

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2300/22

In the matter between:

CHUPETSO MESHACK MOTHUPI

Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

First Respondent

EVAH NGOBENI N.O

Second Respondent

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Third Respondent

Heard: 20 March 2024

Delivered: 24 April 2024

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed to be 24 April 2024.

JUDGMENT

PRINSLOO J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 4 October 2022 and issued under case number PMD021906 wherein the Second

Respondent (arbitrator) found that the Applicant was not constructively dismissed and that the First Respondent lacks jurisdiction to adjudicate the dispute.

[2] The Third Respondent (Respondent/municipality or employer) opposed the application.

The test on review

[3] The first question to be decided in a constructive dismissal case is whether there was a dismissal or not and this must be determined before any enquiry into the fairness thereof. The question as to the existence of a dismissal goes to jurisdiction and this Court has confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ does not find application in reviewing a jurisdictional ruling.²

[4] This Court must decide whether the arbitrator was right or wrong and not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach. The question to be decided in view of the applicable test is whether the arbitrator correctly found that the Applicant was not constructively dismissed.

Background facts

[5] The Applicant was employed with the Respondent since November 1998 and from May 2003 he was employed as the Director: Support Services in the department of corporate services.

[6] The Applicant resigned in December 2018 and his last day of service was 15 January 2019. He subsequently referred an unfair dismissal dispute to the First Respondent where the issue to be decided was whether his resignation constituted a

¹ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 78 - 79.

² *SA Rugby (Pty) Ltd v SA Rugby Player's Association & another* [2008] ZALAC 3; (2008) 29 ILJ 2218 (LAC); *Member of the Executive Council, Department of Health, Eastern Cape v Odendaal & others* [2008] ZALC 161; (2009) 30 ILJ 2093 (LC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management & others* (2013) 34 ILJ 3282 (LC).

constructive dismissal and if so, whether it was fair. If the Applicant's dismissal was unfair, the arbitrator had to determine what the appropriate relief should be.

[7] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings.

[8] It is evident from the onset of the proceedings that the arbitrator identified the *"actual issue for determination is the constructive dismissal"* and *"whether objectively speaking the applicant was constructively dismissed."* The Applicant's attorney, Mr Mkhize, responded that the arbitrator was correct in identifying the issue to be decided.

The Applicant's case

[9] The Applicant testified that that he reported to many different supervisors and there was never any tension, but things changed in 2016 when Mr Shingange started to act as the head of the department, in the absence of Ms Ramulifho. During late November 2016, Mr Shingange called the Applicant to his office and he requested his assistance to deal with Ms Ramulifho, who was the head of the department because Mr Shingange wanted her position. They both reported to Ms Ramulifho and the Applicant indicated that he could not assist Mr Shingange. Mr Shingange smiled and said to the Applicant *"mchana, do not forget that one day I will be your boss and you will find yourself in the street"*. The Applicant testified that he did not take it seriously because it had nothing to do with him.

[10] In February 2017, Mr Shingange started to act formally in the position held by Ms Ramulifho and he was appointed permanently on 1 August 2017 as the head of the department.

[11] The Applicant testified that at the time they moved to Tshwane House, Ms Ramulifo was still the head of the department and it was part of his responsibilities to make sure that everyone was allocated an office according to their positions. The Applicant allocated an office to Ms Ramulifo and Mr Shingange had an issue with

that and he subsequently instructed Mr Laubscher to deal with the allocation of offices. Mr Shingange wanted the office that was allocated to Ms Ramulifo.

[12] He testified that his relationship with Mr Shingange used to be close and they called each other 'mchana', but it changed around June 2017 and Mr Shingange started to ignore him, notwithstanding the fact that he tried to contact him, to communicate with him and had set up formal meetings with Mr Shingange. He wanted to find out from Mr Shingange why he was treating him this way and what the issue was as he could not identify a particular issue which could have caused Mr Shingange's attitude towards him. The Applicant's messages to Mr Shingange remained unanswered and the meeting he tried to schedule never took place. The working relationship changed in June 2017 and requests from Mr Shingange which would normally be sent to the Applicant, were suddenly sent to his subordinates.

[13] In cross-examination, it was put to the Applicant that Mr Shingange gave instructions directly to the Applicant's subordinates because the Applicant was either not taking instructions from Mr Shingange or did not deliver and there were time constraints which caused instructions to be given directly to his juniors.

[14] The Applicant in his testimony referred to a number of examples to illustrate the relationship between him and Mr Shingange. His case was that Mr Shingange took away his functions and prevented him from attending strategic meetings.

[15] In cross-examination, it was put to the Applicant that the reason why he could not attend meetings was because he refused to take instructions, was disruptive in meetings and opposed each and every decision made by Mr Shingange. The Applicant disputed this version.

[16] When the relationship with Mr Shingange deteriorated further and all efforts he made to resolve the issues came to nought, he wrote to the acting governance and support officer (AGSO) on 2 August 2017, indicating that he needed to formalise his grievance in terms of the grievance procedure. He completed the grievance form, which is an attachment to the main collective agreement and formally put in his grievance. The issues raised in the Applicant's grievance included the use of

abusive, insulting and offensive language; continuous and deliberate exclusion from workplace activities; withholding of information vital for effective work performance; denial of access to information, supervision and resources; spreading of misinformation and malicious rumours; and changing of work arrangements.

