REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: CA 11/13

In the matter between:

THE WESTERN CAPE EDUCATION DEPARTMENT **Appellant**

and

THE GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **First Respondent**

CRAIG BOSCH *N.O* **Second Respondent**

JULIAN GORDON **Third Respondent**

Heard: **12 March 2014**

Delivered: **26 June 2014**

Summary: Review application – Constructive dismissal – employee applying for temporary incapacity leave and early ill-health retirement- employer failing to process both applications- employer applying leave without pay- and deducting employee salary- employee resigning- commissioner finding employer conduct rendering employment relationship intolerable and ordering re-instatement. Remedy- consideration of fairness in granting remedy- re-instatement uncommon for constructive dismissal- employee showing undisputed evidence circumstances prevailing at the time of seeking re-instatement different to those at the time of his resignation- Labour Court Judgment upheld- appeal dismissed with costs.

Coram: Davis JA Molemela *et* Sutherland AJJA

JUDGMENT

MOLEMELA AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court (Steenkamp J), dismissing an application brought by the appellant to review an award of the second respondent, acting under the auspices of the first respondent, in which the second respondent ("the commissioner") found that the third respondent ("Mr Gordon") was constructively dismissed by the appellant and ordered that he be re-instated. The appeal is brought with leave of the Labour Court.

Background facts

[2] Mr Gordon was employed in the public service from 1986 and later occupied the position of a Deputy Director: Personnel Management. He reported to a certain Mr Elliot, who was the Human Resources (HR) Director. Mr Gordon suffered a heart attack in July 2006. He recovered but after a while started experiencing anxiety attacks. He was eventually diagnosed with post-traumatic stress disorder and clinical depression.

[3] Mr Gordon returned to work on 8 January 2007. He struggled to cope and was "booked off-sick" from mid-February 2007. He was hospitalised on 27 March 2007. He requested that he be granted an ill-health retirement. He was advised to submit an affidavit. On 2 June 2007, he duly submitted an affidavit in support of his application for ill-health retirement and also applied for temporary incapacity leave. He handed his application and supporting documents over to Mr Elliot, who undertook to personally attend to Mr Gordon's application. On Mr Gordon's request, Mr Elliot undertook to see to it that the form was duly signed by two witnesses. Mr Gordon thereafter submitted medical certificates on a monthly basis as proof of his inability to work.

[4] Mr Daniels took over from Mr Elliot as HR Director. In September 2008, Mr Daniels visited Mr Gordon at his home and made enquiries pertaining to his illness and his return to the workplace. Mr Gordon informed him that he had still not heard anything from the appellant regarding his application for ill-health retirement and temporary incapacity leave.

[5] On 3 December 2008, Mr Gordon received a letter from the appellant acknowledging receipt of medical certificates covering the period up to 30 September 2008 but pointing out that no medical certificates had been submitted since that date. Mr Gordon was instructed to report for duty immediately upon receipt of the letter of 3 December 2008. He submitted medical certificates in respect of the period 1 October 2008 to 3 December 2008. On 19 December 2008, Mr Gordon sent the appellant a letter urging the finalisation of his application for ill- health retirement and temporary incapacity leave.

[6] On 8 February 2009, Mr Gordon received a letter from the appellant notifying him that he would be regarded as having absconded if he did not resume his duties by 9 February 2009. Mr Gordon duly resumed his duties on 9 February 2009.

[7] In April/May 2009, Mr Gordon received a letter from the appellant's Mr Wilkinson, indicating, *inter alia* that his application for temporary incapacity leave that had been submitted in 2007 had not been processed because the application form had not been signed by two witnesses. He was asked to re-submit the form in question. On 11 June 2009, he referred a grievance to the appellant and also alluded to the mysterious disappearance of his application for temporary incapacity leave. The application form re-surfaced in his office more or less on 3 July 2009, when it was slipped underneath his door in his absence. Mr Gordon stated that he could only re-submit his application on 07 August 2009.

