaal did not dispute that there was an operational need to restructure.

The "new" contract of employment

[17] It was common cause that a new contract of employment was drawn up by the Applicant containing the amended terms and conditions of employment of the district surgeons. Of the forty-three doctors who were requested to participate in the new dispensation and to sign the new contracts of employment, only four refused to do so. They were Drs Odendaal (the present Respondent), Cole, Truter and Taylor. Dr Taylor took the view that the Department's conduct constituted an unfair and unlawful attempt to unilaterally change the terms and conditions of his employment. The Department on the other hand took the view that in terms of the original contracts of employment signed by the district surgeons it was entitled to amend the contracts of the district surgeons. The old contract provided as follows:

> *WYSIGING VAN KONTRAK*
>
> *41. Die Administrateur het die reg om hierdie kontrak of staande departementele instruksies betreffende die inhoud van hierdie kontrak to wysig met dien verstande dat die distriksgeneesheer op*

kennisgewing van drie maande geregtig is ten opsigte van –

41.1 'n vermindering in sy jaarlikse salaris of in 'n toelae of aanvullende geld in die Aanhangsels hiervan genome;

41.2 vvysiging wat 'n uitbreiding in die distriksgeneesheergebied wat in klousule I genoem is, meebring;

41.3 enige ander verandering in die gebiedsgrense van die distriksgeneesheergebied wat vir die distriksgeneesheer se wettige belange nadelig sal wees.

[18] In respect of any reliance that is placed by the Applicant on this clause in support of its argument that the old contract provided for the right to amend, it was submitted on behalf of Odendaal that what the Department actually did in the present case was to "*novate"* the contract and not merely to "*amend*" the contract. I will deal with this point hereinbelow. Suffice to point out that it is accepted that a new contract did in fact came into existence after the consultation process was concluded between all interested parties (paragraph [53] *et seq* and that the new contract was binding on Odendaal).

[19] A dispute then arose between the Department and Odendaal and a decision was taken to withhold Odendaal's salary until he signed the new contract of employment. It is thus the non-signing of the new contract that gave rise to the decision not to pay Odendaal which in turn resulted in the

present dispute about the constructive dismissal.

[20] Odendaal claimed that he was dismissed on the date that he addressed the letter containing his resignation. The letter is dated 30 November 2005.

[21] The Applicant submitted that due regard should be had to the time phrame within which the acts complained of occurred. More in particular, it was pointed out that Odendaal had had a long and acrimonious history with the Department in respect of the remuneration that was owed to him by the Department. According to the Applicant, he had made attempts over a period of 10 years to recouver outstanding amounts which he alleged was owed to him. According to Odendaal the Department as early as November 2003 had failed to pay his salary timeously or not at all.

[22] As already pointed out, it was common cause that, because Odendaal refused to accept the changed terms and conditions of employment, the Department did not pay him his full salary as from June 2004 onwards. At the arbitration it was submitted on behalf of Odendaal that he was not aware why his salary was stopped. In response it was submitted on behalf of Applicant that this could not be true and that, at the very least, Odendaal must have realized at some stage that the reason for stopping his salary was because he refused to accept the changed terms and

conditions of employment. At the very least he must have known in February 2004 at a conciliation meeting (see the discussion below) that his salary was not paid because he did not sign the new contract. I agree with the latter submission (see the discussion in paragraph [30] hereinbelow).

[23] Notwithstanding the dispute, Odendaal continued to render services to patients from June 2004 onwards and also submitted invoices to the Department. He did so apparently under the impression that his old contract still existed. However, notwithstanding the fact that his salary was stopped in June 2004, he waited for a period of approximately eight months before he issued a summons for the non-payment of his salary.

[24] It was also common cause that since Odendaal's salary was stopped in June 2004 and until his resignation on 30 November 2005, a period of 17 months have passed.

[25] Odendaal wrote 4 letters to the Department in respect of the dispute between them regarding the non-payment of his salary. These letters were written over a period of more than a year. I will briefly refer to these letters and to the events that followed each letter.

[26] On 30 July 2004 Odendaal enquired clarity in respect of his status within

the department. It is further stated that he needed an urgent response to his letter.

> *"1. What is my client's employment status with the Department?*
> *2. Is the effect of recent developments that my client's services have been terminated?*
> *3. If the Department regards my client as currently serving a notice period, please indicate when his notice period started running and when his notice period expires?*
> *4. If my client remains in the employ of the Department in his capacity as District Surgeon, please advise what the Department's future intentions are in relation to my client."*

[27] In October 2004 the Department appointed a full-time doctor against the post which was situated within Odendaal's geographical area.

[28] On 16 November 2004 Odendaal referred a dispute of an alleged unfair dismissal to the Bargaining Council. The date of the dismissal is indicated as 31 October 2004. In his referral it is expressly recorded that he was unhappy with the Department in that the Department had failed to properly communicate with him and that the Department had failed to pay his salary. It is unclear why Odendaal stated that the date of his dismissal was

31 October 2004 as it is common cause that his salary was already stopped at the end of June. What is, however, important to note that Odendaal indicated in the referral form that he wished to continue the employment relationship with the Department and that the relief that he sought was that of reinstatement. It thus appears that as of end of October 2004, months after his salary was stopped, Odendaal was not of the view that his employment was intolerable. On 13 December 2004 Odendaal again referred a further dispute to the Bargaining Council in terms of which he stated that the Department had failed to pay him severance pay.