[17] The Applicant explained that the main collective agreement provides for a grievance procedure, which is deemed to be a condition of service. Step 1 of the grievance procedure provides that an aggrieved employee must lodge a grievance in writing with his or her immediate superior, on the prescribed form, setting out the complaints and the desired results. Should the grievance concern the conduct of an employee's immediate superior, the procedure requires such an employee to proceed to the next step. Step 2 provides that if the grievance has not been resolved to the satisfaction of the aggrieved employee or within 10 days of the lodging thereof, the matter may be referred to the head of the department. In the Applicant's case, Mr Shingange was the head of the department and he had to refer his grievance to Mr Shingange's senior, being the GSO. The procedure provides that the head of department or his or her nominee, shall arrange a meeting to consult and hold a discussion with the affected parties in an attempt to achieve a resolution. In step 3 of the grievance procedure, the matter is referred to the City Manager.

[18] A step 2 grievance meeting was held on 17 August 2017. The Applicant had escalated his grievance to Mr Mayur, Mr Shingange's senior, who also chaired the grievance hearing. Mr Mayur asked Mr Shingange what the Applicant did to him and he responded that *"sometimes you feel like not working with a person"*.

[19] The Applicant indicated his difficulties to Mr Mayur and the outcome he wanted was to transfer to the shared services division because Mr Shingange did not want to work with him. The Applicant already completed the forms requesting a transfer and Mr Shingange was required to sign the forms.

[20] On 29 August 2017, the Applicant received the outcome of the step 2 grievance hearing, held on 17 August 2017. Mr Mayur found that there was a clear breakdown of trust and a conducive working relationship between the parties. The outcome was that:

'The issues raised by the aggrieved did not relate to unfair labour practices and do not meet the definition of grievance as defined in the grievance procedure. The aggrieveds (sic) desired solution cannot be acceded to and the parties are requested to consider the following options in order to resolve the conflict:

1. The parties need to explore the option of addressing the personality issues amicably or finding an alternative placement using the secondment or transfer policy for Mr Mothupi if the trust relationship is found to irrevocable (sic) broken down;
2. If either party wants to address the allegations of misconduct they should follow the correct process of following a disciplinary process. (A grievance hearing is not meant to hear evidence on such matters).'

[21] The Applicant indicated that he agreed with the outcome and the recommendation as per paragraph 1, as he was of the view that it would resolve the issues. He indicated that he had made a request for a transfer and that his request should be attended to urgently. Mr Shingange signed his request for a transfer the following day and approved the transfer "*once the microstructure has been agreed upon*". The process was left with an understanding that the Applicant's transfer was going to be effected.

[22] It was put to the Applicant in cross-examination that he tried to dictate to the employer as he never considered resolving the issues with Mr Shingange amicably, but instead immediately opted for a transfer.

[23] The Applicant testified that the Respondent's new structure was approved on 27 September 2017 and he expected that his transfer could have been effected.

[24] Mr Mayur, who chaired the grievance hearing, left and Ms Tredoux became the new GSO on 1 October 2017.

[25] The Applicant explained that there is a material difference between a 'transfer' and a 'secondment'. The procedure applicable to secondment is that the request for the secondment of an employee to another department must be initiated by the

departmental head and negotiated with the future departmental head. He explained that a transfer and secondment are not the same – *“when you transfer a person to a department it becomes a permanent feature, but when you second a person, you can recall that person at any given point in time”*.

[26] The Applicant's version was that Mr Mayur, as the chairperson of the grievance hearing, tried to play it safe – *“He says, use the secondment or transfer, and I think he was giving you know, that leeway that the head of department must decide how he wants to deal with that”*.

[27] Notwithstanding the fact that Mr Shingange agreed that the Applicant's transfer would happen after the microstructure had been finalised and that the said structure was approved on 27 September 2017, he was not transferred or seconded.

[28] The Applicant tried to follow up with Mr Mayur, but he was told that Mr Mayur had given all the relevant documents to Ms Tredoux and he should follow up with her. She promised to arrange a meeting to have the issue resolved, but the meeting never took place. According to the Applicant, step 2 of the grievance procedure was concluded in terms of what Mr Shingange said – *“once the structure is approved, you will get transferred”*. The structure was approved and still, the transfer did not happen. The Applicant sent a plethora of emails to Ms Tredoux since October 2017 to enquire about the progress regarding his transfer. He testified that he not only sent emails as reminders, but when he met her at management meetings, he would verbally ask for feedback, but they never *“even bother to deal with that or listen to me”*.

[29] On 10 November 2017, the Applicant made another follow-up with Ms Tredoux and she responded on the same date as follows:

‘Kindly accept my apology for the delay in reply. I had a discussion with the Acting Group Head: Human Capital, and I was informed that the collective agreement on the placement of staff on the microstructure has been agreed to, but has not been formally signed yet. It is anticipated that this will be done either at the special bargaining council meeting scheduled for Tuesday the 14th of November, or upon conclusion of the said meeting. Once the agreement has been signed, placement

can start and your matter can be attended to. I understand that you are anxious for the matter to be resolved, but we cannot act beyond the agreed process. I will liaise with you once the collective agreement has been entered into.'

[30] The Applicant explained that he expected the recommendations made by Mr Mayur to be implemented, the new GSO was briefed on the process and he made continuous follow-ups, Ms Tredoux promised to attend to the matter but she never did and on 15 May 2018, he decided to lodge a new grievance as he was of the view that, because the GSO did not implement his transfer, she did not want to be associated with her predecessor's outcome.

[31] A number of other employees who also requested to be transferred were transferred during the same period and the finalising of the micro-structure and the signing of the collective agreement had no bearing on their transfers. The Applicant did not know why his request for a transfer was treated differently. The Applicant believed that he was ill-treated by Mr Shingange because he refused to assist him to unseat Ms Ramulifo.