[8] What had transpired in the meantime was that on 26 June 2009, the appellant had sent Mr Gordon a letter notifying him that as a result of his failure to re-submit his temporary incapacity leave, the appellant had decided to grant

leave without pay in respect of his absence from work for the period 31 July 2006 to 06 February 2009. On 2 July 2009, Mr Gordon received a letter from the appellant informing him that, in terms of section 38 of the Public Service Act of 1994, the appellant was going to recover from his salary a total sum of R753 352.02, which was the total amount paid to him when he was absent from work. He was advised that the aforesaid amount would be deducted from his salary at the rate of R 12 000 per month. He realised that after all deductions, he would be left with a net income of R2 159 per month.

[9] Mr Gordon contacted the appellant and requested it to place a moratorium on the deductions pending consideration of his application for temporary incapacity leave. He lodged another grievance. He did not receive any response. He tendered his resignation on 1 July 2009. A grievance meeting was held on 3 July 2009 between Mr Gordon, Mr Daniels and a Mr Faker. He was given two options: (i) he could proceed with his resignation, or (ii) he could retract it. In the event of him choosing the latter option, Mr Daniels would assist him with his application for ill-health retirement. He was further advised that irrespective of the option he chose, Mr Daniels and Mr Faker would approach the Head of Department regarding the appellant's decision to apply a policy of leave without pay in respect of his absence from work and the resultant deductions. Mr Gordon retracted his resignation on 29 July 2009.

[10] On 4 August 2009, Mr Gordon sent an e-mail to the appellant enquiring whether a decision had been made regarding the refund of the amount of R12 000.00 that had already been deducted from his salary at the end of July 2009. Surprisingly, despite his retraction of his resignation, he was told to convey his election in respect of the two options offered to him in the grievance meeting of 3 July 2009. He responded in an e-mail dated 7 August 2009 in which he pointed out that the option he had selected was obvious. He *inter alia* stated as follows:

> 'I believe that enough time has passed for the WCED (appellant) to exercise its rights, either way, and to make a decision as to whether the money deducted will be repaid or not. In our conversation last Friday afternoon, you

> indicated to me that this matter will be resolved within 72 hours (and that has long since passed)...
>
> In order for me to make further decisions around my relationship with the WCED, I would urge you to conclude this matter by this coming Tuesday, failing which I will be forced to resign.'

[11] At the end of August 2009, the appellant deducted another instalment of R12 000.00. Another grievance meeting was held on 1 September 2009. After a discussion, Mr Daniels and Mr Faker gave Mr Gordon an agreement and asked him to sign it so as to authorise them to obtain a mandate from the Head of the Department. Mr Gordon kept on phoning them to enquire about the matter. Mr Daniels informed him that they had still not obtained a mandate from the Head of the Appellant's department. On 30 September 2009, Mr Gordon submitted his letter of resignation.

[12] On 30 October, he referred the dispute to the relevant bargaining council (first respondent). The arbitration award was handed down on 14 March 2012. The arbitrator found that Mr Gordon was constructively dismissed and that his dismissal was unfair. He ordered that Mr Gordon be reinstated. The appellant applied for a review of the arbitration award but the Labour Court dismissed the application on the basis that the commissioner had correctly found that Mr Gordon's resignation amounts to a constructive dismissal.

Labour Court proceedings

[13] The appellant brought an application to review and set aside the commissioner's award in terms of section 145 of the Labour Relations Act.[1] The deponent to the founding affidavit alleged that the commissioner had committed misconduct in relation to his duties and had reached a conclusion that a reasonable decision-maker could not reach. It was contended that the commissioner erred on the facts when he found that Mr Gordon was constructively dismissed. The appellant further argued that the commissioner ought to have found that Mr Gordon was not dismissed but chose to resign voluntarily and that his dismissal could not be attributed to the appellant's

[1] Act 66 of 1995.

conduct. With regards to the remedy granted by the commissioner, the appellant's proposition was that the commissioner erred by ordering re-instatement despite Mr Gordon's averment that the employment relationship had become intolerable. According to the appellant, the remedy granted flouted the provisions of section 193(2)(b) of the LRA.[2]

[14] The Labour Court reasoned that, although it seemed anomalous that Mr Gordon sought re-instatement despite having claimed that the appellant had made the working relationship intolerable, the evidence established that the appellant had, objectively speaking, made a continued working relationship intolerable for the employee. The Labour Court found that the employee's desire to be reinstated was not destructive of the finding that the employment relationship was, at the time of the employee's resignation, intolerable. The Labour Court concluded that the Commissioner's findings were not so unreasonable as to warrant interference therewith.

