THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 155/16

In the matter between:

HC HEAT EXCHANGERS (PTY) LTD **Applicant**

and

VICTOR J L DE ARAUJO **First Respondent**

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **Second Respondent**

DAISY MANZANA N.O. (AS ARBITRATOR) **Third Respondent**

Heard: **21 June 2019**

Delivered: **08 October 2019**

Summary: Bargaining Council arbitration proceedings – Review of award of arbitrator – principles considered – test for review – s 145 as read with 158(1)(g) of LRA 1995 – issue of jurisdiction regarding whether dismissal exists – reasonable outcome test does not apply – review considered on the basis of a *de novo* determination of what is right or wrong

Dismissal – constructive dismissal – section 186(1)(e) considered – principles and requirements for proper case of constructive dismissal set out

Dismissal – constructive dismissal – availability of alternative means to resolve issue – resignation not measure of last resort – employee should have followed grievance process to finality – constructive dismissal not shown

Review of award – award by arbitrator ignoring pertinent facts and committing material error of law and misdirection – award reviewable and set aside – substituted with determination that employee was not dismissed and arbitrator having no jurisdiction

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this case, the applicant has brought an application in terms of section 145 as read with section 158(1)(g) of the Labour Relations Act ('LRA'),[1] to review and set aside an arbitration award handed down by the third respondent in her capacity as an arbitrator of the Metal and Engineering Industries Bargaining Council ('MEIBC'), being the second respondent.

[2] How this all came about is when the first respondent, who had resigned from his employment with the applicant, pursued an unfair dismissal dispute as contemplated by section 186(1)(e) of the LRA to the MEIBC, thus contending his resignation was a so-called '*constructive dismissal*' by the applicant. On the other hand, the applicant contended that first respondent had resigned of his own volition, and was thus never dismissed. The third respondent was the arbitrator tasked to decide this matter, and was called upon to first decide whether the first respondent had indeed been dismissed, and only if this was so, whether such dismissal was fair. In an arbitration award dated 14 December 2015, the third respondent held that the first respondent had indeed been constructively dismissed by the applicant, and that such dismissal was unfair. The third respondent then directed that the applicant pay compensation to the first respondent in the sum of R115 000.00, being an amount equivalent to five months' salary.

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[1] Act 66 of 1995 (as amended).

[3] Dissatisfied with this award, the applicant then served a review application on the respondents on 27 January 2016, seeking to review and set aside such award. Considering that the arbitration award itself was served on the applicant on 17 December 2015, the date of 27 January 2016 is literally the last day of the six weeks' time limit contemplated by section 145 (1) of the LRA. However, it appears that the review application, despite being served on the respondent parties in time, was never filed in Court until 8 June 2016.

[4] The aforesaid irregularity was discovered when the matter came before Lagrange J on 23 February 2017. The learned Judge then made an order that *inter alia* required the applicant to file a condonation application by 3 March 2017 as a result of this late filing in Court. The applicant complied with the order, and brought the condonation application.

[5] What followed was a rather unfortunate litigation journey. The matter was set down again on 25 October 2017, but none of the parties were in attendance at Court. Gush J struck the matter from the roll. The applicant then applied for the reinstatement of the matter, which reinstatement application was set down before Prinsloo J on 27 February 2018. Prinsloo J considered both the reinstatement application and the condonation application, and the learned Judge granted an order on 27 February 2018 reinstating the applicant's review application and also granting condonation for the late filing of the review application. The learned Judge further directed that the matter be set down on the opposed roll on an expedited basis in the July 2018 recess.

[6] The application was then indeed set down on 13 July 2018 in the recess. There was no appearance for the applicant on that day, and Mosebo AJ dismissed the review application with costs. A rescission application brought by the applicant followed, which rescission application came before Mabaso AJ on 6 November 2018. Mabaso AJ granted the application, and rescinded the order of Mosebo AJ in terms of which the review application was dismissed and this is how the review application then came before me for hearing.

[7] All considered, the review application is now in all respects properly ripe for hearing, and is properly before me for consideration. I will now proceed to decide this review application, by first setting out the relevant factual matrix.

The relevant background

[8] The first respondent became employed with the applicant in January 2009. The applicant's business is the manufacture and maintenance of heat exchangers, which resorts under the scope of the MEIBC. By the end of 2012, the first respondent had been appointed as the applicant's health and safety manager.

[9] Towards the end of 2014, the applicant decided to move its workshop to a bigger workshop, and at about the same time commenced construction in this regard. During the period between October and December 2014, there were different contractors on site attending to the building and renovation of the new workshop. The first respondent's duties then included the monitoring of health and safety throughout this entire process, and present a report and recommendation on a weekly basis at a production meeting in this regard. The applicant would then deal with any issues raised by the first respondent, following the reports made by him in such meetings. Or at least that was the idea.

[10] But matters unfortunately did not entirely turn out that way. It was not operationally possible to immediately attend to all the concerns raised by the first respondent at the weekly safety meetings, and safety issues were prioritized to be dealt with, depending on how serious they were and whether there was the capacity to do so. But the recommendations were all considered. The reality therefore is that not all the recommendations the first respondent made concerning safety issues were done, and this situation was exacerbated by the applicant being short staffed at the time and that the new workshop which had to be ready by January 2015, still not being complete. The point is that this situation left the first respondent frustrated, feeling his recommendations were being ignored and he was not receiving support.

[11] There was a lot of detail pertaining to the various safety issues and how the applicant failed to address these issues, raised by the first respondent in the course of the arbitration proceedings. However, and in my view, none of this is important in deciding this matter. What is however important to consider is that this undoubtedly, because it was perceived by the first respondent to be a lack

of the applicant's commitment in dealing with all the safety issues he raised, strained the working relationship between the first respondent and the factory manager, Norman Dixon ('Dixon'). Before this workshop move, it appeared that the first respondent and Dixon indeed always had a good working relationship. But with the workshop move, the relationship between the first respondent and Dixon started deteriorating. Dixon confirmed in his testimony that also because of the workshop move, he was stressed, overworked and short staffed at the time. This underlying state of affairs contributed to what in the end happened. It must also be mentioned that at this time, the first respondent did not report to Dixon, but to David Nurden ('Nurden'), the operations manager.

[12] The next important eventuality to consider is an issue that arose as a result of the first respondent's use of company vehicles. First, the first respondent from time to time used Dixon's company vehicle. There was no problem with him doing so, as this was allowed. The issue however was that according to Dixon, whenever the first respondent used the vehicle, it was returned with a mechanical problem or damaged, and this was never reported to Dixon. The upshot is that Dixon then refused to allow the first respondent to use this vehicle, and the first respondent was required to use other company vehicles. This clearly added to the strain in the relationship between the first respondent and Dixon.

[13] Then the proverbial bomb blast happened on 23 April 2015. On that day, the first respondent was allocated a company vehicle which he had a problem with, as he was not happy with its gears. He made some disparaging remarks about the vehicle and the company vehicles in general, which was overheard by Dixon. Dixon confessed that this caused him to snap. He swore at the first respondent, using a number of expletives, and saying to the first respondent that he would '*fuck him up*'. He threatened to harm the first respondent. Dixon did not dispute that this indeed happened. Nurden, who was also present, also confirmed this happened. No one shied away from it. After this altercation, however, the parties simply parted, and the first respondent remained at work and continued to work in the ordinary course for the remainder of that day.

