THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1109/15

In the matter between:

GOLD ONE LIMITED **Applicant**

and

NONKULULEKO MADALANI **First Respondent**

PEARL MBEKWA *N.O.* **Second Respondent**

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION **Third Respondent**

Enrolled: **03 July 2020 (decided on the papers)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 09 September 2020.**

Review application – constructive dismissal – *de novo* determination of the jurisdictional issue on whether the employee was constructively dismissed – intolerability is a high threshold – the conduct of the employer must have brought the employee's tolerance to a breaking point.

JUDGMENT

NKUTHA-NKONTWANA, J

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Introduction

[1] This is a review application in terms of section 145(1)(a) of the Labour Relations Act[1] (LRA), in terms of which the Applicant, Gold One Limited (Gold One), is challenging the arbitration award issued by the Second Respondent, Ms Pearl Mbekwa (Commissioner) issued on 3 June 2015, under case number GAJB18553-14, under the auspices of the Third Respondent, the Commission for Conciliation Mediation and Arbitration (CCMA).

[2] The First Respondent, Ms Nonkululeko Madalani (Ms Madalani), is defending the arbitration award.

Factual background

[3] Ms Madalani commenced her employment with Gold One on 1 January 2013 and held a position of a Contract Manager. She was stationed at Gold One's head office that is situated at Constantia Park, Weltervreden Park, Roodepoort, Johannesburg. On 24 May 2014, she was transferred to Modder East mine operation situated at Eastvale, Springs, Ekurhuleni, consequent to the Gold One's Cook Operations merger with Sibanye Gold Limited and the management of Cook Operations being taken over by Sibanye Gold Limited.

[4] Ms Madalani was one of the four employees that were transferred from head office to Modder East. She and her fellow colleagues received a relocation allowance when they were transferred to Modder East and the transfer did not affect the terms and conditions of their employment. It would seem that some transferred employees were discontented with the move and the culture at Modder East. To resolve that issue, Gold One sent a letter dated 7 July 2014 to all the transferred employees, including Ms Madalani, proposing a mutual termination of their employment relationship and offered to pay them *ex gratia* amount equivalent to three months' remuneration. All the transferred employees, but for Ms Madalani, accepted the offer and their employment contracts were terminated on mutual basis, with effect from 31 July 2014.

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[1] Act 66 of 1995, as amended.

[5] Ms Madalani chose to remain in the employ of Gold One, a decision that was well received. It is common cause that, subsequent to her decision not to accept the mutual termination offer, the relationship between Ms Madalani and Mr Denzil Meredith (Mr Meredith), the Financial Manager and her immediate supervisor, remained cordial.

[6] On 15 July 2014, Ms Geraldine Volschenk (Ms Volschenk), the Financial Accountant, sought assistance from Ms Madalani. In response, Ms Madalani advised her that she would only be available after 14h00. Mr Meredith intervened and instructed Ms Madalani to treat the matter as urgent and attend to it before 14h00. It was then that Mr Meredith became aware that Ms Madalani would normally leave the premises during lunch time.

[7] Mr Meredith took upon himself to investigate Ms Madalani's clocking history. He discovered that she was not clocking out when she leaves the premises during the day and that she arrived late to work on various occasions. Mr Meredith testified that the hours of work for administration employees at Modder East is 07h00 to 16h00. All employees had to keep time because of health and safety requirements as Modder East is a mining operation. This evidence was never challenged.

[8] On 28 July 2014, Mr Meredith had a meeting with Ms Madalani to discuss time keeping requirements applicable at Modder East. Ms Madalani refused to be engaged and demanded a formal and recorded meeting. It is not disputed that Mr Meredith requested the intervention of the Human Resources Department to schedule a counselling session in accordance with the disciplinary code. Immediately after the meeting, Mr Meredith sent an email to Mr Madalani, instructing her to attend an induction session the next day. She blatantly refused to attend the induction session as she was of the opinion that Gold One was hell-bent on changing the conditions of her employment.