The applicable review test

[15] The following dictum in the case of *Herholdt v Nedbank Ltd,*[3] aptly summarises the legal position applicable to reviews brought in terms of section 145(2)(a) of the LRA and requires no further elaboration.

> 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves

[2] Section 193(2) of the LRA provides that "the Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless- (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or the dismissal is only unfair because the employer did not follow a fair procedure."

[3] (2013) 34 ILJ 2795 (SCA) at para 25.

sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

The appeal

[16] The appeal turns on three issues. Firstly, whether Mr Gordon's resignation constituted a constructive dismissal as contemplated in section 186(1)(e) of the LRA. Secondly, in the event that it does constitute such a dismissal, whether the appellant had conducted itself in such a manner that it was to blame for the intolerable relationship. Thirdly, whether the remedy of reinstatement was appropriate given Mr Gordon's assertion that the appellant had made the employment relationship intolerable.

Evaluation of arguments

[17] The appellant argued that the Labour Court erred when it concluded that Mr Gordon was constructively dismissed and that his dismissal was unfair, given that he resigned twice and in both instances his resignation occurred when the appellant was in the midst of attending to his respective grievances.

[18] It was further contended on behalf of the appellant that the real reason for Mr Gordon's resignation was not that the appellant made the employment relationship intolerable but rather that he wanted to avoid deductions from his salary entirely and claim his pension benefits. The appellant submitted that the latter contention was bolstered by the fact that Mr Gordon had approached the appellant and asked for re-instatement after his pension benefits were paid to him. The appellant contended that the inescapable inference that can be drawn from the fact that the third respondent subsequently petitioned the department for re-appointment is that the employment situation was, at the time of Mr Gordon's resignation, not sufficiently intolerable. The appellant further contended that the appellant, as a government employer was entitled to recover any monies owed to it from an employees' salary. The facts demonstrated, so the argument went, that the appellant had reasonable cause to deduct the over-payment in salary and the fact that Mr Gordon disagreed with whether the appellant could lawfully

deduct the monies was inconsequential to the enquiry whether the appellant had reasonable and proper cause to do what it did.

[19] In terms of section 186(1)(e) of the LRA, dismissal means that "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee". It is clear from the provisions of this section that in any proceedings concerning any unfair dismissal dispute, the employee must establish the existence of the dismissal if this is placed in dispute. In the case of *SA Rugby Player Association and Others v SA Rugby (Pty) Ltd; SA Rugby Players Association,*[4] the following was stated in relation to a dismissal in terms of section 186(1)(b) of the LRA:-

> '[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...
>
> [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.' (My emphasis)

[20] In terms of section 192(1) of the LRA, it is clear that where an employee asserts that he/she resigns because the employer made the employment

[4] (2008) 29 ILJ 2218 (LAC) at para 39-41.

relationship intolerable, the employee bears the *onus* of proving that the employer indeed made the employment relationship intolerable. In the case of *Murray v Minister of Defence,*[5] the Supreme Court of Appeal described this *onus* in the following terms:

> '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 enquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. **Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.** 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 may be 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 in the conduct must (in the formulation the courts have adopted) lacked 'reasonable and proper cause'. (My emphasis)

[21] In *Jordaan v CCMA and Others,*[6] this Court, referring to *Sappi Kraft (Pty) Ltd, t/a Tugela Mall v Majaka N.O and Others,* confirmed the two-steps approach to constructive dismissal disputes. It held that an employee who leaves employment bears the *onus* of showing that the employer effectively dismissed the employee by making his/her continued employment intolerable. Once this is established, it then has to be established whether the dismissal was unfair.

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[5] (2008) 29 ILJ 1369 (SCA) at para 12.
[6] (2010) 31 ILJ 2331 (LAC).