[14] The first respondent also reported for work in the ordinary course on 24 April 2015. What was undisputed was that in the course of that day the first respondent also had a job review which involved Dixon. Nurden stated that Dixon had to do the job review because the first respondent only recently started reporting to him, and he would thus not be in a position to do a proper review. According to the first respondent, Dixon repeated the threats he made on 23 April 2015 in this job review. Dixon disputed making any threats to the first respondent in the job review, and said that as far as he could observe, everything was normal following such job review. What is however undisputed is that after this job review, the first respondent went to Nurden, stating he was not feeling well and asked to go and see a doctor, but said nothing about further threats from Dixon made that day. The first respondent also went to the human resources manager, Soibhan Hilton ('Hilton'), and said he needed to report an incident on 23 April 2015, but that he first had to go to the doctor before doing so. Hilton asked him if he wanted to sit down with her to talk about his problem, but he declined.

[15] The first respondent was not at work as from 25 April 2015. The first respondent only consulted his doctor on 29 April 2015, who issued him with a medical certificate booking him off work for 28, 29 and 30 April and 4 and 5 May 2015, due to chest pain with anxiety and panic attacks due to '*work related stress*'. The certificate also recorded that the first respondent was fit to resume work on 6 May 2015. The first respondent sent this certificate by e-mail to Hilton on 30 April 2015.

[16] The first respondent however did not return to work on 6 May 2015. Instead, he obtained another medical certificate booking him off work to 11 May 2015 for depression and general anxiety. He however did inform Hilton (through his partner) that he would be returning to work on Monday 11 May 2015.

[17] But again, the first respondent did not return to work on 11 May 2015. Instead, and on 11 May 2015, the first respondent applied for a protection order against Dixon in terms of section 2 (1) of the Protection from Harassment Act.[2] He also obtained an interim order in terms of section 3 (2) of such Act preventing Dixon from verbally or physically threatening, harassing or

[2] Act 17 of 2011.

victimising him. The return date for the interim order was 8 June 2015. As part of this application for a protection order, the first respondent deposed to an affidavit on 8 May 2015 referring to the conduct of and the threats made by Dixon on 23 April 2015, as referred to above.

[18] Despite being familiar with the applicant's grievance procedure, the first respondent for the first time on 11 May 2015 raised a formal complaint in writing with the applicant about the incident on 23 April 2015, which complaint was sent to Hilton by e-mail. This complaint was however still not a proper grievance. However, and in this complaint, the first respondent set out the particulars of the incident, and stated that it caused him to be in a state of anxiety, experiencing chest pains, and compelled him to seek medical treatment. He was clearly justifying his continued absence from work, considering he was not at work as from 25 April 2015. He also stated that he was considering legal options. He complained of victimization, harassment and bullying by Dixon, which he indicated he was compelled to report. He also said he felt he was being constructively dismissed. However, the first respondent also stated in this same complaint that he wanted the matter investigated by the applicant before he would take it up with the Commission for Conciliation, Mediation and Arbitration ('CCMA'). But virtually in the same breath, he reflects that the working relationship has broken down and that he was unable to enter into the work premises for as long as Dixon was there.

[19] As a result of now having received this complaint, Hilton telephonically contacted the first respondent on 12 May 2015 to discuss the matter, as he was still not at work. The conversation between Hilton and the first respondent was confirmed in writing by way of a letter e-mailed by Hilton to the first respondent that same day. In this letter, Hilton records that the applicant's management viewed the accusations in very serious light and this would be immediately followed up by management. She also stated that a grievance meeting needed to be immediately held, and the first respondent was asked to report for work as soon as possible so that a grievance meeting could be arranged without delay. On this date, Hilton also asked the first respondent to submit a statement about the events on 23 April 2015 as part of the grievance investigation Hilton also requested Dixon and Nurden to do the same (which they did).

[20] The first respondent in turn answered by e-mail the same afternoon (12 May 2015), thanking Hilton for giving him the option of setting the time for a meeting to be held at the applicant's premises on 13 May 2015, and elected the time to be at 07h30. He however never gave Hilton a statement as she requested.

[21] The first respondent attended at work on 13 May 2015 at 07h30 and met with Hilton, as agreed. Hilton advised the first respondent to complete a formal grievance in terms of the applicant's grievance process, which the first respondent then did. In this grievance form, the first respondent refers to his earlier letter (complaint) of 11 May 2015 as the reasons for the grievance, and then records, as the desired outcome for the grievance, the following:

> 'Relationship (working relationship) be restored and to be able to submit my improvement plan towards uplifting H & S as well as QA within the company'

In his testimony under-cross examination, the first respondent conceded that this was indeed his view at the time, and that he believed the relationship could be restored.

[22] The first respondent did not remain at work on 13 May 2015. He left after submitting his grievance. On the same day, the first respondent was again booked off work by way of a medical certificate, until 18 May 2015, for '*chest pain: workup/investigation*'. The certificate reflected that the first respondent would be fit to resume duties on 18 May 2015. The first respondent sent this medical certificate to Hilton late the afternoon of 13 May 2015. There was no further contact between Hilton and the first respondent after that.

[23] Instead of returning to work on 18 May 2015, the first respondent submitted a letter of resignation to Hilton by e-mail just after 07h00 on that day. In this letter of resignation, the first respondent records that his working conditions have become intolerable and his life has been threatened by Dixon. He stated that he reported the matter and laid a grievance. He also stated that the applicant itself was undermining his role as health and safety officer and that his recommendations were disregarded, as another reason for the resignation. The resignation was with immediate effect.

[24] Hilton answered this resignation letter at just after 09h00 on 18 May 2015, intimating it was not accepted. Hilton again confirmed that management of the applicant took all the first respondent's allegations very seriously and intended to deal with the same as a matter of '*extreme priority*'. It was pointed out that the first respondent had been advised that a grievance meeting would be arranged as soon he returned to work. It was indicated that the applicant's management was still intent on dealing with the matter despite the first respondent's resignation.

[25] The first respondent did not heed the invitation extended by Hilton in the above letter. Instead, he referred a constructive dismissal dispute to the MEIBC on 19 May 2015. Upon receipt of this referral, Hilton again wrote to the first respondent on 20 May 2015. It was again indicated that the applicant was still willing to deal with the first respondent grievance in what was called a '*serious, transparent and urgent manner*'. Hilton expressed disappointment because the first respondent chose not to co-operate or participate in the grievance process and instead chose to resign and refer a constructive dismissal dispute to the MEIBC. Hilton specifically stated in this letter:

> 'I don't accept that you were left with no other option in terms of dealing with your grievance but to resign, in fact from the moment I became aware of the situation you found yourself in, I immediately commenced the process of collecting all the relevant information, statements and preparing for a full and in-depth grievance meeting in line with the Company's grievance procedure' (sic)

[26] The first respondent did not answer the content of the letter from Hilton of 20 May 2015, but instead sent a written response on 25 May 2015 raising a further issue that since he was booked off sick, no one at the applicant including the operations manager (Nurden) contacted him to enquire about his well-being, and that the operations manager, once he was aware of the incident, should have initiated an internal enquiry at company level. Of importance is that the first respondent yet again failed to avail himself of the opportunity extended by the applicant to have his grievance addressed.

[27] The saga ended with a response from Hilton on 26 May 2015, reiterating all that had been conveyed to the first respondent earlier, and in particular stating that because the first respondent chose to resign with immediate effect, it was not possible to conduct a grievance without his participation and cooperation. Hilton said:

> 'For the record, management is still available and prepared to proceed with the matter on condition that confirm your availability to participate and stand by your accusations … Insofar as the allegation that management is unconcerned, either about your health, state of mind and/or the alleged circumstances referred to your letter under reply – the record will reflect that on the contrary management went out of its way to quickly deal with the circumstances referred to in your letter of 12th May 2015, that management wanted to deal with the matter in a serious and urgent manner and that ultimately it was due to your immediate resignation and unwillingness to participate in a comprehensive grievance process, even after you resigned and after numerous invitations by management to do so, that you are now allegedly claiming that you have been unfairly treated' (sic)

[28] The matter continued in the MEIBC. Following unsuccessful conciliation, the first respondent referred his constructive dismissal dispute to arbitration on 2 July 2015. The arbitration proceedings convened before the third respondent on 29 July, 8 October and 16 November 2015. Her award followed on 14 December 2015.

