IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 53/2014

In the matter between:

CONTI PRINT CC **Appellant**

and

CCMA **First Respondent**

COMMISSIONER M RAFFEE NO **Second Respondent**

GLADYS MOLOKWANE **Third Respondent**

Heard: **15 May 2015**

Delivered: **24 June 2015**

Summary: Constructive dismissal – whether the issue of constructive dismissal is a jurisdictional question – inappropriate for Labour court to purport to overrule decisions of Labour Appeal Court – employee complaining about air conditioning, located in adjacent workspace partially partitioned from her workstation, impairing her health – employer offering to move employee and promising to closing gap in the partition – employee refusing to move – employee abruptly leaving employment and claiming constructive dismissal - evidence showing employer reacting reasonably to ameliorate the adversity to her– employee's reaction grossly unreasonable – arbitrator ignoring evidence contradicting employee's version of facts – arbitrator failing to weigh up the evidence –

Labour court misconstruing evidence – Labour court incorrectly relying on a statement by counsel from the bar that a fact was common cause when such statement plainly wrong as the fact was, on the record, not common cause -. On the facts, employee not constructively dismissed – CCMA lacking jurisdiction to adjudicate the termination of employment – Award and Labour Court's judgment set aside – appeal upheld.

Coram: Tlaletsi DJP, Sutherland JA *et* Mngqibisa-Thusi

JUDGMENT

SUTHERLAND JA

Introduction

[1] The third respondent (Molokwane) was employed by the appellant, a bindery. She succeeded in obtaining an award that she had been constructively dismissed. On review, the Labour Court (Naidoo AJ) upheld the result. This appeal challenges that finding.

[2] The versions of the parties adduced in evidence contained several material conflicts. To decide the matter, an evaluation of the credibility of the witnesses and of the probabilities was essential. Insofar as one version was preferred over another, a rational basis has to exist. The basis, if any, for preferring Molokwane's version over that of the appellant's witnesses is at the heart of the factual controversy. In addition, on either version, the question as to whether a proper case for a constructive dismissal was made out is the subject matter of the legal controversy.

[3] It needs to be said that the manner in which the evidence was adduced was poorly conducted. The interpreter randomly used first and third person to convey the witnesses' words, there were constant interruptions by the arbitrator to try to get clarity, often in vain. There was poor presentation of the parties' respective cases, leaving critical aspects of the narrative incomplete or cryptic. The cross-examination was frequently perfunctory and equally frequently pointless, whilst critical issues were unexplored, important questions not asked and the contradictions between one witness and another

not put. From out of this melee, it was expected of an arbitrator to make sense.

[4] In addition, the Labour Court, in reviewing the award, embarked upon a treatise about whether an enquiry by an arbitrator into the existence of a constructive dismissal was an issue going to the merits of a matter or was an issue about the jurisdiction of the CCMA. The Labour Court then held that it was not a jurisdictional issue, thereby purportedly overruling the decision by the LAC in *Solid Doors (Pty) Ltd Commissioner Theron and Others*[1] where it was held:

> '[29] Having established what the requirements are for a constructive *dismissal*, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive dismissal - the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.'[2]

[5] Subsequently, in *SA Rugby Players Association v SA Rugby (Pty) Ltd and Others,*[3] the position as to the need to establish jurisdiction by determining, as a fact, that a dismissal occurred was reiterated. There Tlaletsi AJA (as he then was) stated:

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[1] (2004) 25 2337 (LAC) (*Solid Doors*).
[2] At para 29.)
[3] (2008) 29 ILJ 2218 (LAC) (*Rugby Players*).

'[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 s 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 (Edms) Bpk v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) 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 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. 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 at 804C-D:

'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 fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.'

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.' (emphasis supplied)

This stance has been followed as recently as *Western v Cape Education Department v General Public Service Sectoral Bargaining Council and Others* (2013) 34 ILJ 2960 at [17] – [18].

[6] Accordingly, the decision by the Labour Court about whether an allegation about a constructive dismissal triggers a jurisdictional issue or an issue about the merits of a termination of employment, was not competent for the Labour Court to make. Therefore, the views expressed, regardless of whether they have intrinsic merit, are not to be taken as an accurate statement of the law. Moreover, a decision on the jurisdictional point was unnecessary to decide the case, and was therefore wholly obiter. As a result, it is unnecessary for this Court to address the issue. The decision in *Solid Doors* and *in Rugby Players* governs the approach of the courts until an appropriate occasion arises in the LAC to revisit the jurisprudence, at which time the views articulated by the judge *a quo* may receive the appropriate attention.