[32] The Applicant expected the implementation of the outcome of step 2 of the grievance procedure, but it was not implemented. He was frustrated by the fact that nobody communicated with him *"at any point in time, especially Mr Shingange and Lorette Tredoux who were my supervisors"*.

[33] The Applicant lodged a new grievance on 15 May 2018 because Ms Tredoux *"was not interested in it, I felt that maybe she does not want to be bound by her predecessor's decision, because nobody would even care to look at it or what. I then put in the new one. The new grievance was never attended to..."*

[34] On 4 June 2018, the Applicant received a memorandum from the GSO stating that on 29 August 2017, the GSO made a finding in a step 2 grievance hearing that an alternative placement for the Applicant had to be found and that when she (Ms Tredoux) was appointed as GSO, the Respondent was in the process of finalising the microstructure:

'and during that period it was not possible to implement the finding as a number of processes still needed to be finalised. The City however, is now in a position to implement the said finding and pending the final placement being done in the City, it would be to second you to region 2 in the office of the Acting Regional Executive Director who has agreed that you can be seconded to his office to perform tasks and render a service in the position of Director Management and Support with immediate effect. You will report directly to the Acting Regional Executive Director. Your current conditions of service will be applicable during the secondment period and thus your salary, allowance and benefits will remain unchanged. A secondment agreement has been prepared and is available for signature by yourself. Kindly acknowledge receipt thereof. The hearing for the second grievance will be scheduled without delay.'

[35] The Applicant responded to the GSO and he turned down the offer of secondment. He explained during the arbitration proceedings for the first time that the offer sought to amend or change the decision of the chairperson of the step 2 grievance process, the position of Director Support he was seconded to in region 2, did not exist, the Respondent's own staffing policy did not allow what the Respondent intended to do. The Applicant referred to clause 12.3.3. of the staffing policy, which provides for the secondment of an employee only *"to a similar or equal position for a certain period, provided that the job level and the job category are the same"*. According to the Applicant, the secondment was unlawful and unfair. He was working in the City centre and region 2 was in Hammanskraal. The issues were not discussed with him prior to receiving the memorandum from the GSO. To the Applicant, it was a demotion and purely to frustrate him to get rid of him.

[36] It was put to the Applicant in cross-examination that he once again tried to dictate to his employer, the Respondent, who had offered him a temporary secondment to address his situation, which he rejected. The Applicant responded that the offer was a demotion, a humiliation and that no such position existed.

[37] After the Applicant made numerous follow-ups on the status of his grievance, he indicated that he would have no choice but to implement stage 3 of the process and to request a meeting with the City Manager, as the person with the final authority

to deal with the issues. He subsequently contacted the secretary of the City Manager to set up a meeting, but he was not successful to set up such a meeting.

[38] Ms Tredoux intended to send an email to the City Manager's secretary, but it was by mistake sent to the Applicant wherein she stated that *"If he is not happy with step 2, it needs to go to step 3. He cannot approach the CM. In any event, he is not open and honest. I would suggest that you divert this matter as it should not be escalated to the CM at this stage..."*

[39] On 23 October 2018, the Applicant was given notice of a step 3 grievance meeting which was scheduled for 23 November 2018 and it was to be chaired by Ms Kock, the nominee of the City Manager and to be attended by the GSO, the group head human capital management, the Applicant and Mr Geldenhuys as the secretariat. Mr Shingange did not attend as he was suspended in July 2018.

[40] The said meeting took place but the GSO did not attend. The Applicant told Ms Kock 'his story' and she said she would consult with the GSO and revert to him as to the way forward. According to the Applicant, this was unprocedural because, once an employee lodges a grievance, it must be investigated with all the relevant parties present. The policy provides that the parties should endeavour to reach an agreed outcome, which cannot happen if all the parties are not present.

[41] On Monday 26 November 2018, the Applicant addressed an email to the GSO, requesting a meeting to discuss what had transpired at the grievance meeting of 23 November 2018, as no one from the GSO's office attended the meeting. The GSO responded that *"once the grievance is at step 3, I am not in a position to intervene with the process. I recommend that you await the outcome of the matter before you take the matter further, but it is now dealt with by the representative of the CM and this [is] beyond my authority"*.

[42] On the following Thursday, the Applicant asked Ms Kock about feedback from the grievance meeting and her discussion with the GSO and Ms Kock responded *"I asked the GSO. The GSO said she is not interested"*.

[43] The Applicant testified that:

'The GSO is Lorette Tredoux who sent me an email that she cannot interfere. Then you get the chairperson who promised you that she will meet with the GSO and then she tells you that she cannot, I mean the person that she was supposed to meet says she is not interested. And then that is, that was on a Friday. Then over the weekend with respect I then sat down to be honest and then take all these things and then I came to a conclusion that this is not an employer that is willing to really resolve this issue. Remember this issue has been left for dragging since 2017 and I have been the one who has been on a daily basis a nuisance to the employer, and I am the one who, who was just, I do not know, and when I looked at it and then I said but what is it that I have done that this employer must treat me in this way, then I decided over that weekend. I then submitted a resignation letter to Lorette Tredoux, because at that point I have now reached a cul-de-sac. Within the City, therein it is very clear that there is nobody who is going to resolve this issue.'

[44] The Applicant testified that he had cried in his office and suffered from headaches.

[45] The letter to Ms Tredoux, dated 1 December 2018, recorded *inter alia* that "*I apologise for not being able to wait for the outcome of my grievance which in anyway was delayed deliberately and I cannot continue to work under unbearable conditions. However, I regret that due to circumstances beyond my control, I need to resign right away. You know very well my situation which has been going on for more than a year now.*" He received no response after he submitted his resignation.