[29] In her award, the third respondent accepted that she was called on to decide whether the first respondent was dismissed as contemplated by section 186(1)(e) of the LRA, and that the first respondent had the onus to prove such dismissal.

[30] The third respondent held that the first respondent was visited with animosity because of his safety reports, and he received no support from his managers. She also accepted the common cause evidence about the altercation between the first respondent and Dixon on 23 April 2015. She also considered the complaint letter the first respondent had written to Hilton, as discussed above, and the grievance that followed it.

[31] The third respondent devoted a fair part of her award to what was in reality a peripheral issue of past complaints and difficulties raised by the first respondent about safety, which were being ignored, and caused him frustration. The third respondent held that the first respondent was being sent from '*pillar to post*' in this regard and he had a history of experiencing problems with managers. The third respondent did however accept that the first respondent had raised no past grievances or formal complaints in this regard.

[32] The third respondent articulated the first respondent's reason for resignation in her award that he was fearful of returning to work because of Dixon, and for that reason he could not go back to work to '*complete*' his grievance. According to the third respondent, nothing was done by the applicant's management to further allay the treats by Dixon against the first respondent and the fears of the first respondent, because of the pending grievance brought by the first respondent. The third respondent reasoned that Dixon and Hilton should have '*reassured*' the first respondent about his fears, and was express in her dissatisfaction with the applicant's '*lack of compassion*' for the first respondent. The third respondent also rejected the applicant's contention that the first respondent's fears were unfounded, on the basis that fears were '*subjective*', and should be dealt with on that basis.

[33] The third respondent found that there was no evidence that Dixon had apologized to the first respondent or retracted the threats made. The third respondent also placed reliance on the medical certificates which recorded that the first respondent suffered from panic attacks, chest pains and anxiety, which the third respondent then attributed to the threats made by Dixon. The third respondent also held that nothing had been done to Dixon by the applicant.

[34] For all the above reasons, the third respondent then held that the first respondent's continued employment had become intolerable, and thus his resignation constituted a constructive dismissal, which dismissal was unfair. The third respondent then awarded the first respondent five months' salary in compensation, which she considered to be '*fair and reasonable'*. The applicant's review application then followed as a result.

The test for review

[35] In this instance, the crux of the issue the third respondent had to decide was whether the first respondent had been dismissed. As such, the very jurisdiction of the MEIBC and the third respondent to entertain this matter was at stake, because if there was no dismissal, then the MEIBC would have no jurisdiction. In *Mnguti v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Court held as follows:

> 'The issue whether or not a dismissal exists concerns the jurisdiction of the CCMA. If there is no dismissal, then the CCMA has no jurisdiction to entertain an unfair dismissal claim. Where a commissioner thus finds that no dismissal exists, that commissioner in essence determines that the CCMA does not have jurisdiction and the matter is then dismissed on that basis.'

[36] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Court considered the now trite ordinary review test postulated by *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[5] and said:

> '… Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …' (emphasis added)

[37] The aforesaid means that where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator is right or wrong.[6] In *SA Rugby Players*

[3] (2015) 36 ILJ 3111 (LC) at para 14.
[4] (2008) 29 ILJ 964 (LAC) at para 101.
[5] (2007) 28 ILJ 2405 (CC).
[6] See *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 22.

Association and Others v SA Rugby (Pty) Ltd and Others,[7] the Court articulated the enquiry as follows:

> '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.
>
> 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…'

[38] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on review concerned the jurisdiction of the CCMA or applicable bargaining council, as the case may be, and where the arbitrator had to decide whether a dismissal existed.[8] With particular reference to section 186(1)(e) (constructive dismissal) disputes, this was equally confirmed to be the case.[9]

[39] Accordingly, and in this instance, I shall proceed to decide this matter *de novo* on the basis of determining whether the third respondent's determination that a constructive dismissal existed was right or wrong, and not whether the outcome the third respondent arrived at was reasonable. I will commence this exercise by first setting out the relevant grounds of review as raised by the applicant.

<u>The grounds of review</u>

[7] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.
[8] See *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at para 24; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21; *Mnguti* (*supra*) at para 20.
[9] See *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) at para 5; *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 *ILJ* 2337 (LAC) at para 29; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23.

[40] The applicant's case and grounds for review must be made out in the founding affidavit, and supplementary affidavit.[10] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[11]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[41] Because this review application entails a *de novo* consideration as to whether the decision of the third respondent is right or wrong, the actual reasoning of the third respondent as contained in her award is of lesser importance. The review grounds raised by the applicant would thus not be aimed at showing that the third respondent's reasoning is unreasonable, but would rather be aimed at setting out a basis as to why the applicant contends the finding of the third respondent is incorrect (wrong).

[42] The applicant raised a number of complaints about the sustainability of the reasoning of the third respondent in the founding affidavit and the subsequent supplementary affidavit. A lot of these complaints are repetitive, or just further elaborations on already raised complaints. I will summarize all these into what I considered to be the following succinct grounds:

42.1 According to the applicant, the third respondent failed to apply an objective test in deciding whether constructive dismissal existed. The applicant contended that this objective test entailed that the third respondent had to consider that continued employment must have objectively been rendered intolerable to the extent that a reasonable employee could not be expected to put up with it, which test the third respondent never applied. The third respondent had undue regard to the subjective views of the first respondent.

[10] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27. The supplementary affidavit is filed in terms of Rule 7A(8).
[11] (2010) 31 ILJ 713 (LC) at para 27.

42.2 The applicant contended that the third respondent ignored material evidence relating to the grievance lodged by the first respondent, in which grievance he desired an outcome that the relationship be restored. The applicant also complained that the third respondent ignored the fact that the matter was only reported to the applicant some three weeks after the incident, and that this time lapse indicated that intolerability did not exist.

42.3 Another ground of review is that the third respondent failed to consider that resignation had to be a measure of last resort and that in this case, the evidence showed that it was not a measure of last resort. According to the applicant, the third respondent should have had proper consideration to the fact that the grievance process had to first be followed to finality, which she did not do.

42.4 The applicant also contends that the third respondent failed to consider that the applicant assured the first respondent that his concerns were taken seriously and that his complaint would be properly dealt with, and that there existed no evidence to contradict that this would the case.

42.5 A final ground of review concerns a contention that the third respondent failed to appreciate that the first respondent should have given the applicant an opportunity to finalize the grievance before resorting to a resignation, especially in the light of the evidence concerning all the commitments given by the applicant that this would be done, even after his resignation.

[43] I will now decide the applicant's review application based on the above main grounds of review.

<u>The legal position</u>

[44] The best point of departure in deciding this matter is to first come to grips with the concept of '*constructive dismissal*'. The phrase does not emanate from the LRA. Rather, it is a concept adopted from English Law by the former Industrial Court in the course of the development of the labour law jurisprudence under

the former LRA.[12] This concept entailed the notion that there existed an implied term in the contract of employment of an employee that an employer would not conduct itself in a manner designed to bring about the destruction or material damage to the relationship of trust and confidence underlying the employment relationship, which term if breached by the employer entitled the employee to elect to accept that breach and cancel the contract.[13] The concept was succinctly summarized in *Murray v Minister of Defence*[14] as follows:

> 'The term used in English law, 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well-established in our law. In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognized as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.'