[9] On 29 July 2014, Mr Meredith received a complaint against Ms Madalani from one of Gold Ones' suppliers (BME). He decided that he would discuss the complaint with Ms Madalani during the counselling session. On 30 July 2014, Ms Madalani sent an email to Mr Meredith wherein she recorded her

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dissatisfaction with what transpired during the meeting of 28 July 2014 and that it was her view that Gold One wanted to change her conditions of employment. She was adamant that in the absence of a policy regulating hours of work at Modder East, her contract of employment should be honoured and that Mr Meredith should cease from insisting that she should clock in and out or not exit the premises during the day.

[10] On 5 August 2014, Ms Madalani was issued with a verbal warning for poor time keeping based on the allegation that she had arrived late at work the previous day. On 6 August 2014, Ms Madalani addressed another email to Mr Meredith, wherein she objected to the verbal warning on the basis that her complaint about the hours of work had not been addressed.

[11] On the same day, Mr Steven Rule, the Human Resources Manager Legal and Behaviour Adjustment, attempted to serve Ms Madalani with the notice to attend the counselling session that was scheduled to take place on 11 August 2014. She refused to take delivery of the notice and intimated to Ms Rule that should would attend the counselling session. On 7 August 2020, Mr Rule sent an email to both Mr Meredith and Madalani, carbon copied to two other recipients, reporting the events of 6 August 2014.

[12] On 8 August 2014 at 07h00, Ms Madalani responded to Mr Rule's email, addressing all the recipients of the that email. She impugned the scheduled counselling session, calling it, inter alia, a personal project of Mr Meredith to achieve her intended dismissal as per the letter of 7 July 2020 within a short space of time and with no costs to Gold One. She stated further that she viewed the counselling session as a strategy to intimidate her so that she would end up terminating her employment contract. She reaffirmed her refusal to attend the counselling session on 11 August 2014. Moreover, she demanded that Gold One provide her with a written undertaking by 15h00 the same day, Friday, 8 August 2014, on the following terms:

12.1 The counselling session would not proceed;

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12.2 Mr Meredith would cease, with immediate effect, from persecuting her and undermining the terms and conditions of her employment as contained in her employment contract; and

12.3 Gold One would not unilaterally amend the terms and conditions of her employment contract.[2]

[13] Ms Madalani threatened to approach this Court on urgent basis for an appropriate relief and punitive costs order against Gold One and Mr Meredith.[3]

[14] Gold One chose to respond to Ms Madalani's emails of 30 July 2014 and 4,5,6 and 7 August 2014, specifically. In the letter dated 8 August 2014, Mr Meredith explained the basis for the offer of 7 July 2014. He also clarified the importance of timekeeping and the clocking system at Modder East and explained the reason for requesting Ms Madalani to attend the induction. When it comes to the purpose of the counselling session, he gave the following explanation:

> 'The counselling session is an informal measure to deal with minor problems to avoid the necessity for a formal process being implemented. This is in accordance with the Company's disciplinary code and procedure. The intention for counselling session is to address your timekeeping, compliant received from BME and the manner in which you treat fellow employees. This has all been explained to you.
>
> You may legitimately hold a view that you have not acted incorrectly in any of the above mentioned instances and even that the process is unfair, but holding this view does not mean that you do not have to attend the counselling session and that you may lash out against me and Company in the manner that you have. The purpose of the counselling session is to establish the state of affairs and to go forward from there. Your view may therefore be conveyed at the counselling session and it is wholly unnecessary for you to have responded in the manner that you did.
>
> The counselling session forms part of the Company's disciplinary code and procedure as a disciplinary measure, your agreement to the enforcement of

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[2] See: Record arbitration proceedings, pages 57 - 59.
[3] Ibid.

> such procedure is therefore not required. The disciplinary code and procedure applies to you as it applies to all other employees.'[4]

[15] Mr Meredith recused himself as the chairperson of the counselling session given the allegations that were levelled against him by Ms Madalani in her letter dated 8 August 2020. Ms Madalani was accordingly advised that an alternative chairperson would be allocated and that the counselling session was postponed to a date yet to be announced.