[46] The Applicant testified that he never received the outcome of the step 3 grievance meeting. The policy provides that an employee should be informed of the outcome of the hearing, and as he was never informed, there was no compliance with the provisions of the policy.

[47] In cross-examination, the Applicant conceded that he had indeed received the mail dated 19 December 2018 regarding the step 3 grievance outcome. The outcome recorded the action required as: "*The aggrieved should be utilised fully as Director Management and Administration Support within the Department of Group*

Human Capital Management. All necessary delegations, responsibilities and accountability must be returned to him, as per the requirements of the position". The Applicant was asked why he persisted with his resignation after he had received the step 3 outcome. His answer was peculiar and almost obstinate that he saw the outcome but that he was only copied in the email, which was in the main addressed to Mr Radebe and that *"there was nothing that I must do with it... I was not expected to do anything. What was I expected to do?"* On 20 December 2018, the Applicant responded to the Municipality, stating that *"Unfortunately I am not Dr Mosola or Tshepo Hadebe. In terms of the grievance procedure the Chairperson is required to inform the aggrieved employee in writing and to date I have not been informed. I am not sure why you are sending me the CM's letter and that of Tshepo also".*

[48] It was put to the Applicant that he indeed received the outcome of his step 3 grievance and he insisted that *"No I did not. I am still saying that I did not receive the outcome even now as we speak, unless you can give me a letter that says that the chairperson sent it to Meshack Mothupi. It is not me, it is the policy which you can go and read".* It was put to him that by 19 December 2018, he knew about the outcome of his step 3 grievance, whether it was emailed to him directly or as a copied recipient, but he was aware that the outcome gave him everything he wanted and that it restored his responsibilities, yet he persisted with his resignation. It was further put to the Applicant that he resigned because he was disgruntled because he was not appointed to the promotional positions he had applied for and when he got everything he wanted from the employer, he resigned because he would no longer be able to throw his toys. The Applicant disputed the proposition.

[49] The Applicant denied that he could have fulfilled his functions as he used to after the suspension of Mr Shingange in July 2018. He complained that Mr Shingange took away his functions, but argued that after Mr Shingange was suspended, he requested that his functions be reinstated, but it never happened.

[50] Ms Ramulifho was called as a witness for the Applicant. She testified that she was the 'strategic executive director (SED), head of department' and that the Applicant was a director in her office and he reported to her. Ms Ramulifho testified about the Applicant's knowledge of the Respondent's policies and about him as an

employee and his relationship with other employees, whether he could be described as a 'disgruntled' employee and the move to Tshwane House. Her evidence did not contribute to the issues the arbitrator had to decide.

[51] The last witness called by the Applicant was Mr Jele, who reported to the Applicant in his capacity as deputy director responsible for performance management. He testified that reporting changed in 2017 when instructions were sent directly to him from the office of the group head, Mr Shingange. He used to receive his instructions through or to report to the director, Mr Mothupi. There were meetings convened where the director (the Applicant) was not invited and the deputy directors had to account for their functions directly to the group head.

The Respondent's case

[52] Ms Tredoux, the Respondent's GSO testified that she met the Applicant for the first time in 2017, after she was appointed. He approached her about the outcome of a grievance that was not implemented and he wanted her to implement the outcome. The Applicant specifically wanted the part of the outcome which recommended an alternative position to be implemented. Ms Tredoux could not implement the recommendation at that stage as the Municipality was in the process of developing a new microstructure and the City Manager indicated that at the time, there would be no transfers or secondments, pending the finalisation of the microstructure. She indicated to the Applicant that at that point it was not possible to do a secondment or a transfer, as those were not allowed pending the finalisation of the microstructure.

[53] Ms Tredoux indicated that it was explained to the Applicant, but he was insistent on being transferred or seconded before the microstructure was finalised. After the microstructure was finalised, a position in region 2 was identified for the Applicant – it was a position similar to the job he was appointed in and on 4 June 2018, the Applicant was informed about the possible secondment to region 2. The Applicant responded that he did not want the seconded position he was offered as he was of the view that it would be in his own as well as the Respondent's best interest to turn down the offer.

[54] The group head indicated that the Applicant would be transferred once *“the collective agreement under the microstructure process plan had been finalised with the unions”*. Ms Tredoux explained that this meant that firstly, the microstructure had to be developed and approved by the mayoral committee and as a result some positions might fall away therefore secondly, there was a requirement for a placement agreement to be agreed to with the unions. The Applicant however insisted on leaving the group human capital once the microstructure was approved, but before the placement agreement was agreed to and therefore there was a decision to second the Applicant in the interim. He could not be transferred at that time as there could have been a dispute about the position. If the Applicant was seconded in the interim, he could have been moved back to his previous department if there was a challenge or a dispute and in this way, he could have been assisted prior to the placement agreement being finalised. Ms Tredoux explained that it was an interim measure to try and assist the Applicant to get him out of the department where he felt aggrieved and to work in a different environment, whilst the placement agreement was being finalised, which could have taken another 6 to 12 months, but the Applicant rejected the offer.

[55] Ms Tredoux reiterated that she was trying to assist the Applicant by seconding him as an interim measure because of his insistence to be moved from his department – *“Because of his insistence I tried to assist him to go somewhere and this was the only way I could assist him, by seconding him, because he refused to remain in the department”*.