[45] With the advent of the current LRA,[15] the concept of '*constructive dismissal*' was codified into the LRA by making it part of the definition of dismissal in section 186 of the LRA. In section 186(e), which changed to section 186(1)(e) in 2002,[16] a dismissal was defined as including the instance where:

[12] Act 28 of 1956 – now repealed.
[13] See *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) 775G-I; *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe Warehouse* (1992) 13 ILJ 1247 (IC) 1251B-H; *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1232 (LAC) 1248 F-1249B; *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC) 636D-637J.
[14] (2008) 29 ILJ 1369 (SCA) at para 8.
[15] Which came into effect on 11 November 1996.
[16] By way of Act 12 of 2002, with effect from 1 August 2002.

> '… an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.'

In 2015, the reference to '*contract*' was removed, and section 186(1)(e) now reads:[17]

> 'Dismissal means that - … an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee'

[46] But despite this codification, and despite no specific reference to it in the LRA, the phrase '*constructive dismissal*' stuck. The term has become part of the dictionary of employment law phrases colloquially used by practitioners and the Courts alike in cases where section 186(1)(e) of the LRA finds application. But as will be set out below, the principles applicable to the current concept of constructive dismissal as embodied in section 186(1)(e) is somewhat different to the concept as initially imported out of the English law.[18]

[47] Considering then the provisions of section 186(1)(e), three specific issues emerge for determination, as set out in *Solid Doors (Pty) Ltd v Commissioner Theron and Others*[19] as follows:

> '… 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. …'

[17] By way of Act 6 of 2014, with effect from 1 January 2015.
[18] See *Albany Bakeries Ltd v Van Wyk and Others* (2005) 26 ILJ 2142 (LAC) at paras 17 – 18.
[19] (2004) 25 ILJ 2337 (LAC) at para 28. See also *Agricultural Research Council v Ramashowana NO and Others* (2018) 39 ILJ 2509 (LC) at para 11; *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2245 (LAC) at para 9; *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 49; *Johnson v Rajah NO and Others* (JR33/15) [2017] ZALCJHB 25 (26 January 2017) at para 38.

[48] From the aforesaid *dictum* in *Solid Doors*, it is clear that the first determination is that it must be the employee that brought the employment relationship to an end, either by way of submitting an actual resignation,[20] or by way of other form of clear and unequivocal conduct showing an intention on the part of the employee to unilaterally bring the employment relationship to an end.[21] As said in *Fijen v Council for Scientific and Industrial Research*[22], a resignation includes where an employee:

> '… either by words or conduct, evince a clear and unambiguous intention not to go on with his contract of employment. …'

Because is constructive dismissal is dependent upon the employee terminating the employment relationship, the respective claims of constructive dismissal and an 'ordinary' dismissal (for the want of a better description),[23] are mutually exclusive and cannot be both pursued.[24]

[49] Once it is so that the employee terminated the employment relationship, then the next step in the enquiry is to establish whether the reason for that termination is because the employer made continued employment intolerable for the employee. In other words, there must be a proper nexus (link) between the intolerability, and the termination.[25] However, and at the heart of this part of the enquiry is establishing what is '*intolerable*'. In my view, intolerability is far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly.[26] Even a breach of the employment contract, deductions from salary, or unfair disciplinary action would not *per se* establish intolerability.[27] It is, as said in *Billion Group (Pty)*

[20] See *Eagleton and Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) at para 31.
[21] For examples of such kind of conduct see *Solidarity and Another v Public Health and Welfare Sectoral Bargaining Council and Others* (2013) 34 ILJ 1503 (LAC) at para 19; *Mnguti* (*supra*) at paras 22 – 23 and 33.
[22] (1994) 15 ILJ 759 (LAC) at 772C-D. See also *Uthingo Management (Pty) Ltd v Shear NO and Others* (2009) 30 ILJ 2152 (LC) at para 19.
[23] Being a dismissal as contemplated by section 186(1)(a) which reads: '*Dismissal means that - an employer has terminated employment with or without notice …*'.
[24] See *Eagleton* (*supra*) at para 33.
[25] See *Murray* (*supra*) at para 12; *Johnson (supra*) at para 57; *Bandat* (*supra*) at para 66.
[26] Compare *Foschini Group v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1515 (LC) at para 22.
[27] See *Albany Bakeries* (*supra*) at para 24; *Agricultural Research Council* (*supra*) at paras 17 – 19; *Experian Regent Insurance Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 410 (LC) at paras 60 – 61.

Ltd v Ntshangase and Others[28], '*a high threshold*'. In *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others*[29] the Court dealt with the meaning of '*intolerability*' as follows:

> ' … The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance …'

Similarly, and *in Bakker v Commission for Conciliation, Mediation and Arbitration and Others*[30] the Court said:

> ''Intolerable' is not defined in the LRA, but it is a strong word which suggests a high threshold: In this regard, Grogan, in his *Workplace Law*, states:
> '[T]he requirement that the prospect of continued employment be "intolerable" ... suggests that this form of "dismissal" should be confined to situations in which the employer behaved in a deliberately oppressive manner.';

[50] The onus to prove the existence of intolerability rests squarely upon the shoulders of the employee party.[31] The subjective views of the employee is of no consequence in discharging this onus, as the enquiry to establish whether intolerability exists is always an objective one.[32] The topic of what objectively establishes intolerability has been the subject matter of a number of judgments over the years. From a proper conspectus of these judgments, the following core considerations can be extracted, which would serve to establish the existence of intolerability:

50.1 Whether the employer's conduct, considered as a whole together with its cumulative impact, is such that when reasonably and sensibly

[28] (2018) 39 ILJ 2516 (LC) at para 11.
[29] (2019) 40 ILJ 1539 (LAC) at para 39.
[30] (2018) 39 ILJ 1568 (LC) at paras 12 – 13.
[31] This is of course because the employee has the onus to prove the existence of a dismissal in terms of section 192(1) of the LRA. See also *Murray* (*supra*) at para 12; *National Health Laboratory Service v Yona and Others* (2015) 36 ILJ 2259 (LAC) at para 30.
[32] See *Armaments Corporation* (*supra*) at para 42; *Yona* (*supra*) at para 30; *Foschini* (*supra*) at para 26; *Johnson* (*supra*) at paras 50 – 51; *Bandat* (*supra*) at para 55; *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 *ILJ* 988 (LC) at para 38; *Asara* (*supra*) at para 38.

judged, an employee could not be expected to put up with it.[33] In other words, no reasonable employee could be expected to tolerate or put up with the conduct.[34]

50.2 It is not necessary to show that the employee had no other choice but to resign.[35] All that must be shown is that it was the actual existence of the intolerable conduct of the employer that caused the resignation. Or, as described in *National Health Laboratory Service v Yona and Others*[36], '*Resignation must have been a reasonable step for the employee to take in the circumstances*'.

50.3 In my view, the following *dictum* in *Pretoria Society for the Care of the Retarded v Loots*[37] aptly formulates the enquiry:

> '… When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil 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 been constructively dismissed and her conduct proves that she has in fact resigned.'