[29] The dispute regarding the unfair dismissal dispute was conciliated on 1 February 2005. During that meeting the parties signed the following settlement agreement:

> *"Whereas the employee has referred a dispute relating to an alleged unfair dismissal under case reference PSHS428-04/05.*
>
> *And whereas the employer avers that the employee has not been dismissed but for various reasons District Surgeons in the position of the employee have been placed on an amended contract of employment.*
>
> *And whereas the parties contemplate settlement of this dispute.*
>
> *Now therefore the parties agree as fellows:*
>
> *1 The employer and employee will enter into the new*

amended contract on or before noon Friday 11 February *2005 (subject to paragraph 5 below) which contract if entered into will be deemed to take effect from I July 2004.*

2. *The employer will pay the employee the sum of* R148,835.75 *based on a 40 session week for the period I July 2004 to 31 January 2005 less any lawful deductions for tax. This payment is subject to paragraph 5 below and the amended contract, referred to in 1. above being entered into, and will be* p*aid to the employee within 60 days of signature of the contract in question.*

3. *The new amended contract will provide that the employee is entitled to work a 40 session week. The duties and functions of the employee will be* determined *between Dr Wiese and the employee and the employer undertakes to be as flexible as possible in order to accommodate the employee.*

4. *This agreement, subject to paragraph .5 below, is in full and final settlement of the dispute, between the parties, referred under the above case reference.*

5. *The above agreement is subject to a period of grace in favour of the employee to decide on whether to accept the agreement...“*

[30] This settlement agreement thus proposed to settle the ongoing dispute

between the parties in the following manner. Firstly, it proposed to settled (albeit only partly) the dispute in respect of outstanding remuneration owed to Odendaal. Secondly, it proposed to resolve the fact that Odendaal has not yet signed the new contract which embodied the new operational requirements of the Applicant. It is significant to note that the settlement agreement proposed to backdate the (new) contract to 1 July 2004 (being the date the new dispensation became effective in respect of all district surgeons in the province). This fact is significant because it supports, in my view, two conclusions: Firstly, a new contractual dispensation for all district surgeons was implemented during in July 2004. Secondly, as at February 2005 Odendaal could not have been under any misunderstanding that he will not be paid unless he signed the new contract. Despite this knowledge, Odendaal still waited until November 2005 to resign. Although I am of the view that Odendaal should have been aware of this fact much earlier I am prepared to accept that by February 2005 Odendaal could not have been under any misimpression that he will not be paid unless he signed the new contract. I will return to these points where I discuss the constructive dismissal claim.

[31] Despite having been offered the new contract for the second time (as part of the proposed settlement), Odendaal, on 4 February 2005 wrote a letter to the Bargaining Council in which he stated that he would not accept the agreement concluded at conciliation and hence that he would (again) not

sign the new contract. The conciliating commissioner then issued a certificate of non-resolution.

[32] On 9 February 2005 Odendaal addressed a letter to Dr Khan of the Department. In passing it should be stated that Khan denied having received this letter. This letter significantly recorded the stance of the Department that Odendaal had not been dismissed and that Odendaal would then *"at present"* not proceed with a claim based on an alleged unfair dismissal. In this letter Odendaal again recorded that the Department had failed to pay him his salary for months on end. The Department was then *".. specifically placed on terms to comply with its contractual obligations, both in relation to amounts that remain outstanding, and in respect of future compliance with its fundamentals obligations under the contract, including the obligation to pay my client's remuneration on or before due date".* In the letter is recorded that Odendaal was "*prepared to discuss the issues that have troubled the relationship over the last few years. Those issues include the non-payment and late payment of remuneration, the failure of the Department to implement the salary increases that are due in terms of a series of collective agreements and the proposed new contract".* Notwithstanding the fact that the Applicant was specifically placed on terms in February 2005, Odendaal still did not resign and apparently did not view the relationship as being intolerable. On behalf of the Applicant it was

submitted that it is significant that Odendaal, despite the fact that the parties had shared a troubled relationship for a number of years *("over the last few years")* because of the fact that the Department did not pay him his salary regularly, was still willing to remain in the employ of the Department. Instead of resigning, Odendaal decided to issue summons for his salary thereby enforcing the (old) contract of employment.

[33] On 3 May 2005 Odendaal obtained default judgment in respect of his claim for his outstanding salary. This judgment was subsequently rescinded. On behalf of the Applicant it was submitted that it is significant to note what Odendaal actually stated in his opposing affidavit. He stated that he has had trouble with his remuneration since 1995. He also specifically stated that the parties have not agreed on the amended terms and conditions of employment and "*so the Applicant's (Odendaal's) terms and conditions of employment remained unchanged".* It is thus clear from this affidavit (as already pointed out before) that Odendaal was of the view that because the parties could not agree on the amended or new contract, the old contract still applied.

[34] On 9 September 2005 Odendaal's attorney addressed a letter to the State Attorney in which it is stated that he would not be proceeding with the unfair dismissal referral and that he would arrange for it to be *"removed from the roll"* (not withdrawn). On behalf of the Applicant it was submitted

that it is significant that a period of 7 months have passed between this letter and the further communication with the Department. In this letter Odendaal stated that he would enforce his (old) contract of employment. He also stated that his claim for salary was increasing. The State Attorney replied on 4 October 2005 and stated as follows:

> *"Previous correspondence in this matter refers.*
>
> *I reiterate my instructions that your client failed to conclude a new contract of employment agreement and thereafter refused to perform any further duties a District Surgeon (sic). As such your client is not entitled to any remuneration and in fact has no rendered any services for the period of March to September 2005."*

[35] On 7 October 2005 Odendaal responded to the letter in the aforegoing paragraph. It is important to note that Odendaal did not dispute the allegations made in that letter and more specifically the fact that he was not paid because he had not signed the new contract. It is also important to point out that Odendaal made no mention of the fact that he was contemplating a resignation and made no mention of the fact that his employment relationship had become intolerable.

[36] On 16 November 2005 the Labour Court order in favour of Odendaal was rescinded.