[56] The Applicant rejected the offer and submitted a second grievance, which took its course up to step 3. Ms Tredoux explained that there was a backlog of grievances and the City Manager appointed the group head legal and secretariat services to deal with all step 3 grievances that were not dealt with. It took time to schedule all of them due to the backlog and the outcome of the Applicant's step 3 grievance was made available in December 2018. The outcome was that the Applicant be utilised fully as director management and administration support within the department of human capital management and that all the necessary delegations, responsibilities and accountability be returned to him as per the

requirements of the position. the Applicant however resigned before the outcome could be implemented.

[57] Ms Tredoux testified that the Applicant was aware of the step 3 outcome at the time he had resigned as he was copied in an email wherein the outcome was indicated. Ms Tredoux also had a meeting with him on 18 December 2018 – the Applicant indicated that he wanted to resign and she indicated that she wanted him to reconsider his resignation in view of the fact that the step 3 hearing was completed and that he would get all his duties and delegations back. Ms Tredoux asked the Applicant to reconsider his resignation during the meeting as well as in a letter dated 19 December 2018, wherein he was asked to “*consider the outcome of step 3 before going ahead with your resignation*”. Ms Tredoux thought that if the Applicant was returned to his position, it would address his concerns.

[58] After the festive season, the Applicant had another meeting with Ms Tredoux on 9 January 2019. It became clear that the Applicant was aggrieved by the fact that the outcome was not sent to him first and directly, but that he was copied in on the finding and he said that he did not recognise that he was being informed of the finding. Ms Tredoux then indicated that in her letter of 19 December 2018, she indicated the outcome to him, but he still wanted to resign. She testified that: “*I asked him if Marna, the chairperson of the step 3 wrote the finding directly to you, would that have made a difference? And he said no, it does not make a difference, I must please proceed to process his resignation*”.

[59] In cross-examination, much was made of the fact that the policy prescribes that “*the municipal manager or his or her nominee shall inform the employee in writing of the outcome of the hearing*”. Ms Tredoux explained that the communication about the outcome must be under the hand of the City Manager or the nominee. She explained that a nominee is “*somebody that is requested by the City Manager to do a specific task or communicate something specifically. It is different from a delegation*”.

[60] It was the Applicant's case that the outcome of the step 3 hearing was not directed to him and therefore he did not get the outcome. Ms Tredoux responded that:

'when he met with me on 18 December, we discussed the outcome. So whether it was addressed to him or not, he was aware of the outcome. In my letter to him on 19 December, I quoted the outcome to him... And then also in the meeting of 9 January, according to my notes we discussed this process. So to say that he was not informed of the outcome is not correct. The nominee of the City Manager will have to testify as to the process and who was informed and when, but the fact of the matter remains, Mr Mothupi was informed, if then at the latest on 18 December when we met.'

[61] The Applicant disputed that the meeting of 18 December 2018 took place, but Ms Tredoux explained that he had initiated the invitation for the meeting, which he requested and which invitation she had merely accepted.

[62] Ms Dunkle-Kock, the Respondent's group head legal and secretariat services, testified that she was the chairperson of the Applicant's step 3 grievance hearing, which was held on 23 November 2018. At the hearing, the Applicant's main complaint was the working environment between himself and Mr Shingange and his desired solution was for all his functions and delegations to be reinstated. He informed Ms Dunkle-Kock that some of his responsibilities were taken away. She recommended that the Applicant's delegations and responsibilities must be returned to him and with regard to the conflict between him and Mr Shingange, that the parties be referred to the employee wellness unit for a reconciliatory process to be initiated, which process was suspended pending Mr Shingange's suspension.

[63] Ms Dunkle-Kock explained that the normal practice was that all the functions of the secretariat were done by the human resources department (HR) and after she had issued the outcome of the step 3 grievance hearing, she gave it back to HR and they would distribute it and she assumed that it was subsequently brought to the Applicant's attention. Her understanding of the policy is not that she was required to physically hand the outcome of the grievance hearing to the Applicant, furthermore, her workload would not allow for such a requirement and it was never the practice

followed in the Municipality. The practice was always that once she had finished the outcome, it was handed to the HR representative and they dealt with the further distribution of the outcome.

[64] In cross-examination it was put to Ms Dunkle-Kock that the Applicant's case is that there was never a step 3 grievance process and everything regarding that process was "*...slates of hands. It is a trick to confuse all of us to believe that there was a stage 3*". Ms Dunkle-Kock vehemently disagreed with the proposition and testified that she had listened to the Applicant and granted him the outcome that he sought.

[65] It is evident from the cross-examination that the Applicant's focus was on the non-compliance with certain clauses in the Respondent's policy. Like the other evidence presented, very little was presented to show how the non-compliance with clauses of the policy made the employment relationship unbearable to the extent that the Applicant had to resort to resignation. Had the dispute been one about procedural unfairness in dealing with a grievance and non-compliance with the prescripts of the applicable policy, the evidence would have assisted the presiding arbitrator in deciding the issue of procedural compliance. However, the case to be decided was one of constructive dismissal and it is evident from the evidence adduced that the Applicant's focus during the arbitration proceedings was on procedural non-compliance with the applicable policy and little was adduced to discharge the Applicant's onus in a case of constructive dismissal. The proposition was that the Applicant would not have resigned if he had received the outcome of the grievance hearing that was in his favour. That may be so, but it does not speak to an unbearable working relationship.

[66] The Respondent's last witness was Mr Ratsiene. The transcribed record is incomplete and contains only part of his cross-examination and re-examination. The portion of the record available shows that he was cross-examined on the secondment policy and procedure as well as the policy and procedure to be followed in the event of a grievance. Once again, the dispute was one of constructive dismissal and it appears as if the Applicant had lost sight of what the issues were to be presented, proved and decided in a case of constructive dismissal.