[22] In determining whether an employee has proven that the employer made continued employment intolerable, the employer's conduct must be considered as a whole in order to make an objective determination of whether the employer made the employment relationship so intolerable as to warrant its termination. In doing so, it must be borne in mind that the test for constructive dismissal does not require that the employee should not have the choice but to resign, but only that the employer should have made continued employment intolerable.[7]

[23] An important consideration in this case, as correctly stated by the Labour Court, is that Mr Gordon's evidence relating to the circumstances he viewed as intolerable is largely uncontroverted. There is no doubt that such circumstances were of the appellant's making. The facts of this case are straightforward and clearly show that the appellant's senior employees were wholly responsible for the intolerable conditions with which Mr Gordon had to contend. Although it was argued on behalf of the appellant that it always wanted to help Mr Gordon, the evidence adduced is inconsistent with this submission.

[24] The exchange at page 195 Vol. 3 of the record is significant.

> 'Presiding officer: I am not interested in Mr Fry's mandate, what I am interested in is why you wanted to go back. You [are] telling me that this is intolerable so much so that you had to resign. A little while later you go back and say please take me back. Now really how intolerable could it have been if you want to go back, do you understanding my dilemma.
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> Julian John Gordon: I understand your dilemma.
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> Presiding officer: I need to make a finding on whether you are in an intolerable situation.
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> Julian John Gordon: An organisation is made up of people, it is not an organ that exists in a vacuum, it is made up of people and the actions of people within that organisation. I have known the organisation for a long time, what happened to me in and to many others due to the [inaudible] process not being administered properly, was not the norm within the organisation. In fact I was asked by Mr Daniels to facilitate a session where we…[inaudible] in

[7] *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 at para 4

terms of …[inaudible] within the department to handle the process, just thinking about that made me extremely fearful and stressful because it is a stressful thing to contemplate how are we going to deal with this without me projecting what is happening to me.

Presiding officer: Okay, why is it not intolerable how you left because you said at the time it was intolerable and you went home and thought about it for a week. Then you sent them a letter saying, please take me back. It is actually not so intolerable after all, is that not what you are saying?

Julian John Gordon: I am not saying it was not intolerable then. I am saying I believe that they will not introduce those back if I should be re-appointed within the WCED and they without a court order deduct leave without pay from me to the value of 700 000.00 and I would again be in a dispute with the employer.

Presiding officer: But precisely, so you think that is not … [inaudible]

Julian Gordon: I believe that they will not introduce the same intolerable situation.

Presiding officer: So you think it would not be intolerable when you go back and the whole thing is not going to re-emerge? That they are not going to insist on taking R750 00.00 they wanted from you. You think that is just going to go away because that is the intolerability as I understand it. That is the essence of it, apart from the way that they [inaudible] the process which I understand you [inaudible] your complaint. The real problem was they wanted to deduct R12 000.00. You think that also not going to reinstate when you came back to work for them?

Julian John Gordon: They wanted to re-surface it within the context of this offer and I agree with the Department. I would pay it back.

Presiding officer: You would pay it back?

Julian John Gordon: I agree with them, I disagree that they are entitled to it.

Presiding officer: So it is not intolerable to pay the money back. Is that what you are saying?

Julian John Gordon: It would have been intolerable. It would have been still difficult.... It would have been a difficult matter for me to pay something that I know was not due to the department in the first place."(sic).

[25] This exchange also shows that the commissioner was alive to the fact that Mr Gordon had, subsequent to his resignation, sent a letter asking for his job

back. The commissioner clearly applied his mind to this aspect of the evidence.

[26] The appellant made much of the fact that Mr Gordon had, after his resignation, written a letter to the appellant asking for his job back. This must be considered in its proper context, for his letter was only authored on 19 October 2011, a good two years after Mr Gordon's resignation. A desire to be reinstated does not, without more, serve as proof that the employee did not regard the employment relationship as intolerable at the time of the resignation. The employee's perceptions of the intolerable conditions must be tested against the circumstances that prevailed at the time of resignation. A change in circumstances after the employee's resignation is therefore a significant factor in the equation. I shall return later to this aspect.