The test for a constructive dismissal

[7] According to the decision of the LAC in *Solid Doors:*

> '[28] ….there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment

because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.'[4]

[8] The Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others*[5] held thus:

'[3] Section 185(a) of the Labour Relations Act confers 'the right not to be unfairly dismissed'. Section 186(e) defines 'dismissal' as including a situation where 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'. This definition gives statutory embodiment to the jurisprudence of constructive dismissal that preceded it. The CCMA concluded that Mr Redgard had been constructively dismissed. In its application to this court, the employer contends that the CCMA - and the Labour Courts in refusing to review its determination - misconceived the jurisdictional prerequisites for constructive dismissal, since on Mr Redgard's own version he had a choice whether to resign or be subjected to poor performance procedures. It asks this court to step in.

[4] There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks Mr Redgard's uncontested evidence to the effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no 'choice'. The second is that it misconceives the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable. (Emphasis supplied)'[6]

[9] The assessment required of the arbitrator was therefore to adhere to these precepts, ie: determine if there was evidence to establish that there was:

(1) a termination of employment by the employee,

[4] At para 28.
[5] (2008) 29 ILJ 2218 (LAC).
[6] At paras 3 and 4.

(2) intolerability of continued employment, and

(3) the intolerability was the fault of the employer.

The facts

[10] Molokwane was an operator in a bindery. She had worked for the appellant for about 10 years. In or about October 2008, the appellant fitted an air conditioning system to cool the machines in use. The workspace where the machines which required cooling were located and the workspace where Molokwane, and where others had their work-stations, was separated by a partition. The partition was not fitted hard up against the ceiling and a gap of some 400 mm existed.

[11] Molokwane alleged that she was adversely affected by the cold draught from the cooled air pumped into the adjoining workspace. The question of whether she was exposed to a draught *per se* or simply the environment was cooled down to an extent that she was aware of the lower temperature and was discomforted by it is unimportant. It was accepted by everyone that her complaint of discomfort was genuine.

[12] The date of Thursday 29 January 2009 is a pivotal date. It is common cause that on that day, she returned from sick leave and Rob Viviers, the Production Manager, and she conversed about how to address her complaint about the ill-effects of the air-conditioning on her. A decision by the Arbitrator was necessary about what happened (1) before that day, (2) on that day and (3) on Monday 2 February 2009.

[13] The version of Molokwane is thus:

13.1. In October 2008, she says that she complained to Viviers about the air conditioning. He promised to seal the gap in the partition. She waited vainly until November before complaining to Viviers again. Viviers on this occasion promised to deal with the partition. Her third complaint was on 23 January 2009 when, whilst away ill, she faxed to the appellant a certain medical note. (The substance of this and other

medical notes sent on 2 February 2009, shall be addressed discretely) She never lodged a grievance or put in a written complaint at any time.

13.2. On 29 October 2008, she saw Viviers in his office. Her immediate supervisor, Cynthia Mathebula was called in. Viviers undertook to close off the gap in the partition, and as an interim measure to move her to another spot to evade the effects of the air conditioning. According to Molokwane, Mathebula said to Viviers there was no place free from the effects because the partitioning was “open at the top” everywhere. (This was not put to Mathebula when she testified). The impression left by Molokwane’s evidence is that she was not offered a different work station that could make a difference.

13.3. The next day, Friday, 30 January, when she arrived at work, the partitioning had still not been closed up at the top. The further account in the evidence is incoherent, but what seems to have been said is that the air conditioning had been switched off and in the course of the day it was switched back on. Apparently the machines overheated and to run them the environment had to be cooled again. She asked that the air conditioner be switched off. Viviers then angrily told her that the machines were expensive and she must choose between her health and her work. Presumably this exchange took place before the lunch break because she says at lunch time she went to Viviers office and “humbly” said that he did not have to shout at her. Viviers repeated that she must choose between her health and her work. She worked the rest of the day.