[51] The third requirement is that the employer must have caused the intolerability. In this regard, it has been held that the employer must in some way be culpable. Culpability does not mean that it must be proven that the employer

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[33] *Murray* (*supra*) at para 12; *Yona* (*supra*) at para 30.
[34] *Armaments Corporation* (*supra*) at para 40.
[35] *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at para 4; *Johnson* (*supra*) at para 47
[36] (2015) 36 ILJ 2259 (LAC) at para 30.
[37] (1997) 18 ILJ 981 (LAC) at 984D-G. This *dictum* was referred to with approval in *Old Mutual Group Schemes v Dreyer and Another* (1999) 20 ILJ 2030 (LAC) at paras 16 – 17.

had the intent to get rid of the employee, but at least it must be shown that the employer acted without '*reasonable and proper cause*'.[38]

[52] It is in the context of the two requirements that that continued employment must objectively be shown to be intolerable and that the employer was the cause of such intolerability, that a particular consideration has arisen, when determining a claim for constructive dismissal. The principle that an employee cannot legitimately claim constructive dismissal where such an employee has suitable available alternative remedies or mechanisms to resolve the cause of the intolerability, before resorting to a resignation. This consideration was first articulated with such specificity in *Albany Bakeries Ltd v Van Wyk and Others*[39] where the Court stated, in no uncertain terms, that '… *The decision of an employee to leave because of the intolerable work relationship has to be a last resort …*'. The Court in *Albany Bakeries* specifically considered the *dictum* in *Loots supra*, as quoted above, and held:[40]

> 'Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.
>
> As is clear from the remarks of Conradie JA an employee should make use of a grievance procedure. …'

[38] *Murray* (*supra*) at para 13; *Metropolitan Health Risk Management v Majatladi and Others* (2015) 36 ILJ 958 (LAC) at para 30; *Bandat* (*supra*) at para 53.
[39] (2005) 26 ILJ 2142 (LAC) at para 27. See also *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 2331 (LAC) at 2336A-B; *Foschini* (*supra*) at para 32.
[40] Id at paras 28 – 29.

[53] In *Bandat v De Kock and Another*[41] the Court considered the aforesaid *dicta* in both *Loots* and *Albany Bakeries*, and came to the following conclusion:

> 'What the court in *Loots* and *Albany Bakeries* thus clearly said was that the employee, in order to show that a continued working environment was intolerable, has to convince the court that the employee had a genuine belief that the employer would never change its ways. An important component of establishing such a genuine belief then has to be the use of suitably available alternative remedies, such as raising a grievance or using the remedies provided for in the LRA. As the court said in *Albany*, it can be considered to be opportunistic for an employee to resign out of the blue, so to speak, without even raising an issue with the employer and giving the employer the opportunity to remedy the cause of complaint, thus giving it a chance to remedy any errant ways.'

[54] In short, and where there is a grievance process in the employer available to the employee which would, if applied, resolve the cause of complaint, the employee must follow it. If the employee does not follow it, the employee cannot as a matter of principle claim constructive dismissal, unless the employee proves that there exists truly exceptional circumstances that may serve to absolve the employee from this obligation.[42] And for the employee to subjectively claim that he or she has no confidence in the grievance outcome or that the employer would not reform, cannot suffice as such exceptional circumstances.[43] In *Armaments Corporation supra* the Court held:[44]

> 'It may be that the appellant had a legitimate complaint about the performance outputs and appointments to his division. But such matters occur often and are run of the mill points of difference or tension in any workplace. Grievance procedures exist for that very purpose. They are the compulsory means of resolving conflict over run of the mill disagreements between subordinates and their superiors. A proper application of the grievance procedure aims at testing

[41] (2015) 36 ILJ 979 (LC) at para 52.
[42] In *Foschini* (*supra*) at para 37 the Court said: *'… Where an employee resigns and claims a constructive dismissal under circumstances where he did not avail himself of an available grievance procedure or the mechanisms for dispute resolution provided for in the Labour Relations Act, he will have to show very compelling reasons why he failed or refused to follow these procedures available to him prior to resignation …*'
[43] See *Armaments Corporation* (*supra*) at para 46; *Sampson Associates (Pty) Ltd t/a Interbrand Sampson v Cities Shepherd and Others* [2010] JOL 25430 (LC) at para 65.
[44] Id at para 44.

the legitimacy of any difference of opinion and through conciliation hopes to find workable remedial solutions.'

[55] The aforesaid approach that there is an obligation on the employee to exhaust available alternative remedies before resigning has been consistently applied in this Court since the judgment in *Albany Bakeries supra*.[45] Statements made by this Court in this regard include the following:

55.1 In *Bakker supra*[46] the Court said: *'… The Labour Court has held that if an employee is too impatient to wait the outcome of the employer's attempts to find a solution to the perceived intolerable situation and resigns, then constructive dismissal is almost always out of the question…*'.

55.2 In *Foschini Group v Commission for Conciliation, Mediation and Arbitration and Others*[47] the Court held: *'… It has also become fairly trite law that an employee should make use of the employer's grievance procedure where such is in place to resolve the problem before resigning and alleging constructive dismissal. If an employee fails first to lodge a grievance before resigning and alleging constructive dismissal, she may very well be precluded from claiming to have been constructively dismissed*'.

55.3 In *Johnson v Rajah NO and Others*[48] it was said that: '*The Courts made it clear that an employer should be made aware of the alleged intolerable conditions and be afforded an opportunity to address and rectify it. An employee cannot merely resign and claim constructive dismissal while other options are available and as I already alluded to the test is whether a reasonable alternative existed. An employee cannot resign without affording the employer an opportunity to rectify the causes of his or her complaints and successfully claim constructive dismissal*.'

[45] See *Nedcor Bank Ltd v Harris and Others* [2010] JOL 24790 (LC) at para 32; *L M Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* (2008) 29 ILJ 356 (LC) at para 12.
[46] Id at para 13.
[47] (2008) 29 ILJ 1515 (LC) at para 33. See also para 37 of the judgment.
[48] (JR33/15) [2017] ZALCJHB 25 (26 January 2017) at para 74.

55.4 And lastly in *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) and Others*[49] it was held as follows: '*If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s. 23 of the Constitution which requires that fairness be viewed from the perspective of both employer and employee.*'

[56] Although not in itself decisive, further considerations that would work against a conclusion that intolerability exists is where the employee resigns on notice,[50] where the employee later sought to withdraw the resignation,[51] where the employee continued to work for the employer for some time after the events that it is alleged caused the intolerability to arise,[52] or where the employee imposes a condition that must be met by the employer against which the employee would resign willingly and then the condition is not met with the employee therefore resigning and claiming constructive dismissal.[53] It has also been held that where an employee resigns in the face of disciplinary or poor work performance proceedings, it would be very difficult to successfully claim constructive dismissal.[54]

[57] Finally, and even if it is true that the employee was constructively dismissed, all that proves is that the employee was dismissed. This is only the first stage of a two stage enquiry.[55] As the employee in such circumstances has proven he or she was dismissed, the employer must then prove the dismissal was

[49] (2013) 34 *ILJ* 3184 (LC) at para 131.
[50] *Billion Group* (*supra*) at para 12.
[51] *Value Logistics Ltd v Basson and Others* (2011) 32 ILJ 2552 (LC) at para 61.
[52] *Volschenk v Pragma Africa (Pty) Ltd* (2015) 36 ILJ 494 (LC) at para 26.
[53] *Albany Bakeries* (*supra*) at paras 31 – 32.
[54] *Asara* (*supra*) at paras 37 – 38
[55] See *Niland v Ntabeni NO and Others* (2017) 38 ILJ 1686 (LC) at para 22; *Majatladi v Metropolitan Health Risk Management and Others* (2013) 34 ILJ 3282 (LC) at para 49; *Asara* (*supra*) at para 36; *Eagleton* (*supra*) at para 35.

fair.[56] The arbitrator concerned can only afford the employee relief for unfair dismissal if the arbitrator also finds, with proper reasoning, that the dismissal as established by the constructive dismissal is unfair.