[16] That very same afternoon Ms Madalini responded to Mr Meredith's letter, stating, *inter alia* the following:

> 'Therefore given the pre-determined position of the Company as encapsulated in the abovementioned letter as well as the unfair and prejudicial environment created by the Company through the well documented actions, I will be foolhardy to expect any fairness in the so-called 'counselling session' that is forced upon me. This façade that is referred to as 'counselling session' is simply another episode in a series of events that are being pursued by Mr Meredith and the Company to undermine my contract of employment as concluded on 12 October 2012 and make my employment intolerable. As a result, I will not dignify such actions which have completely no benefit for me in my current position which is evidently under threat from the Company as a whole.
>
> The postponement of the so called 'counselling session' charade is simply to technically remove urgency of the relief I would have sought from the Labour Court and so the Company can continue to string me along and to make my conditions of employment intolerable.
>
> As it seems like will I not be receiving an undertaking as stated my email earlier today, I will proceed with an appropriate course of legal action. It was my trust that this could be avoided, however it does not seem.'[5]

[17] On Monday, 11 August 2014, Ms Madalani did not report for duty. Instead, she referred an unfair dismissal dispute to the CCMA, claiming that she was dismissed as contemplated by section 186(1)(e) of the LRA (constructive

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[4] See: Supplementary Affidavit at page 57 para 5.3; see also, the record of the arbitration proceedings at pages 60 - 62.

[5] See: The record of the arbitration proceedings at page 63.

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dismissal).[6] The matter was set down for conciliation after which a certificate of non-resolution was issued after the parties failed to resolve the matter and progressed to arbitration; hence the impugned award.

Condonation application

[18] Gold One has applied for condonation for the non-compliance with section 145(5) of the LRA which provides as follows:

> 'Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.'

[19] The review application was launched on 26 June 2015. As such, the matter ought to have been set down for hearing by 27 December 2015. The notice of set down was only delivered on 19 August 2016. The delay is imputed to the process that was undertaken in order to reconstruct the record of the arbitration proceedings. Even though the delay is not inconsequential, the explanation is reasonable and there is no considerable prejudice. Ms Madalani is not opposing the grant of condonation. I am satisfied that Gold One has shown good cause for the grant of condonation.

[20] To deal with every aspect, I proceed to deal with the application for the revival of the review application that was deemed to have been withdrawn because of non-compliance with clause 11.2.2 of the of the Practice Manual of the Labour Court[7] (Practice Manual). It is apparent from the papers that Gold One took a precautionary step in launching this application as the transcribed record was filed within 60-days from that date it was notified by the Registrar that the record had been received. As such, there is no reason to pronounce on this application as clause 11.2.2 is not applicable in the circumstances of this case.

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[6] Section 186(1)(e) provides that: 'Dismissal means that - … an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee'.
[7] Effective April 2013.

Legal principles and application

[21] Tritely, an enquiry in a constructive dismissal case turns on the jurisdiction of the CCMA, a principle established by the Labour Appeal Court (LAC) in *Solid Doors (Pty) Ltd v Commissioner Theron and Others,*[8] where it was held:

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

[22] In *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others,*[9] the LAC pertinently stated that:

> 'In terms of s 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 Players Association & others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Association Union & Another*,[10] the following was stated in relation to a dismissal in terms of s 186(1)(b) of the LRA:

[8] (2004) 25 ILJ 2337 (LAC) at para 29.
[9] (2014) 35 ILJ 3360 (LAC) at para 19; see also *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) at para 5.
[10] (2008) 29 ILJ 2218 (LAC) at paras 39-41.

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'[39] The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.

[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. …

[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.'… (Emphasis added)

[23] It follows, as stated in *HC Heat Exchangers (Pty) Ltd v Araujo and Others,*[11] 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 on 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'.

[24] Gold One, nonetheless, pleaded unreasonableness as the applicable test. In my view, the fact that Gold One impugns the award on the basis of reasonableness is not fatal to its case since this Court is enjoined to pronounce on the issue of jurisdiction *de novo*. In *NUMSA obo Zahela and Three Others v*

[11] [2020] 3 BLLR 280 (LC) at paras 35 to 39.