Resignation letter of 30 November 2005

[37] On 30 November 2005 Odendaal resigned. His letter of resignation reads as follows:

"DR J.P. ODENDAAL / DEPARTMENT OF HEALTH

1. *As you are no doubt aware, the Labour Court judgment in favour of my client was rescinded on 16 November 2005.*
2. *Please file your client's statement of defense as soon as possible.*
3. *It would appear that the Department of Health has no interest in continuing an employment relationship with my client. It is certainly intolerable for my client to continue with the relationship in the absence of any communication, any interest in his tender of services, and without payment to name but some of the issues.*
4. *My client hereby terminates the employment relationship, because the Department of Health has made continued employment intolerable. My client's view is that he has effectively been dismissed by virtue of the of Department's action (or, in some respects, lack thereof).*
5. *My client views his dismissal as substantively and*

procedurally unfair and will refer a dispute to the Bargaining Council in relation thereto.

6. *If it is your client's attitude that it has not dismissed my client and that it wishes to continue the employment relationship, you are invited to contact me as a matter of urgency.*
7. *I reiterate my client's willingness to resolve these matters amicably. You are invited to contact me in this regard."*

[38] Without waiting for a response to his letter of resignation Odendaal referred a dispute to the Bargaining Council about his unfair dismissal on 21 December 2005. In the referral form it is alleged that an intolerable state of affairs have been created by the Department.

[39] Less than six months after having referred his constructive dismissal dispute to arbitration, and in May 2006, Odendaal was re-employed by the Department on substantially the same terms and conditions of employment as those which he refused to accept when he was initially presented with the amended contract of employment.

Award

[40] The Arbitrator concluded that the main issue giving rise to the constructive dismissal was the non-payment of remuneration. The Arbitrator based her

award on the premise that the non-payment of salary for a considerable time will always justify a claim for constructive dismissal:

> *"The bottom line is that the Applicant was not paid for a considerable time and, in terms of the law that justifies a claim of constructive dismissal."*

and

> *"The Respondent's conduct, in particular its non-payment of remuneration, is sufficient ground for a constructive dismissal".*

ISSUE 1: JURISDICTIONAL ISSUE

[41] Before turning to the constructive dismissal dispute it is necessary to briefly deal with the jurisdictional issue (referred to in paragraph [5] *supra*) as a decision on this issue may well (as already indicated) dispose of the need to decide the constructive dismissal claim. In dealing with this issue I intend referring to general principles of the law of contract as these principles have, in my view, also an impact on my decision in respect of the constructive dismissal issue.

[42] Both parties were *ad idem* during the arbitration that the employment relationship had endured until the time when Odendaal actually tendered his resignation (in November 2005) and argued that the Arbitrator's

comment that the Applicant's conduct at an earlier stage could in law have amounted to a dismissal, was merely *obiter*. The Respondent further pointed out that it was also the Applicant's stance in February 2005 at the conciliation that it had not dismissed Odendaal. This stance is also recorded in the pre-trail minutes where it is stated that *"Neither the Applicant, nor the Respondent, terminated the employment relationship at any time prior to 28 February 2005."*

[43] However, notwithstanding the apparent agreement between the parties that Odendaal has not been dismissed at any time before his alleged constructive dismissal, I raised the following concern during argument: Did the employment relationship between the parties continue to exist *after* the new contract of employment (which was offered to Odendaal following the consultations in April 2004) was rejected by Odendaal?

[44] It is clear from the papers that the new contracts as proposed by the Applicant came into operation on *1 June 2004* and that all doctors except for a few (including Odendaal) have accepted the new contract. It is further clear from the papers that Odendaal has persistently up until the date of his alleged constructive dismissal refused to sign the new contract of employment. If the employment relationship between the parties had in fact ended in June 2004 when Odendaal refused to sign the new contract it would mean that the subsequent referral of Odendaal of a dispute about

an alleged constructive dismissal in November 2005 would become academic: An employee cannot claim to have been dismissed if no employment relationship existed.

[45] It is trite law that a reviewing court is limited to deciding the issues that are raised in the review proceedings and that a reviewing court may not raise issues not raised by the party who seeks to review an arbitration award. However, there is an exception to this rule as confirmed by the Constitutional Court in *CUSA v Tao Ying Metal Industries & Others*[1] and that is where parties proceed on a wrong perception of what the law is. An example would be where the Court raises the issue of the jurisdiction of the CCMA or the Bargaining Council:

> *"[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review*

[1] Case CCT 40/07 [2008] ZACC 15 (decided on 18 September 2008).

application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play."

[46] It is, in my view, clear from the papers that Odenaal's old contract no longer existed after June 2004 although Odendaal insisted that his old contract did in fact survive and continued to regulate the employment relationship notwithstanding the fact that the new contract was offered and implemented in respect of all district surgeons (except for four who

refused to sign it) following a proper consultation process. In essence it was Odendaal's argument that his contract was unilaterally amended and since he did not consent thereto, the old contract simply continued to regulate the employment relationship. This argument, however, completely loses sight of the fact that the *new* contract was presented and implemented in respect of all district surgeons following a proper consultation process[2] with all interested parties – a process which included Odendaal. It can thus not be argued that because Odendaal did not accept the new contract, his old contract simply continued to regulate the employment relationship. This is also inconsistent with the clear intention communicated to all consulting parties that the new contracts would replace the old contracts.[3]

[47] I am further of the view that, by refusing to sign the new contract (which replaced his old contract), Odendaal in fact *repudiated* the (new) terms and conditions of his employment relationship which repudiation constituted a breach of the (new) employment contract (see the discussion

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[2] *It was in any event not the case for Odendaal that the consultation process was not conducted fairly. It is further common cause that Odendaal did not propose any alternatives or suggestions as part of the consultation process or that he has complained at any stage about the manner in which the consultation process was conducted.*