[27] In the letter in question, Mr Gordon stated that he had always regarded himself as a friend of the appellant, that he was a valuable asset to the appellant, that his health had improved and that he would like to work for the appellant. The appellant contended that the letter in question is critical to the assessment whether, in substance, Mr Gordon's workplace environment was intolerable and if so, whether the intolerability was caused by the appellant. I can find nothing in the letter that seems to suggest that Mr Gordon did not at the time of his resignation perceive the working relationship to be intolerable. Put differently, the contents of his letter in no way negate the existence of intolerable conditions and how he perceived the employer's conduct towards him at the time of his resignation. As pointed out in the *Murray* judgment, the enquiry is whether the employer had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee.

[28] The uncontroverted evidence in this matter clearly shows that from June 2009, Mr Gordon did his part to address the issues confronting him, but constantly had to contend with an uncaring attitude from the appellant's senior officials. They were unsympathetic despite their awareness of his vulnerabilities arising from his illness. It is evident from the Code of Good Practice in Schedule 8 to the LRA that an employee is entitled to a fair

process when his application for incapacity, whether temporary or permanent, is considered. Mr Gordon's application for temporary incapacity was not processed for two years simply because one of the appellant's officials had not procured the signatures of witnesses despite his promise that he and his secretary would sign as witnesses. This state of affairs persisted despite the numerous enquiries Mr Gordon regularly directed to the officials of the appellant regarding the progress of his application. If the application had been processed timeously and Mr Gordon had then been notified of the outcome, he would not have been faced with a situation whereby the rejection of his application resulted in him having to repay amounts paid to him as remuneration over a period of almost two years.

[29] While section 38 of the Public Service Act, 1994, permits the recovery of any overpayment made to an employee and permits the accounting officer of the relevant government department to determine the instalments in terms of which the overpayment can be liquidated, the exercise of such a power must be effected reasonably. The need for the accounting officer to act reasonably is implicit in the purpose of the section read as a whole. Section 38(1) provides for the recovery of an overpayment of remuneration which, being money which has been improperly paid from public funds, must be recovered. However, section 38(2) (b) which empowers the accounting officer to recover the monies, expressly provides that he or she make a decision as to the quantum of the instalments to be paid by the employee to discharge the debt so owing. That power clearly envisages that the amounts to be deducted from the employee's salary should take account of the need to repay and the ability of the employee to discharge the debt as expeditiously as possible. For this reason, a determination in terms of which the deduction amounts to 80% of an employee's salary over a long period of time can hardly be considered to be reasonable under the circumstances. To make matters worse, the appellant continued to deduct an amount equivalent to 80% of Mr Gordon's salary even after he had re-submitted his temporary incapacity application forms. His request for a moratorium on deductions fell on deaf ears. An 80% reduction in income has the potential to cause any employee stress. It is thus not surprising that Mr Gordon ended up unable to service his debts to an extent

that this state of affairs, to his embarrassment, came to the attention of his secretary due to his creditors phoning him at work.

[30] Mr Daniels was the HR Director and can thus be expected to be reasonably conversant with all the necessary procedures applicable in the public service, yet he dragged his feet in addressing Mr Gordon's problems. He seemed content in merely informing him that the problem was being escalated to the head of the department. Both Mr Daniels and Mr Faker displayed no urgency in seeking the intervention of the appellant's head of the department. The appellant went on to deduct another instalment equivalent to 80% of Mr Gordon's salary, despite the fact that he had already lodged a grievance. His enquiry on this issue was met with the same response he had received a month previously: that the matter would be escalated to the head of the department. Mr Gordon's evidence to the effect that the latter deduction was the proverbial last straw that broke the camel's back is perfectly understandable, under the circumstances.

[31] I agree with the Labour Court's observation that the culmination of events in this case is analogous to the situation in the case of *Murray v Minister of Defence.*[8] The following remarks made by the court in the Murray case (*supra*)[9] apply equally to the facts of the case at hand: "The plaintiff's subjective condition of suspicion, demoralization and depression, which was evident to those dealing with him, was materially relevant to how fairness required the navy to deal with him". In this matter too, fairness dictated that the appellant should have taken the same considerations into account. Unfortunately this did not happen. Looking at the appellant's conduct as a whole and its cumulative impact, I am satisfied that its effect, judged reasonably, was such that Mr Gordon could not be expected to put up with it. The Labour Court correctly described the attitude displayed by the appellant's officials as obtuse.