13.4. The evidence is incoherent about when she next came to work. It seemed initially as if it was implied she said she came to work on Saturday, but later evidence indicates that she meant it was the following Monday, 2 February 2009. She said that she arrived and saw nothing had been done about the partition. She said she went to Mathebula. She asked why nothing had been done. Molokwane’s evidence was variously, that Mathebula said that she thinks Viviers

really meant that she had to choose between work and health and that she, Molokwane, herself said these words to Mathebula.

13.5. At this juncture, she left and went to the CCMA. In cross-examination, she said she told Mathebula she was resigning. The resignation was oral. (Some point was made about her contract of employment requiring a written resignation and thus an oral resignation was ineffective. It is unnecessary to unravel this aspect to decide the case, and it is common cause that she had a fixed intention to resign.)

13.6. It is established that the CCMA referral was faxed to the appellant by 11h30 that same day.

[14] The evidence of Mathebula, the supervisor, which contradicts Molokwane in several important respects, was thus:

14.1. She had never received a complaint from Molokwane about her health problems. The first she knew of the air conditioner issue was on 29 January when Viviers called her into a meeting he was having with Molokwane. Mathebula corroborates Viviers undertaking to address the partitioning, but says no deadline was stipulated by him.

14.2. In that meeting, she was told to move Molokwane. In Viviers' presence Molokwane made no demur. However, at the workplace she flatly refused to relocate, intimating she would do so at another time.

14.3. Mathebula recalls Viviers approaching Molokwane at her work station on Friday and having a conversation. There was no argument apparent to her. She did not testify about any shouting. What was said she did not overhear.

14.4. On Friday, the air conditioner was on and off at various times.

14.5. On Monday 2 February, Molokwane did not report for work. To the single question put in cross-examination that it was her word against Molokwane that she was there, she denied Molokwane arrived. The conversation that allegedly occurred, a critical part of Molokwane's

case was not put. Of some considerable importance, it was never put that Mathebula was a witness to Viviers telling Molokwane to choose between her health and her work or that she had taken up that theme when on Monday the partitions remained untouched. Further, Molokwane's refusal to move was unchallenged.

14.6. Significantly, the Arbitrator ignored Mathebula's evidence entirely, a serious error, given the obvious materiality of this evidence to both credibility and the assessment of the probabilities and uncritically accepted Molokwane's evidence that Mathebula had made the remarks to her about Viviers really meaning she had to choose between her job and her health.

[15] Human, an executive of the appellant testified thus:

15.1. On 23 January 2009, a Friday, a faxed document was brought to his attention. It was an undated medical note from a doctor. It reads:

> 'This is to certify that Gladys Molokwane is under medical treatment for recurrent episodes of upper respiratory infections. These seem to be attributed to the air conditioner above her at work. Kindly arrange to have her moved away from the air-con for her to be a more productive worker.'

15.2. Human went to Viviers and reported this communication. Human says that Viviers told him he had no prior knowledge of these circumstances; self-evidently, of the circumstances as described in the note.

15.3. Human then, with reference to the clocking record and other routine reports made to him referred to three other matters of importance. First, he said that after she returned to work on 29 January, the air conditioner was off for the whole of that day and on 30 January it was on and off at times owing to a machine overheating and breaking down. Second, Molokwane had been expected to turn up for a voluntary overtime shift on Saturday and when she did not the supervisor called her and she cried off as being unwell. Third, she did not clock in on Monday.

15.4. A Further episode of note occurred on Monday 2 February. At 11h30, the CCMA referral that had been faxed on behalf of Molokwane to the appellant was brought to him. The referral alleges that her employer refused to comply with a medical certificate. This could only be the certificate cited, which advised the appellant to move her away from the air conditioning. He at once phoned Molokwane to enquire about the problem. She refused to talk to Human, citing advice. From whom she had procured advice in the couple of hours available to her, on her version, was not disclosed.

15.5. Human called Viviers to report to him on what was going on. Viviers claimed he had said that she be moved in the interim and that the partition would be closed during the coming week. At that time the bindery was very busy, hence by implication, remedial action was not possible immediately.