[3] It was the clear intention of the Department that the old contract would no longer govern the employment relationship between the parties and that the new contract would govern the employment relationship between the parties. This much is clear from the policy document dated 1 April 2004 and which was handed to all the district surgeons. Clause 8 of this policy document clearly states: *"**Transitional Arrangement** To phase out the contracts between the Department and the District Surgeons employed on contracts, this policy will become applicable to all district surgeons and **will replace all existing contracts as from 1 June 2004**.This policy will become applicable to all existing Part-Time Medical Practitioners currently performing sessions for ECDOH as from 1 July 2004."*

in paragraph [58] *et seq*). In response to Odendaal's refusal to sign the new contract and to render his services in terms of the provisions of the new contract, the Department then refused to pay him his remuneration. I am of the view that this refusal to pay was lawful as no reciprocal duty to pay Odendaal his salary arose as a result of his refusal to render services in terms of the new contract. In the context of a constructive dismissal the question then becomes relevant whether the refusal to pay Odendaal his salary in circumstances where he (Odendaal) is in breach of his contract of services rendered the employment relationship intolerable. I will return to this question hereinbelow (see the discussion in paragraph [60] *et seq*).

[48] Before turning to the constructive dismissal issue, the question must first be considered whether the employment relationship did in fact and in law survive the subsequent repudiation of the new contract of employment in circumstances where the old contract no longer existed. As already pointed out, if no employment relationship had come into being in April 2004 it would then, in my view, follow that a (constructive) dismissal could not have been taken place in November 2005. The latter statement, however, presupposes an acceptance of the principle that the contract of employment (whether verbally or in writing) constitutes the basis or *sine qua non* for the existence of the employment relationship between an employer and an employee.

Importance of a contract of service and the status of common law contractual principles

[49] Historically at least it has been accepted that the contract of employment signaled the commencement of the employment relationship between the employer and the employee. Once the two contracting parties have agreed on the core elements of the employment contract which is an agreement that the employee will place his or her labour at the disposal and under the control of the employer in exchange for some form of remuneration, the employment relationship will be created. Influences such as globalization; the introduction of social legislation and collective bargaining which all have a profound impact on the employment relationship has, however, forced courts and academic writers to rethink the role of traditional contractual principles in the employment relationship and more in particular, the interaction between traditional contractual principles and applicable legislation. This debate has led some academic writers to opine that the employment relationship is a status relationship rather than a contractual relationship and that it is the employee's status that determines his obligations and his remuneration.[4] It has even been stated that since the advent of the LRA this new phramework of legislation signaled the demise of the contract of employment.[5] Although it accepted that the contract of employment has taken on a more hybrid quality as a

[4] Oliver Common Values at 128.
[5] Mischke "Return of EC" 2002 CLL at page 58.

result of the fact that labour and social legislation as well as collective bargaining often supersede, expand and in many instances limit the rights and obligations of the respective contracting parties (particularly in order to protect the employee who is, in most instances, the vulnerable contracting party), the conclusion of the contract of employment nonetheless, in my view, signifies the *commencement* of the employment relationship. It would therefore follow that the *termination* of the contract of employment would also signify the end of the employment relationship.[6]

[50] The impact of the LRA on the common law employment contract is particularly significant in circumstances where the employer wishes to *terminate* the employment contract through a dismissal. Although it is in terms of contractual principles lawful (and sufficient) to terminate a contract of employment by giving the other party the required contractual notice, it is, however, trite in the labour law context that the *lawful* termination of the contract of employment does not necessarily mean that the termination of the employment contract is also *fair*.[7] Labour legislation has therefore supplemented the common law principles regulating the

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[6] I must, however, point out that I am mindful of the fact that the LRA provides for a "*dismissal*" in circumstances where there is no contract of employment. I am of the view that the statutory provision of a "dismissal" termination in certain exceptional circumstances does not detract from the general principle that a contract of employment forms the basis of the employment relationship. See section 186 of the LRA and especially to subsections 1(a), 1(b); 1(e) and 1(f). There is, however, one statutory exception and that is that it is for purposes of a "*dismissal*" accepted that a dismissal may occur where an employer refuses to re-employ (section 186(1)(d).

[7] See in this regard *Council for Scientific & Industrial Research v Fijen* 1994 (15) *ILJ* 759 (LAC) where the Court held as follows: "*A lawful dismissal is not necessarily a fair dismissal*."

termination of a contract of employment with the import of the requirement of *fairness.* The requirement of a "*fair*" termination does not, however, imply that employers need not adhere to the requirements in respect of the *lawful* termination of the contract of employment. From the aforegoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have soften the harsh effects a mere lawful termination of the contract may have. It does seem that it may safely be stated that the fairness requirements embodied in the LRA operate – at least in respect of the *termination* of the employment contract – alongside the contractual principles regulating the termination of the contract of employment (see, in general, *Amazulu Football Club and Hellenic Football Club*[8]).