Analysis of the arbitrator's findings and grounds for review

[67] The arbitrator recorded that the issue to be decided was whether there was a dismissal and if so, she must determine the fairness thereof. In her analysis of the evidence, the arbitrator recorded that the onus was on the Applicant in his constructive dismissal dispute to show that he was dismissed.

[68] The arbitrator also referred to *Solid Doors (Pty) Ltd v Commissioner Theron and others*³ as authority for the three requirements that must be present before it could be said that a constructive dismissal has been established. All three requirements must exist and be established before it could be found that an employee was constructively dismissed and absent any one of them, constructive dismissal had not been established.

[69] In respect of the first requirement, it was common cause that the Applicant had terminated his employment with the Respondent. The arbitrator moved to consider the second and third requirements and ultimately found that the Applicant failed to discharge the onus to prove the second requirement and as such, she found that there was no dismissal and that the First Respondent lacked jurisdiction to adjudicate the dispute.

[70] The Applicant raised several grounds for review which I will deal with *infra*.

[71] Before considering the merits of the Applicant's case, it is necessary to set out the principles and the legal test to be considered and applied in constructive dismissal cases.

Constructive dismissal: the legal principles

³ [2004] ZALAC 14; (2004) 25 ILJ 2337 (LAC) (*Solid Doors*).

[72] Section 186(1)(e) of the Labour Relations Act⁴ (LRA) defines a constructive dismissal to mean that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable.

[73] Where an employee claims constructive dismissal, the onus is on the employee to prove that the resignation was not voluntary and that it was not their intention to terminate the employment relationship. Once the employee discharges the onus, the conduct of the employer must be assessed, and the question is whether the employee could reasonably have been expected to put up with the conduct of the employer.

[74] The Court has previously considered that an employee who claims constructive dismissal must prove that:⁵

1. He or she terminated the contract of employment;
2. continued employment became intolerable for the employee;
3. the employer must have made continued employment intolerable.

[75] I will deal with these requirements in turn.

The employee terminated the contract of employment

[76] The Labour Appeal Court⁶ (LAC) made it clear that employees claiming constructive dismissal must prove that they, and not their employer, terminated the contract of employment.

[77] The resignation must also not be for a voluntary reason such as to take up alternative employment, to access pension benefits or for some or other reason motivated by personal circumstances.

⁴ Act 66 of 1995, as amended.

⁵ *Eagleton & others v You Asked Services (Pty) Ltd* [2008] ZALC 102; (2009) 30 ILJ 320 (LC) at para 22.

⁶ *Solid Doors supra*.

[78] In *Pretoria Society for the Care of the Retarded v Loots*⁷ (*Pretoria Society*), the LAC held that when an employee resigns as a result of constructive dismissal, the employee, is in fact, indicating that the situation has become so unbearable that the employee cannot work. Effectively, the employee is saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee resigns because he or she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If this assumption was wrong and the employer proves that the employee's fears were unfounded, there was no constructive dismissal but in fact a resignation.

[79] In *Strategic Liquor Services v Mvumbi N O and others*⁸ (*Strategic Liquor Services*), the Constitutional Court held that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.

[80] This moved away from the position that in a constructive dismissal case, the employee had no other choice or option but to resign.

[81] In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*⁹ (*Asara*), the Court expressed the view that it was doubtful that the strict test, namely that employment should be so intolerable that the employee had no option but to terminate the employment relationship, would survive the Constitutional Court formulation in *Strategic Liquor Services*.

[82] In *Asara*, the Court considered the authorities and held that where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee.

[83] In my view, the position is this: the employee needs not to establish that he or she had no choice but to resign. Where the employee resigns and claims that he or

⁷ (1997) 18 ILJ 981 (LAC).

⁸ [2009] ZACC 17; (2009) 30 ILJ 1526 (CC) at par 4.

⁹ *Asara supra*.

she was constructively dismissed, the test is whether a reasonable alternative to resignation existed.

Continued employment became intolerable for the employee

[84] In *Pretoria Society*, the Court held that the employee must satisfy the Court that at the time of the termination of the contract, he or she was under the genuine impression that the employer behaved in a manner that rendered the relationship intolerable and would continue to do so.

[85] The operative word is 'intolerable'.

[86] The courts have confirmed that the use of the word 'intolerable' means that there is an onerous burden on the employee and the employee is required to show that continued employment would be objectively unbearable. Intolerability is not established by the employee's say-so, perception or state of mind. What is relevant is the conduct of the employer viewed in an objective sense.¹⁰

[87] The test remains that the conduct of the employer must be judged objectively.¹¹ The subjective apprehensions of an employee cannot be a final determinant of the issue. In *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others*¹² (*Smithkline*), the Court held that it would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when those perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the LRA.

The employer must have made continued employment intolerable

[88] The third requirement to prove a constructive dismissal is that the circumstances that led to the employee's resignation, must have been brought about

¹⁰ A Van Niekerk, N Smit, MA Christianson et al, 'Law @Work', 4th ed. (LexisNexis) at p 247.

¹¹ *Smithkline Beecham (Pty) Ltd v CCMA & others* (2000) 21 ILJ 988 (LC).

¹² *Ibid.*

by the employer. This means that the employer must have performed actions which created the intolerable circumstances.

[89] In *Pretoria Society*, the LAC held that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

[90] In *Murray v Minister of Defence*,¹³ the Supreme Court of Appeal (SCA) accepted that there are many things an employer may fairly and reasonably do that make an employee's position intolerable. However, the SCA confirmed that the employer must be culpably responsible in some way for the intolerable conditions. It held that:

'the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance "must have been of the employer's making". But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked "reasonable and proper cause".'