Analysis

[58] Returning to the matter at hand, something must first be said about the testimony of the first respondent. Having read the transcript of his testimony in the arbitration, he was in my view a poor witnesses. He exaggerated the events and the consequences thereof to the extreme. He was argumentative, long winded and on occasion sarcastic when answering questions. He on several occasions read from a file of his on which he did not discover, to the extent that he had to be directed to put it away. Under cross-examinations, he failed or avoided to answer direct and clear questions. He refused to make concessions where it was called for, for example in respect of the simple issue that he had never raised a formal grievance before the current one. He gave long speeches which were not in response to questions he was asked. Under re-examination, he came up with a new version of events relating to what happened on 13 May 2015, never raised before. He even suggested the grievance process could be conducted without him, to explain why he did not return to work to participate therein.

[59] The third respondent however completely failed to appreciate the first respondent's complete lack of credibility as a witness. This unfortunately tainted her reasoning in this matter, when she should have viewed the first respondent's testimony with extreme caution instead of in effect simply plumbing for his *ipse dixit*.[57] Also, the instances where she referred in her award to testimony given by the first respondent not being disputed by the applicant is mostly the testimony that came out for the first time during the first respondent's re-examination, and as such should have been rejected, and not accepted as undisputed. The following *dictum* in *Conti Print CC v Commission*

[56] As contemplated by section 188(1), as read with section 192(2), of the LRA.
[57] The third respondent failed to make proper credibility findings which is in itself a reviewable irregularity – see *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC) at para 7; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20; *University of Venda v M and Others* (2017) 38 ILJ 1376 (LC) at para 90.

for Conciliation, Mediation and Arbitration and Others[58], which actually dealt with a constructive dismissal case, aptly describes the criticism that would be applicable to the manner in which the third respondent considered the testimony:

> '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….'

[60] Fortunately, this matter can be decided without becoming embroiled too much in the issue of whose testimony to accept. This matter can be decided based on what turned out to be common cause and undisputed facts, after all evidence was in and as supported by the documentary evidence, as dealt with hereunder. However, and insofar as testimony presented by the parties is concerned, I have very little hesitation in saying that the testimony of the first respondent should have been rejected insofar as it was not corroborated by the testimony of the other witnesses and the documentary evidence.

[61] As the point of departure in deciding whether the third respondent's award was right or wrong, it was uncontested that the first respondent resigned on 18 May 2015. Therefore, the first requirement for constructive dismissal has been met.

[62] I will next deal with the remaining two requirements, namely whether continued employment was made intolerable for the first respondent and whether the applicant was the cause of such intolerability, together. It is with regard to these two requirements that the first respondent's case of constructive dismissal faces considerable difficulty, for the reasons to follow.

[63] Undoubtedly, there was an altercation between the first respondent and Dixon on 23 April 2015. In the course of this altercation, it is also true that Dixon behaved in an entirely unacceptable manner. He lost his cool, swore at the first respondent and threatened him with physical harm. There was no legitimate cause or reason for Dixon to have behaved in such a fashion. In this regard, the findings of the third respondent are unassailable. It however cannot be ignored that Dixon admitted that he had done wrong and said that he never intended to or would harm the first respondent. The pressure caused

[58] (2015) 36 ILJ 2245 (LAC) at para 19. See also paras 20 – 21 of the judgment.

by the unique event of the workshop move must also be considered. Nurden also testified that everyone was under a lot a pressure at the time because of the workshop move and being present during the altercation and knowing and working with Dixon for 17 years, he did not believe Dixon would ever have harmed (attacked) the first respondent.

[64] However, and even accepting that the conduct of Dixon as aforesaid is the kind of conduct that can be seen to render continued employment beyond the limits of what can be reasonably tolerated and to be unduly oppressive, thus justifying the label of '*intolerable conduct*', this does not automatically lead to a conclusion that the continued employment of the first respondent with the applicant is rendered intolerable to the extent that the first respondent would be entitled to call it quits on the employment relationship and claim constructive dismissal. Rather, the real question to answer is what the first respondent did when confronted with this state of affairs, and in particular, whether he brought it to the attention of the applicant's responsible management, followed by a consideration of what the applicant then did about it upon being so informed.

[65] Considering the nature of the incident complained of by the first respondent, and that it was perpetrated by one employee onto another in the course of a one on one altercation, it was essential for the first respondent to have brought it to the attention of the applicant's responsible management, such as for example the human resources manager or even a responsible director. The reason for this is simple. It simply cannot be said that the applicant as the employer of the first respondent acted in such a fashion so as to render continued employment of the first respondent intolerable if the applicant is not aware of what plagued the first respondent and was given the opportunity to try and fix it. This is precisely what is envisaged by the *dicta* in *Loots*, *Albany Bakeries*, *Armaments Corporation* and *Bandat* referred to above.

[66] There is an appropriate comparison that can be drawn with this kind of situation, and the circumstances under which an employer can be held liable for acts of discrimination perpetrated by an individual employee upon another employee. This is found in section 60 of the Employment Equity Act ('EEA')[59]

[59] Act 55 of 1998 (as amended).

which requires that the discriminatory conduct must first be brought to the attention of the employer and that the employer be afforded an opportunity to deal with it, before the employer can be held liable.[60] The point is that intolerable and oppressive behaviour perpetrated by one employee upon another can only render an employer culpably responsible and liable for such conduct if the employer knows of it and is given a chance to deal with it, but then fails to do so properly and fairly.

[67] So did the first respondent react as required? In my view, and unfortunately for his constructive dismissal case, he did not. He did not immediately report the incident to responsible management. He only intimated to Hilton on 24 April 2015 that he had something to report to her, but he did not say what, declined her invitation to sit down and talk, and instead said he needed to visit his doctor. He then left work that same day, never to return back to work, and justifying most of his absence from work by way of a succession of medical certificates. In the absence of the applicant being informed about the event of 23 April 2015 by the first respondent, it would not be able to establish from a reading of these certificates on face value that it related to such incident or that the incident even existed. In short, the incident cannot be intimated from the certificates.

[68] But even under those circumstances, and despite removing himself from the area of conflict, it still takes the first respondent until 11 May 2015 (close on three weeks later) to report the incident to Hilton. This is also the same time when the first respondent obtains an interim protection order against Dixon, rather than first approaching the applicant. It has the hallmarks of a planned strategy, so to speak. One has to ask why, if what Dixon did on 23 April 2015 was considered by the first respondent to be so egregious that it could not be

[60] Section 60 reads *'(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer; (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act; (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision. (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act*'. See *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd* (2015) 36 ILJ 1111 (LC) at para 29, and the authorities referred to in paras 30 – 31 of the judgment; *TFD Network Africa (Pty) Ltd v Faris* (2019) 40 ILJ 326 (LAC) at para 51; *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC) at para 37.

reasonably expected that he put up with it and remain employed by the applicant, it takes him just short of three weeks to bring what happened to the attention of responsible management at the applicant. This kind of diminishing of the temporal nexus between the incident itself and the action taken by the employee as a result thereof, detracts from a legitimate complaint of intolerability.[61]

[69] The written report by the first respondent to Hilton on 11 May 2015, which was the first occasion of the conduct by Dixon being brought to the attention of responsible management at the applicant, was not a grievance. But this does not detract from the fact that the said conduct was at least now specifically raised by the first respondent with the applicant as his employer. The complaint also at least properly sets out the events complained of, which is the squarely conduct of Dixon. However, it is contradictory as to how the first respondent views this. On the one hand, he says that he sees it as constructive dismissal and a destruction of the employment relationship, but on the other hand he says that he would first like the applicant as an employer to investigate and do something about it before he proceeds to the MEIBC. The first respondent does not say in this complaint that he is actually considering resigning or otherwise terminating his employment because of what Dixon did.