15.6. The exchange between Human and Molokwane was unchallenged. Of importance is the time the referral was received, which has a bearing on the probabilities of Molokwane having initially come to work at the appellant's premises in Village Main and having thereupon decided to go to the CCMA in the central city and achieving a completed referral and the faxing of it before 11h30. None of these considerations were addressed by the arbitrator.

[16] Viviers, the Production Manager, testified thus:

16.1. On 29 January when Molokwane returned to work, he and she met in his office. She had brought a medical document. The conversation initially seemed to be about an osteo-arthritic condition, but it emerged the issue was respiratory. This occasion was the first time Molokwane had made him aware that she had difficulties with the air conditioner. [R162/7-10]

16.2. He called Mathebula into the meeting and instructed her to move Molokwane "somewhere where she could feel comfortable". There were other workstations not close to the air conditioner.

16.3. Viviers said that in this meeting, he undertook to deal with the partition. He did not recall if Mathebula was present when that was mentioned.

16.4. Later when he went to the workplace, he saw that Molokwane had not moved and Mathebula reported that she refused to do so.

16.5. On Friday, the technicians reported to him that while the air conditioners were off (ie since 29 January) the machines were overheating. He then told Molokwane that there was a need to switch the air conditioner back on, explaining the problem. In the afternoon, she approached him. She said that "there is something wrong". In cross-examination, he expressed the exchange as Molokwane asking *if* there was a problem. He said there was not. His intention in speaking to her was to allay any suspicion that management were indifferent towards her problem because of the need to turn on the air conditioner back on again. He explained to her that it was essential to do so as it was a busy time and production was being adversely affected.

16.6. A critical aspect of Viviers account was, of course, his awareness, in any, before 29 January 2009, of the problem Molokwane claimed to have about air conditioning. Whilst giving evidence in chief, the Arbitrator tackled Viviers about this issue. A lengthy exchange took place triggered by this remark in evidence in chief:

> Q; Did she ever speak to you prior to that [ie 29 January] about the air conditioner?
>
> A: I cannot recall her speaking about it.
>
> [R162/11-13]

16.7. The exchange that followed addressed the distinction between the absence of recollection, and by implication an inability to conclusively dispute a contrary assertion, and an outright denial. As I read the whole of the passage, Viviers denied being told. In motivating his denial, he invoked the absence of a recollection, and was emphatic that it did not occur. He alluded, also, to a consideration relevant to the probabilities

of such a complaint being made; ie he said if it had been made aware, she would have been moved earlier, a response consistent with his reaction when alerted to the issue in January 2009, at which time, as soon as she returned to work he met with her and immediately ordered her to be moved.

16.8. This theme of the semantic distinction was later taken up again by the Arbitrator, after the cross-examiner had ignored it. It was then put to Viviers that in October 2008, Molokwane said she had complained. His answer was that he did not recall it and said "as far as I am concerned it did not happen." [R179/1-14] This denial, he stated twice. Viviers was then asked about the complaint in December 2008 and the allegation that he undertook to address the air conditioning problem. He flatly denied such a complaint being made. [R180/1-5]

16.9. He denied remarking that Molokwane had to choose between work and health. He said that he had indeed made remarks about "all of us" having to take care of our health. He denied shouting at Molokwane.

16.10. As regards, medical certificates, Viviers said all he saw on 29 January was a badly photocopied flier alluding to osteo-arthritris. He saw several other certificates on 6 February at a disciplinary enquiry convened into Molokwane's desertion and conducted in her absence.

16.11. The episode, to which Human had referred, of the report received initially by Human on 23 January, was addressed in cross-examination. Viviers said he did not see the certificate faxed to Human on 23 January. He said Human mentioned getting a certificate but he did not look at it then. The Arbitrator took up the theme about when Viviers saw the certificate cited above. He said he did not recall this document being brought to his attention, meaning he did not see it before 6 February. When referred to Human's evidence, he accepted that Human had discussed the doctor's report, but said that he had not read it at that time. When asked by the Arbitrator if 29 January was "the very first time you got to know of her condition" he answered "well, like I

said, that is when I saw from her when she came , returned back, and showed me the flier …" [R174/18-21]