[91] In *Jordaan v Commission for Conciliation, Mediation and Arbitration and others*¹⁴, the LAC approved a salutary caution that constructive dismissal is not for the asking and held that:

'With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal.'

¹³ [2008] ZASCA 44; (2008) 29 ILJ 1369 (SCA) at para 13.

¹⁴ [2010] ZALAC 10; (2010) 31 ILJ 2331 (LAC) at 2336D.

[92] The employer therefore must be culpably responsible for the intolerable conditions. In my view, this touches on another important and relevant aspect namely whether the employer was aware of the alleged intolerable conditions and was afforded an opportunity to address and rectify it.

[93] In *Smithkline*, the Court held that where an employee could reasonably have lodged a grievance regarding the cause of the unhappiness but failed to do so before resigning, such employee may find it hard to persuade the court or an arbitrator that he or she had to resign. The Court emphasized that if the employee is too impatient to await the outcome of the employer's attempts to find a solution to the perceived intolerable situation, and resigns, constructive dismissal is almost always out of the question.

[94] In *Kruger v Commission for Conciliation, Mediation and Arbitration and another*¹⁵ (*Kruger*), the employee did not follow a grievance procedure as she believed that the grievance procedure was no longer an option. The Court found that employees should not second guess the outcome of lodging a complaint in terms of the employer's grievance procedure, especially not where the employee is contemplating resignation coupled with an allegation of constructive dismissal and such employee had never raised the issue with the employer before. The Court held that:

'... when there are remedies available to an employee which had not been exhausted, as in this case, the employee has not discharged the onus of proving that she was constructively dismissed. ... An employee may not choose constructive dismissal while other options are available. The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, is such that the employee could not have been expected to put up with it.'¹⁶

¹⁵ (2002) 23 ILJ 2069 (LC), (2002) 11 BLLR 1081 (LC).

¹⁶ Ibid at para 14.

[95] The judgment in *Kruger* supports the notion that an employee cannot resign and claim constructive dismissal while other options are available. As I already alluded to, the test is whether a reasonable alternative existed.

[96] In *Albany Bakeries Ltd v Van Wyk and others*¹⁷ (*Albany Bakeries*), the LAC effectively took the view that an employee should make use of alternative remedies. This would obviously include an internal grievance procedure. The Court held that:

‘[28] 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.

[29] As is clear from the remarks of Conradie JA an employee should make use of a grievance procedure. Such a grievance procedure exists and was annexure B in bundle A of the documents in the arbitration. It provides for a discussion of a problem with an immediate superior with the assistance of a representative. If the employee is not satisfied with that, there is a further step that may be taken to the next level of management. The procedure even provides for an enquiry to be held for the purpose of clarifying the issues.’

[97] It is in this context that the arbitrator’s findings stand to be determined.

The arbitrator’s findings

[98] The arbitrator considered the second requirement, namely that continued employment became intolerable, in view of the Applicant’s evidence that the Respondent made continued employment unbearable after failing to resolve an issue that was pending for more than a year.

¹⁷ (2005) 26 ILJ 2142 (LAC) at paras 28 – 29.

[99] The arbitrator recorded that the step 2 grievance outcome resolved that the Applicant and Mr Shingange explore the option of addressing their personality issues amicably or find an alternative placement, using the secondment or transfer policy if the relationship was found to be irrevocably broken. The Applicant had completed a transfer form, requiring to be transferred to the shared services department. The transfer was not recommended or implemented pending the finalisation of a collective agreement on the microstructure, to be concluded with the unions. In the alternative, the Applicant was offered secondment in June 2018. This was intended to be temporary relief to the Applicant, but he declined the offer without providing a reasonable explanation and his response did not assist the parties to resolve the dispute or to explore alternatives. The arbitrator found that it was evident from the Applicant's submissions that his mind was only set on being transferred to a particular department, other than a secondment.

[100] In July 2018, Mr Shingange was suspended and the Applicant lodged a step 3 grievance. The Applicant's case was that he wanted the Respondent to reinstate his functions.

[101] The arbitrator found that after the Respondent convened the step 3 grievance meeting in November 2018, the outcome was not issued timeously, in compliance with the applicable policy.

[102] The Applicant resigned in December 2018 and he indicated that there was a delay in finalising his grievance. The arbitrator found that the policy sets out timelines within which the outcome is to be issued to an employee, but even where there was non-compliance with the timeframes, the Applicant was not left without a remedy. He was well vested with the Respondent's policies and the arbitrator found that the Applicant played along, in the hope that he would be transferred.

[103] The arbitrator found that, after Mr Shingange's suspension and after realising that his request for a transfer was not favourably considered, the Applicant could not positively engage the Respondent with the view to resolve his issues, because Mr Shingange, as the cause of his unbearable working conditions, was no longer a

threat to his job security. The outcome of the step 3 grievance was that the Applicant's functions and delegations were reinstated.

[104] The arbitrator considered the fact that the Applicant disputed that he was not aware of the outcome of the step 3 grievance but found that by the Applicant's own admission, he had seen the outcome of the step 3 grievance meeting. She found that the Applicant was reasonably aware of the outcome, he could have retracted his resignation, more so since he was still employed by the Respondent.

[105] The arbitrator concluded that the working relationship was not entirely broken down. Furthermore, clause 13.4.5. of the main collective agreement provides that if the grievance has not been resolved to the satisfaction of the aggrieved party, that party may refer a dispute/grievance to the council for adjudication. The arbitrator found that the Applicant was well aware of his rights and there was no reason provided as to why he could not follow the provisions of the collective agreement to address his concerns.