[70] With the applicant now being aware of the issue, what does it then do? Firstly, it is immediately dealt with by Hilton, who as HR manager, would be the proper member of management to deal with it. Hilton immediately (the very next day on 12 May 2015) calls the first respondent and assures him that his complaint is viewed in a serious light and will receive proper attention. The first respondent is told that a grievance meeting will be held and will be arranged with him as soon as he is back at work. This conversation is confirmed in writing by Hilton. Hilton also immediately proceeds to ask all involved to give statements. The first respondent and Hilton then actually agree on a time on 13 May 2015 when the first respondent will report at work to facilitate this process.

[61] Compare *Bandat* (*supra*) at para 66; *Taylor and Another v ILC Independent Loss Consultants CC* (2011) 32 ILJ 2006 (LC) at para 34.

[71] The first respondent then does report at work on 13 May 2015 as arranged. He is asked to complete a proper grievance document in terms of the applicant's grievance procedure, and he does so. What is however of critical importance is that first respondent records in that document, as a grievance outcome, considering all that had gone before which includes the medical certificates, the protection order, and the written complaint, that he would like to restore he employment relationship and in essence be given the necessary support and recognition as health and safety officer. This is an outcome which as a matter of logic and common sense inconsistent with any legitimate complaint of an intolerable working relationship between the first respondent and the applicant that would justify a constructive dismissal case. As held by the Court in *Value Logistics Ltd v Basson and Others*[62]:

> 'In the present case, Basson was clearly of the view that the employer could or might improve the work environment. He was willing to continue working and, in his words, to 'meet with [Morais] in person to discuss my responsibilities and how I can/should reach such goals'. Or, as he told his wife, he was willing to sit around a table and talk. These are not the sentiments of a person whose continued employment has been made intolerable.'

[72] Insofar as the issue of the first respondent not receiving the necessary support and recognition as health and safety manager is now pertinently raised as part of the grievance, I am of the view that on the facts, this cause of complaint was substantially exaggerated by the first respondent in any event. There was no reason not to have accepted the testimony of Nurden that this was never the case, and that all recommendations by the first respondent were properly considered. In fact, Nurden was candid in agreeing that not all recommendations were always implemented, due to operational reasons, but this did not mean they were not considered. According to Nurden, the first respondent in effect wanted all that he recommended to be done, which was not always possible, and this aggrieved the first respondent. Nurden however said that this situation could not come close to making continued employment intolerable, and I agree with him.

[62] (2011) 32 ILJ 2552 (LC) at para 59.

[73] Returning to the chronology, the first respondent goes off work on 13 May 2015 after lodging the grievance, and is booked off work until 18 May 2015. This unfortunately deprives the applicant of an opportunity to deal with the grievance at this point, which has now been properly initiated and is pending, and in respect of which the first respondent had the assurance that it would be properly dealt with. The simple reality is that between 13 May 2015 and 18 May 2015, there is absolutely no change in circumstance or any further events that could serve to objectively convince the first respondent that his continued employment was actually intolerable and that the applicant would not properly and fairly attend to his grievance.

[74] In fact, there is no evidence at all that the applicant was not genuine in saying that it would attend to the first respondent's grievance in a proper, transparent and fair manner. It was never shown that the applicant had somehow decided to protect Dixon or sweep the first respondent's complaint under the rug or just ignore it. The only evidence was that the applicant genuinely intended to deal with and try to resolve the grievance. Unfortunately, and as a result of his own conduct, the first respondent deprived the applicant of the opportunity to show that its money was where its mouth was, in this regard.

[75] All the first respondent had to do was to return to work on 18 May 2015 and arrange with Hilton to set up the grievance meeting. After all, and up to that point, the first respondent had clearly indicated that this is what he wanted and was a willing participant in this process. However, and instead, early the morning on 18 May 2015, the first respondent simply resigned with immediate effect, contending as the reasons for this that that his working conditions had become intolerable and his life has been threatened by Dixon. He seemed to rely on the fact that his mere bringing of a grievance was proof of this intolerability. He also complains that the applicant itself was undermining his role as health and safety officer. The difficulty with all these justifications for alleging intolerable working conditions as contained in the letter of resignation, is that it is directly contradicted by the first respondent's own grievance on 13 May 2015, in which he specifically seeks the outcome that the working relationship be restored and his role as health and safety officer be given the necessary support. If this grievance process achieved this objective, then surely there would be no need to resign. And nothing at all changed between

13 May and 18 May 2015. The first respondent simply could also not say that his grievance was not being dealt with, because he was booked off work for this whole period, and knew it would be arranged when he was back at work.

[76] Further, the applicant did not simply just accept this resignation. Hilton immediately engaged with the first respondent, and again assured him that his complaints were taken seriously and that his grievance would be properly dealt with. The first respondent was informed that all that was needed was that he come back to work so the grievance meeting can be initiated. The applicant indicated that it was still willing to do so, despite the first respondent having submitted a letter of resignation. The first respondent should have taken this approach by the applicant to heart. At the very least, and if he believed in the justification of his cause and the *mala fides* of the applicant, he should have called what would then have been a bluff on the part of the applicant, and attended at work to set up the grievance and so establish what happens and what the applicant does next. If it then turned out the grievance process was nothing but a sham and/or that the applicant was intent on protecting Dixon, then the first respondent would have gone a long way indeed in establishing that it could not reasonably be expected for him to continue being employed by the applicant, and that the applicant was culpable for this situation. Comparable is the following *dictum* in *Armaments Corporation supra*:[63]

> '… The appellant in effect resigned before the grievance procedure progressed beyond the first step. … But most importantly, even if there were merit in his assertion that he justifiably had no confidence in the internal grievance process, his letter of resignation indicates that he was aware of step 5 of the process which required him to refer the grievance to the CCMA. He resigned before he invoked that remedy. The appellant was too hasty in his decision to resign. His conviction in the merit of his cause, fuelled by his obvious outrage and indignation, may well have been misplaced. His assumption that his superiors' views about the performance contract outputs and appointments were wrong or unacceptable needed to be objectively tested and there was a legitimate, prescribed remedy available for that very purpose, which he opted not to pursue. In the circumstances, his resignation

[63] Id at para 46

was petulant, premature and ill-considered. In the premises, it cannot be concluded that he was constructively dismissed.'

[77] The first respondent should have pursued the grievance he had brought to finality. However, he did not even give the applicant a chance to convene it. The only way in which the first respondent could have avoided the consequences of this failure to his constructive case was to prove, and not just assume, that the grievance process was pre-determined, or a sham, or simply part of an orchestrated campaign to get rid of the first respondent and protect Dixon. As held in *Johnson supra*:[64]

> 'The Applicant's assumption that it would not have made any difference had she filed a grievance, is not a reasonable assumption and was not substantiated by any facts.
>
> The Labour Appeal Court made it clear that that an employee should make use of alternative remedies which include an internal grievance procedure. It was not open for the Applicant to second guess the outcome of lodging a complaint or formal grievance.'

[78] In my view, the real frustration of the first respondent was his subjective views that certain of the applicant's operational management was not taking his role and recommendations as health and safety manager seriously, and viewed him as a hindrance to production, leading him to reconsider if he wanted to remain employed with the applicant. The altercation with Dixon simply served as the basis upon which he could orchestrate his exit from the applicant with an appropriate compensation package and not just a resignation. This is evident from the fact that virtually immediately following his resignation, the first respondent's attorneys wrote to the applicant to explore a monetary settlement. As held in *Bandat supra*:[65]

> 'It is my view that the applicant, on the advice of her current attorneys, decided to resign and so create a cause of action to sue the respondents for compensation. This matter has all the hallmarks of intolerability designed after

[64] Id at paras 75 – 75
[65] Id at para 68

> the fact, and is not one which is consistent with a true intolerable working environment.'