16.12. Lastly, it was mentioned that the physical task of closing off the gap was a low cost quick half-hour job.

[17] The medical condition of Molokwane as revealed by the documents she submitted is an aspect of interest but of dubious value to decide any issue of note. In chronological order, the documents which she faxed with the referral form on 2 February are set out; (it may logically be assumed the employer had received the original certificates of the earlier occurrences at the dates of the notes referred to as the notes are plainly prepared to deal with a legitimate absence from work):

17.1. Dr Ganda on 8 April 2008 booked her off for that day owing to a dental procedure.

17.2. Dr Makenete on 27 October 2008, booked her off until 20 October 2008 because of a urinary tract infection.

17.3. Dr Mokgatle on 4 November 2008 booked her off until 5 November for cystepyelist (sic) and pleurisy.

17.4. On 21January 2009, Dr Mokgatle noted atopic eczema and booked her off from 19 – 23 January.

17.5. The undated certificate given on 23 January 2009, dealing with respiratory infections, has already been addressed.

17.6. On 24 January, Dr Makumu booked her off until 29 January for "medical condition". In addition, her evidence was that on 24 January she went for X-rays which revealed rheumatism.

Evaluation of the arbitrator's evaluation

[18] The Arbitrator found that it was clear that Vivers knew from October 2008 of the air-conditioning problem, reneged on a promise made in December 2008 to address it and told Molokwane to choose between health and work. He

held that Viviers must have shouted at Molokwane because no other reason could exist for her to go to see him later that day. Further, he made an adverse finding against Viviers in relation to Human's act of alerting him to the medical problem on 23 February, thus, so it was concluded, Vivier's evidence that he saw the medical documents only on 6 February was not explained and his veracity was impaired. He held that because the repair job was said to be a half hour task there was no need to turn the air conditioner off. Molokwane was at the workplace on Monday and had the conversation with Mathebula as described by her. Hence says the arbitrator, the probabilities favour the version of Molokwane.

[19] In my view, this appreciation of the evidence on record is a travesty. No genuine analysis was undertaken. As alluded to earlier, Mathebula's testimony is ignored. There is no rational basis to reject Mathebula's version. Moreover, the probabilities are against Molokwane being at the bindery on Monday morning. Human said she did not clock in. This was unchallenged. Moreover, the 11h30 production of a completed CCMA referral when the idea of a dispute only occurred that very morning calls for an explanation how a decision to resign, visit to the CCMA and despatch of a referral could take place, not to mention the solicitation and receipt of advice could occur so rapidly. On Molokwane's version, all of this was unthought-of until Monday morning, for it was her intention to resume work but the idea to resign was triggered by the sight of the unclosed gap in the partition. Importantly, no reason exists why Molokwane's version on this aspect is preferable to that of Mathebula.

[20] The Arbitrator's reasons for rejecting Viviers' version are either unexpressed or facile. No rationale is offered why it is less probable that no complaint was made in October or December. Contrary to the Arbitrator's remark that such knowledge was "abundantly" clear, the version of Molokwane is uncorroborated and improbable. In support of Viviers' flat denials of a reported complaint is the improbability of Molokwane not raising the alleged tardiness of Viviers with, at least, Mathebula, or with higher Management. It is also unlikely that she would not have shared her problem with the cold with co –

workers if she had been uncomfortable for nearly three months. The alacrity with which the decision to move her was made could, as Viviers himself said, have been made earlier, and on the probabilities it would have occurred then.

[21] The criticism of Viviers in relation to Human's evidence is incoherent. He was held to have given contradictory evidence to that of Human about sight of the medical certificates on 23 January. Human did not say he gave or showed the medical certificate to Viviers on 23 January; he reported the problem. Moreover, Viviers did, Contrary to the Arbitrator's findings, indeed explain how he came to see the document only on 6 February and not earlier.

[22] The finding that the probabilities favour Viviers making hostile remarks about Molokwane having a choice between health and work and shouting at Molokwane is wholly unfounded. Molokwane's evidence about shouting is uncorroborated by Mathebula who witnessed, but did not hear, the conversation between them. Raised voices would have been heard. To suggest Viviers did shout as the only explanation for her to visit him later is unsustainable. Moreover, the "choice" remark is, on Molokwane's evidence, an occurrence of which Mathebula had to have knowledge. However, Mathebula denies that happened. Viviers' denials have not been displaced and no reason to favour Molokwane's version exists, especially where she is contradicted by Mathebula.