[51] Having briefly set out the interaction between the statutory principles and the common law principles when *terminating* the employment contract through a dismissal, it now needs to be assessed whether or not an employment relationship can come into being without the existence of a contract of employment. Put differently, can an employment relationship exist *without* the conclusion of a contract of service?[9] Although a

[8] (2002) ILJ 2357 (ARB) at 2364G-H.
[9] It does, however, appear that after the majority decision in *Transnet Ltd & others v Chirwa* [2007] 1 *BLLR* 10 (SCA) that a dismissed employee is obliged to follow the dispute procedures as set out in the LRA in dismissal disputes. It would appear that an employee no longer has the option or proceeding with his or her common law remedy for contractual damages based on a breach of contract.

dismissed employee after the decision by the Constitutional Court in *Transnet Ltd & others v Chirwa*[10] no longer has the option of proceeding with a common law remedy for contractual damages based on a breach of contract with the result that the dismissed employee is obliged to follow the dispute procedures as set out in the LRA for dismissal disputes, the Constitutional Court has nonetheless made an important statement regarding the importance of the contract of employment as the source of the power to terminate the contract of employment. The Court held as follows:

> "[*The] source of the power is the employment contract between [the parties]. The nature of the power involved is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the [employee's] contract of employment, it was exercising a contractual power."*[11]

That the contract of employment is important also appears from the decision in *Member of the Executive Council, Department of Roads & Transport, Eastern Cape & Another*[12] where the Court pointed out that the common law contract of employment should be developed in such a way

[10] [2007] 1 *BLLR* 10 (SCA).
[11] At 121B-D.

[12] (2008) 29 ILJ 272 (E).

that it conforms with the constitutional right to fair labour practices.[13] (See also *Fedlife Assurance Ltd v Wolfaardt*.)[14]

[52] In conclusion: The contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices[15]) remains the basis[16] of the employment relationship.[17]

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[13] The Court held as follows: *"[16] The explanation for much of this lies in our history. Before the advent of constitutional democracy different aspects of employment law were governed by the common-law contract of employment, employment legislation and administrative law respectively. The development of a fair and equitable law of employment occurred on different fronts. The right to fair labour practices never found expression, pre-Constitution, in the common-law contract of employment. In private employment relationships it developed under the unfair labour practice jurisprudence of the erstwhile Industrial Court and was later given legislative clothing in terms of the Labour Relations Act 28 of 1956. 10 Fairness was introduced and developed in public employment relationships under the rules of natural justice in administrative law in cases such as Administrator, Transvaal & others v Zenzile & others, 11 in respect of pre-dismissal hearings, and Hlongwa v Minister of Justice, Kwa-Zulu Government, 12 in respect of pre-transfer hearings. [17] Under the Constitution and present national legislation the compartmentalization of employment law continues to exist to the extent that the employment relationship is still governed to some extent by the common-law contract of employment, to some extent by labour legislation, and to some extent by administrative law legislation, but in my view there is now an important difference between the present state of the law compared to pre-Constitution law. That difference* lies *in the fact that the values of the Constitution now underlie all law, be it public or private law, whether expressed in legislation or in the common law. This should imply, I would respectfully suggest, a convergence and harmonization of underlying principles when the same set of facts arise for adjudication in an employment context, be it under the common-law contract of employment, labour legislation or administrative law legislation."* This decision is, however, in conflict with the Constitutional Court decision in Chirwa to the extent that the Court was of the opinion that the High Court has jurisdiction to hear contractual disputes arising from a dismissal.

[14] (2001) 22 *ILJ* 2407 (SCA) :"*[14]That position was perhaps ameliorated with the adoption of the interim Constitution in 1994 which guaranteed to every person the right to fair labour practices in s 27(1) and rendered invalid any law inconsistent with its terms (which has been repeated in the present Constitution). Thus it might be that an implied right not to be unfairly dismissed was imported into the common-law employment relationship by s 27(1) of the interim Constitution (and now by s 23(1) of the present Constitution) even before the 1995 Act was enacted. "* This decision is, however, also in conflict with the decision in Chirwa to the extent that this Court was also of the view that the High Court has jurisdiction to hear contractual disputes arising from a dismissal.

[15] See Nakin v MEC, Department of Education, Eastern Cape Province & Another [15] (2008) 29 ILJ 1426 (E) 1448B-D: "The nature of the legal employment relationship between the applicant .... and the department ... is a complex one ... The common-law of contract of public employment is 'framed' by administrative law principles, and should include, as a constitutionally mandated implied legal term, the right to fair labour practices. Fairness is required in administrative justice, in labour legislation, and yes, in contract too. To view these interlocking aspects of a public employment relationships in separate compartments of their own would deprive one of viewing the whole and complete picture of such a relationship."

See also Grogan:[18]

> *"In spite of legislative intervention in the employment relationship, the common law of employment remains relevant. Generally, labour legislation applies only to parties to contracts of employment. That relationship remains regulated by the common law to the extent that legislation is inapplicable."*

Did an employment contract exist between the parties after June 2004?

[53] I have already referred to the fact that it was common cause that

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[16] The Court in *Discouvery Health Ltd v CCMA & Others* (2008) 29 *ILJ* 1480 (LC) was of the view that the definition of an "employee" in section 213 of the LRA is not necessarily underpinned by a common law contract of employment. At paragraph [42] the Court remarked as follows: *"To summarize: The protection against unfair labour practices established by s 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another. The line between performing work 'akin to employment' and the provision of services as part of a business is a matter regulated by the definition of 'employee' in s 213 of the LRA."* See also *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384: "*The existence of an employment relationship is therefore not dependent solely upon the conclusion of a contract recognised at common law as valid and enforceable. Someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship*." In *"Kylie" v CCMA & Others* **(KRY ASB VIR MY DIE VERWYSING)** a review application the Applicant (a dismissed sex worker) argued that the Commissioner committed a legal error in excluding workers who did not have a valid and therefore enforceable contract from the ambit of the LRA because the LRA defines employees to include anyone 'who works for another person' and accordingly the Act applies to all employment relationships irrespective of whether they are underpinned by enforceable contracts or not. The Court in this case did not decide this issue as it was not necessary to do so but did indicate in footnote 16 that it was of the view that there is no general answer to this question but specific answers depending on the context in which the term is used. It includes ex-employees in respect of certain provisions and only those under a contract of employment in others – see section 186 for example of both.

[17] See Brassey Employment and Labour Law Volume I page C:iii: "*Contract, thus, remains the foundation of employment law."* See also page C1:22.