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Volkswagen SA (Pty) Ltd and Others,[12] an unreported decision on this Court, per Prinsloo, J, referred to with approval in *Johnson v Rajah NO and Others*,[13] another unreported decision per Prinsloo, J, where, confronted with the similar circumstances, the Court dismissed the review application. While I agree with Prinsloo, J that the review test is that of correctness as opposed to reasonableness, I am unable to support the conclusion that where all the averments in the founding papers impugn the award on the basis of reasonableness, the review application falls to be dismissed without even affording the applicant an opportunity to amends its papers as the 'applicant would be obliged to make out an entirely new case for review'.[14]

[25] In *SA Rugby Players Association*,[15] the LAC established the principle that the inquiry into the jurisdiction of the CCMA entails the determination 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'. As correctly stated in, *HC Heat Exchangers*[16] this Court is obliged to determine *de novo* whether the Commissioner's decision is right or wrong. This principle was recently affirmed by the LAC in *Ukweza Holdings (Pty) Ltd v Nyondo and Others.*[17]

[26] Turning to the merits, the test for constructive dismissal has been set out in a number of authorities and, as mentioned in *Solid Doors,*[18] there are three requirements for constructive dismissal to be established and they are that:

> '…The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is

[12] unreported case number PR 137/13, handed down on 16 November 2016
[13] (JR33/15) [2017] ZALCJHB 25 (26 January 2017) at para15.
[14] Ibid.
[15] *Supra* n 7 at para 41.
[16] *Supra* n 8.
[17] [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC) at para 12.
[18] *Supra* n 4 at para 28.

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no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.'[19] (Emphasis added)

[27] Put differently, as held by the LAC in *National Health Laboratory Service v Yona and Others,*[20]

> '…a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee…The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.' (Emphasis added)

[28] Since it is not disputed that Ms Madalani terminated the employment relationship herself, then the next leg in the enquiry turns on whether the reason for that termination is because Gold One made her continued employment intolerable.

[29] Ms Madalani testified that the genesis of all her ills was her rejection of the Gold One's offer of mutual separation contained in the letter dated 7 July 2014. She argued that Mr Meredith began to feel ill-at-ease in her company and used every available opportunity to pressurise her to terminate her employment contract. On the contrary, she conceded that the relationship with Mr Meredith and her other colleagues was cordial up until the 8 August 2014, the day she packed her bags and never looked back.

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[19] See: *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* 2015] 9 BLLR 865 (LAC) at paras 7 to 9.

[20] (2015) 36 ILJ 2259 (LAC) at para 30; see also *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (JR1078/14) [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC); (2018) 39 ILJ 1568 (LC) at paras 5 to 16.

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[30] Mr Meredith's evidence that the mutual termination offer contained in the letter dated 7 July 2014 was presented to all the transferred employees, including Ms Madalani, was not disputed. It is clear that she was not cherry picked for termination and her decision to reject the mutual termination offer was welcomed by Gold One.

[31] Notwithstanding the above, the Commissioner found that given the sequence and the time within which the incidents that Ms Madalani complained about, the officials of Gold One indeed made her continued employment intolerable.

[32] Gold One impugns this finding on several grounds which I do not deem necessary to repeat save to state that the mainstay of its attack is that this finding is not supported by evidence that was before the Commissioner.

[33] I now deal with each complaint. First, Ms Madalani had qualms with time keeping and the clocking system. She argued that she was not bound by the clocking system and time keeping rules that are applicable at Modder East. She was of the view that Mr Meredith's instructions to adhere to the time keeping rule and practice not to leave the premises during lunch time was a violation of her contract and an attempt to unilaterally change the terms and conditions of her employment. It was Mr Meredith's testimony that the time keeping and clocking policy was applicable to all employees, including the executives, as part of health and safety measures since Modder East is a mine operation unlike head office.

[34] Ms Madalani refused to be engaged on the issue of time keeping during the informal meeting of 28 July 2014. Instead, she insisted on a formal and recorded meeting, a fact she concedes. When Gold One acceded to her wish by scheduling a counselling session, she bailed out. The crest of Ms Madalani's gripe with the instruction to adhere to the time keeping and clocking policy is that it tempered with her terms and conditions of employment that were applicable when she was still at head office.