[23] The invocation of the idea of a "half-hour" task is incoherently invoked by the Arbitrator but, nevertheless, it can be inferred that what was in mind was that the idea that if the job was that quick and easy to do, it can be argued that the failure to do it at once tells against a willingness by Viviers to do so at all. That imputation ignores the decision by Viviers to move Molokwane at once, the busyness of the time and the concomitant distractions that busyness implies. In addition, it is Viviers' evidence that the task of sealing the partition would be addressed during the "coming week'. Moreover, common sense informs one that even a half-hour job needs to be organised; ie instruct the handyman, procure the material and schedule a time to do the work when it would not disturb the production schedule. If Viviers was intending to do the job personally, these obvious considerations apply equally.

[24] In my view, the factual findings in the award are fatally flawed on the grounds of ignoring evidence, not properly weighing it up, and illogical and irrational reasoning. A reasonable arbitrator could not have reached such a conclusion on the body of evidence adduced.

[25] The Labour Court also misconstrued the evidence in its assessment. It held that Viviers contradicted Human over knowledge of the certificates. This finding is incorrect, as is evident from the analysis above. Further, a finding was made that Viviers was evasive, not a finding articulated by the Arbitrator, but rather a glib and superficial reading by the Labour Court of the evidence of Viviers about his lack of knowledge of Molokwane's condition prior to January 2009. This perspective is unfounded, as is evident from the analysis above.

[26] An important aspect of the labour Court's finding was its reliance on what it says was said during the argument on review by counsel for the appellant (applicant on review), ie that it was "common cause" that Viviers made the remark that Molokwane had to choose between work and health. [R 267 – J para [46]] No record of that statement exists. Taking the statement to have been made, it was plainly wrong, as no reading of the evidence could justify the idea that it was common cause. Counsel cannot change the evidence by a statement from the bar, nor offer an admission of facts that contradicts what is on the record. If Counsel indeed said this in the face of a clear record contradicting it, the court should not have latched onto the statement. The court noted the contradiction yet wholly inappropriately relied on a patently wrong submission.

[27] The findings of the Labour Court in this regard cannot stand.

<u>Do the proven facts establish a constructive dismissal?</u>

[28] In my view, no case for a constructive dismissal exists. The enquiry upon the proven facts, ie the appellant's version establishes no foundation.

[29] The employer reacted immediately to ameliorate the adversity alleged to exist. It offered to move her and block off the partition in due course. That response

establishes an empathy and a reasonable set of steps to cure a problem not of its making but arising from a personal vulnerability of the employee.

[30] Molokwane's response was grossly unreasonable. She refused to move. Moreover, she wanted instant or near instant closing of the gap. If the working conditions were such that she could not move to another work-station (for which no case exists) she could have stayed at home for a week until the gap was closed or said she could not carry on until the gap was closed. The rush to resign, fortuitously, at the end of the month was an inappropriate response. Moreover, as was contended on behalf of the appellant, the nature of the problem was such that the lodging of a grievance was an obvious appropriate response.

[31] Assessing the employer's conduct, it cannot be said to have been responsible for creating an intolerability of continuation of the employment relationship.

Conclusions

[32] Accordingly, there was no constructive dismissal. The CCMA had no jurisdiction. The labour Court Judgment and the arbitration award must be set aside.

[33] As to the question of costs, despite a prayer for costs by the appellant, a not unreasonable stance in the circumstances, it is evident that Molokwane is indigent. She has been represented *pro bono* in the matter. No point is served by a costs order.

[34] The court thanks Adv Meyerowitz who appeared *pro bono*, and his instructing attorneys Cliffe Dekker Hofmeyr for their assistance in the conduct of the appeal.

The Order

[35] In the result the following order is made**:**

(i) The appeal is upheld;

(ii) the judgment of the Labour Court is set aside and replaced with the order that:

"the award is reviewed and set-aside and replaced with a finding that the employee was not dismissed".

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Sutherland JA

Tlaletsi DJP and Mngqibisa -Thusi AJA concurred.

APPEARANCES:

FOR THE APPELLANT:	Adv W J Hutchinson
	Instructed by Fluxmans Inc
FOR THE RESPONDENT:	Adv M Meyerowitz
	Instructed by Cliffe Dekker Hofmeyr