[18] Workplace Law 9th edition at page 3.

Odendaal had refused to sign the new contract. I have also referred to the fact that Odendaal was adamant that because he did not *consent* to the new contract, the old contract still applied to his employment relationship between him and the Department. There are several difficulties with this contention. The new contracts envisaged by the change in operational requirements were implemented on *1 June 2004*. Although it is not permitted in terms of the common law to unilaterally amend the terms and conditions of employment, it is accepted that an employer may after a proper consultation process implement changes to conditions of service in accordance with its operational needs. In the present case the implementation of the new contractual dispensation was accepted by all the district surgeons except for Odendaal and 3 others who had declined to accept the new contract which imposed new conditions of service. It is important to point out that there is nothing on the papers to suggest that a dispute about the unilateral amendment of conditions of service has been referred to the bargaining council in terms of the provisions of the LRA. It is also common cause that Odendaal has never registered any objection to the proposed changes nor has he ever suggested any alternatives in respect of the proposed amendments during the consultation process. In fact, there is no explanation before this court for Odendaal's refusal to sign the new contract. For purposes of this judgment it is accepted that the new contractual dispensation constituted a radical departure from the old dispensation although I must once again point out that the rationale or

necessity for the new dispensation has never been placed in dispute by Odendaal nor has a dispute been referred to the bargaining council. I am thus satisfied that the amended contract came into being on 1 June 2004 and was applicable on all district surgeons (including Odendaal). Under the common law an employer who unilaterally amends the terms of the contract of employment will be in breach of contract. This will in turn entitle the employee to cancel the contract or to seek damages or sue for specific performance. The provisions of the LRA, however, provide for the possibility of a unilateral variation of terms and conditions of employment in certain circumstances. In terms of section 64(4) of the LRA the issue of contractual variations is made the subject of collective bargaining. In terms of this section employees or a trade union may refer a dispute over a unilateral amendment to a Bargaining Council or the CCMA in order to require the employer not to implement the unilateral variation for the duration of the consultation period. If the employer refuses to comply, or where the conciliation period lapses, the employer may implement. The employees may, however, resort strike action to resist the unilateral change or to force the employer (through strike action) to restore the status quo. In the present case there is no suggestion on the papers that the section 64(4) – process has been followed. In fact, as already pointed out, the contracts of all the district surgeons were substituted by the new contracts after the employer has consulted with all the district surgeons.

In summary:

(i) Firstly, it was not disputed that the Department had a valid economic rationale for implementing radical changes to the health system in the Province.

(ii) Secondly, it was not disputed that the process (of imposing new contracts) was preceded by a proper consultation process that involved Odendaal.

(iii) Thirdly, Odendaal gave no indication during the consultation process that he was unhappy with the process or the proposed changes. Odendaal also submitted no alternatives or suggestions to the Department during the consultation process.

(iv) Fourthly, no dispute in respect of a unilateral change of conditions and service has been referred to the bargaining council nor did Odendaal institute proceedings to enforce his old contract.

[54] In light of the aforegoing I am thus satisfied that a new contractual dispensation for district surgeons in the Province replaced all previous contracts as from 1 June 2004. This conclusion is also supported by the documentation and correspondence which preceded the implementation of the new contract in terms of which it is made clear that the old dispensation (and the old contracts) would be replaced with the new contracts as from 1 June 2004. Odendaal's view that the old contract amounted to an unlawful and unilateral amendment of his conditions of

service can therefore not stand in light of the aforegoing Secondly, his argument that the old contract continued to govern the employment relationship can equally not stand in light of the aforegoing. Having accepted that a contractual relationship did exist between the parties, it will therefore be necessary to decide the second issue namely whether or not Odendaal was constructively dismissed. I will return to this issue hereinbelow.

Odendaal's repudiation of the new contract of employment

[55] In light of the fact that the new contract of employment amended or replaced the old contracts, Odendaal's conduct in refusing to sign the amended contract and tender his services in terms of the new contract, amounted to a repudiation of his (new) contract of employment.

[56] It is accepted that, once an employer and an employee conclude a contract of employment, the employer must accept the employee into employment and provide him or her with the contractually agreed work. An employer is therefore obliged to allow the employee to perform his or her service in accordance with the *agreed* contract of service (see *Toerien v Stellenbosch University*[19]). Where an employee, however, refuses to tender his or her services in terms of the contract of employment, it follows

[19] (1996) *ILJ* 56 (C) at 60C – D

that the employer will have no reciprocal duty to remunerate the employee. In the present case the Department refused to pay Odendaal his remuneration because Odendaal refused to sign the new contract and refused to tender his services in terms of the new contractual dispensation. I will return to the legal principles in respect of and the legal consequences of a repudiation of a contract in more detail in paragraph [57] hereinbelow. Suffice to point out the repudiation of a contract entitles the innocent party to either *terminate* the contract or to *enforce* the contract. An employer who implements changes in accordance with its operational needs may thus elect to terminate (by way of a dismissal) the contract of employment of an employee who rejects the changed terms and replace him or her with another employee who is prepared to work in accordance with the needs of the business. This the employer may do provided that the requirements of section 189 of the LRA are complied with. In the present case it is common cause that the employer decided *not* to dismiss Odendaal (and did not in fact dismiss him) and that the Department instead decided to continue with the employment relationship and to insist that Odendaal sign the new contract and tender his services in terms of the provisions of the new contract. As a result of Odendaal's repudiation of the contract of employment, he committed a breach of contract. Because Odendaal was in breach of contract by not tendering his services in terms of the new contract of employment, no reciprocal duty to pay him his salary arose. Put differently: The reciprocal duty of the

Department to pay Odendaal his salary would only have arisen once Odendaal had tended his services in terms of the new contractual dispensation. Until Odendaal had done so (which he never did), the Department had no reciprocal duty to pay him his salary. (I will return to this aspect hereinbelow where I discuss the claim of constructive dismissal.)