[79] In the end, and as unacceptable as the conduct of Dixon may have been, this was insufficient to *per se* establish intolerable working conditions the first respondent could not be reasonably expected to put up with, considering the following: (1) the time lapse between the event itself and when the issue was raised with the applicant; (2) the applicant's immediate steps taken to deal with the issue in a formal grievance process and providing assurance to the first respondent that his complaint is considered serious and will receive proper attention; (3) the fact that the first respondent raised and was a willing participant in the grievance in which he sought an outcome restoring the working relationship; (4) the first respondent not being at work between the event and his ultimate resignation, and thus did not further interact with Dixon which may have compounded matters, before the grievance was dealt with; and (5) there was no case that the grievance would not have been properly dealt with by the applicant. In *Ternsportswear (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry and Others*[66] the Court said:

> 'Taking the above into account and as the record in this matter reveals that the first time the Third Respondent raised his concern regarding his treatment by Mr Lu in writing with the Applicant was on the 4th February, in the face of clear evidence that the Third Respondent's issue was in the process of being dealt with; the Third Respondents resignation can only be described as deliberate and premeditated and his resignation does not constitute a constructive dismissal.'

[80] Finally, and even if it can be said that the conduct of Dixon establishes intolerability, the fact is that because the first respondent short circuited the actual pending grievance process and did not allow such process to conclude and possibly arrive at a solution, how can it be said that the applicant as employer is culpable and should be held accountable for the intolerability. This is especially so considering the applicant's repeated efforts, even after the first respondent's resignation, to bring him back into the fold and conclude the grievance process. A simple illustration shows the point. It may well have been

[66] (D534/08) [2010] ZALC 308 (27 January 2010) at para 30.

an outcome of the grievance process that the first respondent is not required to deal with Dixon any longer or in any way interact with or report to him, or even that Dixon may have been disciplined. Either way, the applicant would have acted in a manner designed to avoid the cause of any intolerability. The applicant must have been given the opportunity to do so by the first respondent. The fact that the first respondent deprived it of such opportunity is destructive of the constructive dismissal claim. In short, and in this case, resignation by the first respondent was not the measure of last resort.

[81] The third respondent placed reliance on the medical certificates which recorded that the first respondent suffered from panic attacks, chest pains and anxiety, which the third respondent then attributed to the threats made by Dixon. The difficulty with this is that the medical certificates themselves cannot justify such a conclusion. The third respondent is in effect speculating. If the case is that intolerability was compounded by the first respondent's medical conditions which resulted directly from the conduct of Dixon, this needed to have been proven by the first respondent though calling the medical practitioner to testify that this was the case, or at least submit an affidavit to this effect. In *Mgobhozi v Naidoo NO and Others*[67] the Court held:

> 'Although the Labour Court did not decide the issue of admissibility and merely determined the application on an acceptance of the certificates at face value, I believe it ought to have done so. I do not believe that it ought to have exercised its discretion to consider the certificates at all, in the absence of affidavits by the medical practitioners in question.'

[82] The third respondent held that there was no evidence that Dixon apologised to the first respondent. Whilst it may be so that Dixon did not apologize at the time, it must be said that the grievance meeting was the appropriate occasion in which it could have been established if Dixon showed genuine contrition for his conduct and how the first respondent may view such an apology offered to him in those formal proceedings, with a temporal wedge being driven between the actual conflict and the hearing of the grievance, giving the parties a proper opportunity to reflect on all the events and their relationship and so make informed decisions. In short, the face to face grievance meeting would have

[67] (2006) 27 ILJ 786 (LAC) at para 30. See also para 33 of the judgment.

been the proper opportunity for Dixon to apologize, and it was the conduct of the first respondent that stopped this from happening.

[83] Lastly, and insofar as the third respondent placed reliance on past issues and complaints raised by the first respondent, relating to his dealings with management on safety issues, the simple answer to this is that on the evidence, he had never raised a formal complaint about this in the past and never instituted grievance proceedings in this regard. Also, his issue about being taken seriously and receiving support for his duties as health and safety officer would have been one of the issues dealt with in the grievance process, as it was raised in the grievance submitted by the first respondent on 13 May 2015. Again, these considerations do not advance the cause that resignation was a measure of last resort.

[84] In sum, the third respondent got it wrong both on the facts, and in law. She failed to have proper regard to all the essential factual considerations I have set out above. She plumbed for the evidence of the first respondent when she should have rejected it. In particular, her finding that the first respondent was justified in not returning to work to '*complete*' his grievance has no factual foundation, and completely negates the content of the first respondent's own grievance form of 13 May 2015. The third respondent failed to apply the requisite legal principles where it comes to deciding constructive dismissal claims, in particular the requirement that resignation must be a measure of last resort and that an employee must pursue the internal remedies available to the employee to finality, in particular grievance processes. Her conclusion that the first respondent was constructively dismissed is unsustainable on review, and must be set aside.

[85] It therefore follows that the applicant did not dismiss the first respondent, but the first respondent resigned of his own accord. Because the first respondent was not dismissed, the MEIBC and the third respondent thus had no jurisdiction in this matter. And because the MEIBC and the third respondent had no jurisdiction, the award of the third respondent on the merits of the matter (i.e. that the dismissal was unfair) and the consequential relief she afforded the first respondent can equally not be allowed to stand, as it was simply not competent to have been made in the first place.

Conclusion

[86] For all the reasons as set out above, the third respondent's award cannot stand. The first respondent failed to prove that he was dismissed as contemplated by section 186(1)(e) of the LRA, which was the case he brought before the MEIBC. The third respondent should have dismissed the matter for want of jurisdiction. The arbitration award of the third respondent accordingly falls to be reviewed and set aside.

[87] With the third respondent's award having been reviewed and set aside, what is this Court to do? As stated above, it is up to this Court to finally determine the matter, not only because the dispute is in reality one of jurisdiction, but also considering the issues of law at stake. The pertinent facts in this matter ultimately turned out to be largely uncontested and there is simply no need to go through arbitration all over again. For all the reasons elaborated on above, I am satisfied that the third respondent should have found that the first respondent was not dismissed, and should thus have disposed of the dispute on the basis of a lack of jurisdiction. Accordingly, the arbitration award of the third respondent must be substituted with a determination that the first respondent was not dismissed by the applicant, and consequently the MEIBC and the third respondent had no jurisdiction to entertain the dispute.[68]

Costs

[88] This then only leaves the issue of costs. In terms of section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, this was certainly an arguable case. I also cannot ignore that Dixon had some part to play in the unfortunate events that happened. I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[69] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from the principle set out

[68] This Court has the power under section 145(4) of the LRA to substitute the award.
[69] (2018) 39 ILJ 523 (CC) at para 25.

therein. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

[89] In the premises, the following order is hereby made:

Order

1. The applicant's review application is granted.

2. The arbitration award of the third respondent, arbitrator Daisy Manzana, dated 14 December 2015, and issued under case number MEGA 46900/15, is reviewed and set aside.

3. The arbitration award is substituted with a determination that the first respondent was not dismissed by the applicant, and therefore the second and third respondents had no jurisdiction to entertain the dispute.

4. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr M Vilakazi of Menzi Vilakazi Attorneys
For the First Respondent:	Advocate A J Nel
Instructed by:	Goldberg Attorneys