[35] The flaw in this thinking is quickly brought to bear when regard is had to the relevant clauses in Ms Madalani's employment contract. Clause 6 thereof states that:

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'**6. Hours of work and working conditions**

6.1 The employee agrees that her appointment is a senior appointment and will necessitate working reasonable hours outside normal hours on regular occasions and therefore the Employee will be required to reside in a close proximity of the Company's operations.

6.2 The employee shall satisfy the time requirements of the Company and accordingly, employee may be called upon to work irregular hours.'

[36] While, in terms of Clause 5.1.3 Ms Madalani had 'to devote all her time and attention during normal business hours, and such additional time and attention as the requirements of the Company's business may reasonably require, to her duties under the Agreement. The 'normal business hours' are defined as the 'times and duration that the employee in specific occupation and/or organizational structure are required to work'.

[37] Ms Madalani, was a senior employee who, granted, had some level of flexibility in terms of her hours of work. However, such flexibility had to be exercised in accordance with the operational requirements of Gold One. A request to keep time by clocking in and out and to work during lunch did not offend her contractual terms. As correctly argued by Gold One, the request was sensible within the context of Modder East, a mining operation. This construction of the employment contract must be preferred as it is loyal to the language chosen by the contracting parties as aptly stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[21]

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose

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[21] 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) at para 18.

> to which it is directed and the material known to those responsible for its production.'

[38] Second, Ms Madalani refused to attend the induction session because she was of the view that Gold One was going to use it to tempter with her conditions of employment, a view she persists with even in her answering affidavit. The Commissioner was won over by this averment solely because of the timing of the induction session as Ms Madalani had been at Modder East since May 2014 and the fact that Mr Meredith failed to clarify its purpose.

[39] Mr Meredith testified that the reason he had requested Ms Madalani to attend the induction session stemmed from the discussion he had with her on 28 July 2014. It became clear to him that Ms Madalani had misconstrued the applicable hours of work and the safety implications of a mine operations. This evidence was rejected as incoherent by the Commissioner, despite the fact that it was not disputed. Notably, Ms Madalani conceded that she had not attended any induction since her transfer to Modder East. It stands to reason that, had she attended the induction, a light could have been shed on all her queries pertaining to the hours of work and applicable prescripts in a mining operation. Who knows, that could have marked the end of her grievances and she would still be in the employ of Gold One. Thus, her decision to reject that opportunity was impetuous.

[40] Third, Ms Madalani took issue with the complaint against her by BME, Gold One's client, and the verbal warning for poor time keeping. It must be remembered that the BME's complaint came at the time when there was an impasse between Ms Madalani and Mr Meredith on the appropriate process to follow in order to address work related issues with her. She opted for a formal process as opposed to an informal process because of her unsubstantiated suspicions. Mr Meredith testified that he decided to defer the discussion pertaining to the complaint by BME to the counselling session. Mr Meredith also clarified to Ms Madalani that she would be given an opportunity to refute the allegation during the counselling session. So, nothing turned on it and as such it did not avail the Commissioner to pronounce on the contents thereof because they remained allegations.

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[41] Likewise, Ms Madalani could have raised her dissatisfaction with the verbal warning for poor time keeping during the counselling session. I fail to understand why Ms Madalani, a senior employee and a patently strong-willed person, did not avail herself to the counselling session, a process she had requested, in order to deal with her grievances. Otherwise, since the verbal warning is a disciplinary sanction, she could have challenged it in terms of internal grievance procedures or externally as an unfair labour practice.

[42] Fourth, the counselling session. The purpose of the counselling session was clearly spelt out in Gold One's letter of 8 August 2014. Even if Ms Madalani smelt a rat when she was initially notified of the counselling session, the letter of 8 August 2014 should have dispelled the confusion about the process and allayed her fears. That is so because she was assured that she would be given an opportunity to refute the allegations against her and to challenge both the process and the outcome, if she was still aggrieved. Moreover, the issues that were going to be discussed during the counselling session pertained to Ms Madalani's grievances.