[57] A repudiation or breach of a contract will arise where a party to a contract renounces his intention to perform the contract or repudiates it before the time for performance. The Court in *Nash v Golden Dumps (Pty) Ltd*[20] explains as follows:

> *'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .”*

Although the impression may be gained from this quotation that the guilty

[20] 1985 (3) SA 1 (A) at 22D – F.

party must repudiate the contract intentionally, the Courts, in numerous cases, have stated that the test for a repudiation is not subjective but objective. In *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*[21] the Court pointed out that the test to determine whether there has been repudiation is not subjective but objective:

> "*The question is therefore: has the appellant acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part of the contract?"*

[58] A person who repudiates the contract breaches the contract. In this regard the Supreme Court of Appeals in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[22] accepted that a repudiation of a contract is a breach in itself. The Court further also accepted that the "*intention*" need not be deliberate or subjective but is simply "*descriptive of conduct heralding non- or malperformance on the part of the repudiator*."[23] Of particular importance to the present matter is the statement by the Court that the "*acceptance*" of the breach (the repudiation) (by the other contracting party) "*does not 'complete' the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement*." The innocent party to the breach therefore has the right to terminate or to cancel the agreement but until he or she exercises the election and communicates

[21] 1980 (1) SA 645 (A) at 653.
[22] 2001 (2) SA 284 (SCA) at 187.
[23] Ibid.

the election to do so to the guilty party, the contract will remain in force.

[59] *To summarize:*

(a) A new contract was imposed on all district surgeons on 1 July 2004 after a consultation process. As a result the old contracts were replaced by new contract of employment.

(b) All district surgeons except for Odendaal and three other doctors accepted the new contract.

(c) Odendaal persistently and continuously refused to accept the new contract until his resignation on 15 November 2005. His refusal constituted a repudiation and therefore a breach of the new contract. As a result of her persistent refusal to render services in terms of the new contract of service, no reciprocal duty arose to pay Odendaal his salary. The Department thus lawfully refused to pay him his salary.

(d) Odendaal's breach of contract entitled the Department to elect to cancel the contract. It is, however, common cause that the Department elected not to terminate the contract and not to dismiss Odendaal. Odendaal persisted with his breach up until November 2005 when he finally decided to resign. Whether or not this act of resignation constitutes a "dismissal" will now be considered.

ISSUE 2: CONSTRUCTIVE DISMISSAL

General exposition of the law in respect of constructive dismissals

[60] The law in respect of constructive dismissals is succinctly set out in the following judgment by the Labour Appeal Court in *Jooste v Transnet Ltd t/a SA Airways*[24]

> *"In considering what conduct on the part of the employer constitutes constructive dismissal constitutes constructive dismissal, it needs to be emphasized that a `constructive dismissal' is merely one form of dismissal. Ina 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) Ltd (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 that circumstances justify and what do not. It is a question of fact for the tribunal of fact...'*
>
> *Subject to the reservation that in our labour law it is not necessary to find an implied term of the kind required in English law, an approach that comments itself to me is that of the Employment*

[24] (1995) 16 *ILJ* 629 (LAC).

Appeal Tribunal in Woods v WM Car Services (Peterborough) (1981) IRLR 347 at 350:

> *`[I]t is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: ... the conduct of the parties has to be looked as a whole and its cumulative impact assessed."*

[61] In *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC) the Labour Appeal Court went on to say the following (at 724 D-F), after quoting approvingly from *Jooste v Transnet supra:*

> *"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that*

the situation has become so unbearable that the employee cannot fulfill what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not constructively dismissed and her conduct proves that she has in fact resigned.

Where she proves the creation of an unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end; Venter v Livni 1950 (1) SA 524 (T) at 528. In that circumstance, if it constitutes an unfair labour practice, the employee is entitled to sue for compensation in terms of section 46(9)(c)of the Act.

In the latter instance she is demanding, therefore, that compensation be paid because it is the employer's unlawful act that has precipitated the refusal to work and the acceptance of the employer's repudiation. The two envisaged steps are not always

easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not. The two stages are not necessarily water-tight compartments."

[62] In a recent decision the Supreme Court of Appeals confirmed what the inquiry into the facts in the case of an alleged constructive dismissal entails. Of particular importance is the enquiry whether or not the employer conducted itself in a manner that destroyed the relationship between the parties. What is also required is some form of culpability on the part of the employer although it is not required that the employer must necessarily have intended to get rid of the employee. In conclusion it must be asked "[*L]ooking 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 employee could not be expected to put up with it".* See in this regard *Murray v The Minister Of Defense* (case number: 383/2006)

"[12] 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 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."

[63] It is further clear from the decision in Murray is the fact that a fragmented approach is to be avoided:

> "[65] *But after more than two years of purgatory at Staff College, the navy was not entitled to leave the plaintiff under a material misapprehension of what it offered him instead. In overall assessment, the preponderant conclusion seems to me inevitable that the navy did not deal fairly with the plaintiff*
>
> *[66] The trial court's judgment omitted to reach this conclusion because in my respectful view it fragmented each of the plaintiff's complaints, considering them one by one in isolation, concluding in relation to each that they were neither pivotal to his resignation nor rendered his position intolerable. When one considers the case as a whole, however, the conclusion is hard to avoid that the navy breached its duty of fair dealing in the denouement of his acquittal in the second court martial."*

[64] I have already pointed out that the Applicant for review has put up six grounds for the review. I do not deem it necessary to consider each of these grounds for purposes of the conclusion that I have reached. Suffice to make the following observations: There is no doubt on the papers that the failure of the Applicant to pay Odendaal his remuneration for an

extended period of time was the main issue that gave rise to the dispute. This was also the view of the Commissioner.