[32] The appellant's attempt to create the impression that Mr Gordon's resignation was prompted purely by financial gain is clearly not consonant with the totality

[8] (2009) 3 SA 130 (SCA).
[9] *Supra* at para [59]

of evidence. .Mr Gordon was cross-examined extensively on why he wanted to be re-instated into what he had previously described as an intolerable working environment. He remained steadfast that the financial aspect "was a crucial part of it but it was not the only part". He categorically stated that he believed that the workplace environment would be different in that he would, upon his return, not be subjected to deductions or if he was, he would repay a reasonable amount monthly. He also testified that the appellant had since formalised its processes and the Labour Relations department of the appellant was jointly involved with HR in such matters, so he anticipated that the issue would be better handled after his re-instatement. He also testified that he had also recovered psychologically and would be better equipped to work than he was previously.

[33] The Labour Court demonstrated its awareness of the *onus* and the approach applicable in respect of the dismissals in terms of section 186(1)(e) of the LRA and correctly found that Mr Gordon had established his dismissal. Having made this finding, the Labour Court then went on to investigate whether the commissioner's finding that the dismissal was unfair was an unreasonable conclusion. The Labour Court properly considered all the evidence adduced at the arbitration proceedings and found that the employer had not shown that there was a fair reason for the dismissal. In my view, the circumstances of the case show that there is a causal nexus between the conduct of the appellant towards Mr Gordon and his resignation. Expressed differently, the appellant was to blame for creating the intolerable conditions of which Mr Gordon complained. The Labour Court duly took into account that the arbitrator was faced with only Mr Gordon's version and correctly concluded that in the absence of any evidence to the contrary the arbitrator's finding in respect of reinstatement was not unreasonable.

[34] At first blush, the granting of the remedy of re-instatement in constructive dismissal disputes may seem to be an anomaly, considering that the basis for the termination of the employment contract is that the employer made the continuation of an employment relationship intolerable. However, such a remedy is not always incongruous with the provisions of section 193(2)(b) of

the LRA. The fact that an employee resigns on the grounds that the employer made the employment relationship intolerable for him/her should not, without more, serve as a bar to re-instatement. It seems to me that what is of the essence is the stage at which intolerability occurs. An employee that avers that he/she was constructively dismissed must prove that *at the time of termination of the employment contract* he/she was genuinely under the impression that the employer had rendered the continuation of the employment relationship intolerable. If such an employee subsequently seeks the remedy of reinstatement, then such an employee must show that the intolerable circumstances that prevailed at the time of termination of the employment contract are no longer extant. In a matter like the present, where the employee has placed facts showing that the circumstances prevailing at the time of seeking re-instatement are different to those at the time of his/her resignation and the employer has chosen not to refute them, then the notion of fairness dictates that the employee's uncontested evidence be accepted and that he/she be re-instated into his/her position. It follows that there is no merit in the appellant's proposition that Mr Gordon's desire to be re-instated served as proof that he did not regard the employment relationship as sufficiently intolerable.

[35] Having considered all the circumstances, I am satisfied that the Labour Court has not erred in any way. The commissioner in his award demonstrated a clear understanding of the two-stage approach applicable to constructive dismissal cases and correctly found that the appellant had established his dismissal. The Labour Court was correct in finding that, objectively speaking, the facts before the commissioner established Mr Gordon's dismissal and that the commissioner's decision pertaining to the fairness of the dismissal was one that a reasonable decision-maker could reach. The Labour Court correctly dismissed the application for review. The appeal thus falls to be dismissed. There is no reason to depart from the general rule that costs should follow the result.

Order

[36] In the result, I make the following order:

1 The appeal is dismissed with costs.

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Molemela AJA

I concur

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Davis JA

I concur

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Sutherland AJA

APPEARANCES:

FOR THE APPELLANTS:	Advocate T J Golden
	Instructed by State Attorney Cape Town
FOR THE THIRD RESPONDENT:	In person