[43] It remains a mystery as to what triggered Ms Madalani's resignation. When she left work on Friday, 8 August 2014, having been apprised of the purpose of the counselling session and the fact that it had been postponed, she did not tender her resignation. Conversely, she threatened Gold One with legal action. This is how she dealt with this difficulty in her answering affidavit:

> '45.1 The applicant has conveniently omitted to mention that I sent both Mr Rule and Mr Meredith a further e-mail on the 8th of August at 03.53 p.m;
>
> 45.2 As is apparent from the contents of that letter, I made it clear that it did not seem that I would be receiving an undertaking as I had requested from the Applicant in my e-mail earlier that day and that I would accordingly proceed with appropriate course of legal action;
>
> 45.3 There was certainly no need for me to indicate at that stage my intention of resigning from my employment with the Applicant. Applicant, however, should have anticipated both from the contents of my final letter as well as the contents of various letters that I would be

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compelled to resign by virtue of the Applicant having made my working life intolerable.'[22]

[44] Despite Ms Madalani's assertion that Gold One should have expected legal action as well as her resignation from her last communication on 8 August 2014, she testified that she only decided over the weekend that she could not bear the thought of reporting to her employment on Monday, 11 August 2014. However, what is missing from her evidence is the explanation as what was the reason for sentiments because at that time the threat of the counselling session proceeding on 11 August 2014 had been removed, albeit temporarily, by it being postponed.

[45] It is obvious from the tone of Ms Madalani's communication and the technical points raised therein that she had been legally advised on the legal recourse to pursue. As such, Gold One cannot be faulted in its contention that it was expecting Ms Madalani to invoke legal processes as threatened in her communication and not a resignation.

[46] To my mind, Ms Madalani failed to establish intolerability. It is well-accepted that intolerability is a high threshold, 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'.[23] Put otherwise, intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point.[24]

[47] Furthermore, Ms Madalani failed to show that Gold One is to blame for making her continued employment intolerable. In this context, it does not avail 'an employee to unjustifiably 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'.[25] In the present instance,

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[22] Answering affidavit, page 91.

[23] See: *HC Heat Exchangers*, *supra* n 7 at para 49; see also, *Billion Group (Pty) Ltd v Ntshangase and Others* (2018) 39 ILJ 2516 (LC) at para 11.

[24] *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) at para 39.

[25] See: *HC Heat Exchangers, supra* n 7 at para 52 and 54.

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Ms Madalani obviously shunned the counselling session that was meant to resolve the cause of the alleged intolerability.

[48] Ms Madalani also failed to make good her threat to vindicate her rights through legal processes. It does not assist her case to allege that she had addressed her concerns with the senior executives and, as such, she did afford Gold One an opportunity to address her complaints when she obviously circumvented the very process that was meant to address her complaints.

[49] It follows that Ms Madalani failed to show that the employment relationship had become so intolerable that she had no other reasonable option other than to tender her resignation.

Conclusion

[50] In all the circumstances, I am satisfied that the Commissioner incorrectly clothed herself with the jurisdiction which she did not have. Accordingly, the award stands to be reviewed and set aside.

[51] There is no need to remit the matter back to the CCMA given the conclusion that I have arrived at. As such, the award stands to be reviewed and set aside and to be substituted with an order that Ms Madalani failed to prove that she was dismissed and that her dismissal could be classified as a constructive dismissal as contemplated in terms of section 186(1)(e) of the LRA and consequently, the CCMA had no jurisdiction to entertain the dispute.

Costs

[52] I am disinclined to award costs against Ms Madalani as the circumstances of this case dictate that each party pays its own costs.

[53] In the premises, I make the following order:

Order

1. The arbitration award issued by the Commissioner under case number GAJB18553-14G dated 3 June 2015 is reviewed and set aside and replaced with the following order:

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1.1 Ms Madalani failed to prove that she was dismissed as contemplated in terms of section 186(1)(e) of the LRA.

1.2 The CCMA has no jurisdiction to entertain the dispute.

2. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

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