[65] I am in agreement with the Applicant's submission that the non-payment of remuneration will not as a matter of course constitute a ground for a constructive dismissal although I do accept that in most instances it may be a significantly persuasive factor in coming to a conclusion that a constructive dismissal did in fact take place as the non-payment of a salary would, in most circumstances, render the continuation of a employment relationship intolerable. After all, payment of remuneration constitutes one of the *essentialia* of the contract of employment: The employee works and in return he or she receives payment. A refusal to pay will (in most cases) constitute a material breach of the contract. The latter statement, however, presupposes that there existed an obligation in the first place to pay the employee his salary. Put differently, where the employee has a right or claim to be paid, an employer's refusal to pay an employee will, in most instances (although not as a general rule), render the employment relationship intolerable.

[66] The present case is, however, different. I have already pointed out that Odendaal was in breach of his contract of service by refusing to render his services in terms of the new contract. As a result, no reciprocal duty on the part of the Department arose to pay Odendaal his salary. Under

these circumstances it can hardly be concluded that the Department (the employer) rendered the employment relationship intolerable. By repudiating his contract of service, Odendaal was in breach of his contract of service and as such the author of his own misfortune. Odendaal only had to render his services in terms of the contract of employment. He was afforded ample opportunity by his employer to do so. As already pointed out, a different conclusion may be reached in a situation where an employer has in fact the reciprocal duty to pay a salary but refuses to do so. In those circumstances the refusal to pay a salary may well render the employment relationship intolerable. In the present case Odendaal resigned – he was not dismissed.

[67] Even if it may be concluded that the employment relationship was intolerable and that Odendaal had no other alternative than to resign, I am still of the view that the dismissal was not unfair: The employer had a valid economic rationale to change the conditions of employment and did so only after a fair consultation process has been followed. A case in point is the decision in *WL Ohse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 *ILJ* 361 (LAC). In this case the employer confronted the employee with a choice between accepting the new package or to suggest a alternatives. What was made clear was that the employer no longer had the intention to be bound by the remuneration package. What is important about this decision is the fact that the Labour Appeal Court

pointed out that where an employee refuses to accept a change in his or her working conditions, the eventual dismissal may still be fair where sound economic reasons existed for the change in the first place and provided that the employee has been properly consulted on the proposed change. The Court held as follows at paragraph 365 – 367:

> *"Where a dismissal follows a refusal by an employee to accept changed conditions of employment, the dismissal may nevertheless be fair if the employer shows that there was a commercial rationale for the change and the employee was properly consulted about the change (see Le Roux & Van Niekerk The SA Law of Unfair Dismissal at 280-2). In such a case the dismissal might be unlawful under the common law, but still fair under the Act.*
>
> *……..*
>
> *What this means in the present case is that the appellant was entitled to change the respondent's remuneration package if there was a commercial rationale for it, and if the final decision was arrived at after due consultation with the respondent, involving him properly in the process leading to a fair decision.*
>
> *Any successful business needs contented employees. Unhappiness can lead to problems such as labour unrest, a drop in productivity, and the like. The appellant sought to address the unhappiness of the majority of its employees with the old*

remuneration structure, by seeking ways to change it. That remuneration structure (viz differentiated commissions) was a remnant of previous statutory determination and not only of an agreement between the employees and the employer. If the problem was not addressed the possibility of further problems arising, such as those mentioned earlier, would have increased. The evidence on record does not establish an ulterior motive on the part of the appellant for attempting to find a new remuneration package. A commercial rationale for the changes was thus established.

The respondent was intimately involved in the process of seeking a viable alternative. He was part of the original committee charged with finding a solution. He attended all the general meetings where the matter was discussed. He had earlier agreed to an arrangement whereby employees would either accept the recommendations of the majority shareholders, or resign. At the general meeting in early October this agreement was extended to give him another option, namely to come up with an alternative of his own. He chose not to do so. When he resigned he was asked to reconsider and to continue working to see whether the new system would work: if not, further changes were not excluded. He declined, having already made arrangements for work at the market in the employ of another. In short, the respondent refused to recognize the

appellant's entitlement to consider a change in the remuneration structure and did not materially assist in the process of change, despite having the opportunity to do so. A final impasse had not even occurred: the meeting in October gave him another chance to present an alternative and when he resigned it was stated that the new system was open to change. Nothing prevented him from remaining in employment and pursuing his remedies internally, or even approaching the Industrial Court for relief whilst remaining in employment.

In the circumstances the appellant's conduct in exploring ways to implement a change to the remuneration structure was not procedurally unfair. At the time the respondent left it was too early to determine whether the changes would be substantively unfair to the respondent. On the face of it though, there is nothing on record to suggest that the changes were commercially unreasonable or of such a nature to suggest bad faith or improper motive on the part of the appellant. There are no specific features to this case which call for second-guessing by this court of a rational business decision."

[68] In respect of costs I can find no reason why costs should not follow the result.

ORDER

[69] In the event the following order is made:

(i) The award of the Second Respondent under the auspices of the Third Respondent under case number PSHS533-05/06 is reviewed and set aside and replaced with an order that the First Respondent was not constructively dismissed.

(ii) The First Respondent is ordered to pay the costs of this application.

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AC BASSON, J

Date of judgment: 13 January 2009

Date of application: 12 November 2008

ON BEHALF OF THE APPLICANT

ADV PN KROON INSTRUCTED BY THE STATE ATTORNEYS

ON BEHALF OF THE FIRST RESPONDENT

FRANCOIS LE ROUX ATTORNEYS