[106] Referring to *Albany Bakeries* as authority, the arbitrator concluded that the Applicant should have made use of alternative remedies – his issues could have been resolved by referring a dispute to the bargaining council (without resignation) and he failed to discharge the onus to show that his working conditions were made unbearable by the Respondent, leading to his resignation.

Applying the law to the facts

[107] It is common cause that the Applicant resigned and what remained for the arbitrator to consider, was whether the employment relationship was made intolerable by the Respondent.

[108] The Applicant bore the onus to prove all the elements of constructive dismissal to succeed with his claim - he had to prove that he terminated the contract of employment, that continued employment became intolerable and that it was the employer that made continued employment intolerable.

[109] The arbitrator found that the Applicant was unable to prove that his working conditions were made unbearable by the Respondent.

[110] I already alluded to the question to be decided: did the arbitrator correctly find that the Applicant was not constructively dismissed?

[111] The Applicant filed a founding affidavit wherein he stated that the arbitration award constituted a gross irregularity and was flawed because the arbitrator did not consider the evidence that was before her, she recorded evidence that was not part of the record and she “*brought in arguments that were never arguments of the parties*”. He subsequently filed a supplementary affidavit consisting of 71 pages wherein he not only supplemented his grounds for review but repeated the contents of his founding affidavit and unnecessarily inserted an extensive background to his case (37 pages), the facts of which were already captured in and were evident from the lengthy transcribed record (575 pages), which was placed before this Court.

[112] The Applicant raised issues with respect to irregularities which do not constitute proper grounds for review, and I do not deem it necessary in a review application to deal with all the issues raised by the Applicant. It is important to emphasize that the application remains one of review and this Court must apply the relevant principles and decide the application accordingly. This is not an appeal and this Court should be mindful of the difference and to the extent that the Applicant's complaints are akin to grounds for appeal, they cannot be considered on review.

[113] The Applicant complained that the Respondent did not comply with the grievance policy. I already alluded to this complaint *supra* – it has no bearing on the question of whether the Applicant discharged the onus to show that continued employment became unbearable and intolerable and that no reasonable alternative to resignation existed.

[114] In *Albany Bakeries*, the LAC held that any solution falling short of resignation be attempted as it preserves the working relationship. Further, that 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 and that it might 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.

[115] The Respondent's grievance procedure provides for a 3-step process. When the three steps have been exhausted and in the event that the grievance was not resolved to the satisfaction of the aggrieved party, it may be referred to the Mayor or the bargaining council for adjudication, after having declared a dispute. *In casu*, the Applicant lodged a formal grievance against Mr Shingange in August 2017, which was a step 2 grievance. The outcome was given on 29 August 2017 by Mr Mayor but it was not implemented for the reasons fully dealt with *supra*.

[116] In May 2018 the Applicant lodged a new grievance, which was treated as a step 3 grievance. The desired outcome was for all his functions and delegations, as per his job description, to be reinstated with immediate effect.

[117] On 4 June 2018, Ms Tredoux, the new GSO, advised the Applicant regarding the step 2 grievance that as the Respondent was in the process of finalising the microstructure, it could not implement the outcome, but that pending the final placements being done, the Applicant would be seconded, as an interim measure, to another region and that the hearing of the step 3 grievance would be scheduled.

[118] The Applicant rejected the offer of being seconded, without providing any reasons.

[119] The step 3 grievance hearing was held in November 2018 and the outcome granted the Applicant the outcome he wanted.

[120] The Applicant resigned in December 2018 and in his letter of resignation he stated that *"I apologise for not being able to wait for the outcome of my grievance which in any way was delayed deliberately and I cannot continue to work under unbearable conditions"*.

[121] In my view, there was no reason for the Applicant to resign because the step 3 grievance process was in his favour and granted him his desired outcome. Alternatively, in the event he was not satisfied with the outcome, he had other avenues available to him, as an employee of the Respondent.

[122] The grievance process was delayed, but to some extent, there were reasons for that, which seemed to have been accepted by the Applicant – he was willing to wait for the microstructure to be approved and implemented etcetera. The step 3 grievance hearing was held in November 2018 and the outcome was made available in December 2018. Although the Applicant took a pedantic approach to try and convince the arbitrator that he was not informed about the outcome, as per the prescripts of the policy, it was evident that the outcome came to his attention and that he was aware of it. The Applicant chose to ignore the outcome due to his fixation on the provisions of the policy and the fact that the chairperson did not inform him personally about the outcome. This however does not take away the fact that the outcome came to his attention and that a reasonable person cannot claim not to be aware of the outcome, albeit that it was not communicated in the prescribed manner.

[123] Although it might be so that the Applicant found the grievance process and the delay frustrating, the question to consider is, in an objective sense, whether it caused his continued employment with the Respondent to be intolerable.

[124] Intolerability is not established by the employee's say-so, perception or state of mind, but it is the conduct of the employer viewed in an objective sense.

[125] Instead of affording the Respondent an opportunity to address the issues, the Applicant resigned.

[126] 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 them. 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.

[127] There was a perfectly legitimate avenue open to solve the Applicant's problem, but instead, he resigned.

[128] In *Pretoria Society*, the LAC held that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

[129] The fact that the Respondent granted the Applicant the outcome he desired, cannot constitute unbearable or intolerable conditions, nor can the fact that the process was delayed. More is indeed needed to constitute unbearable or intolerable working conditions –the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

[130] Objectively viewed, the Applicant failed to make out a case that his employment became intolerable or unbearable to an extent that he could not be expected to put up with it.

[131] The Applicant raised an issue about the fact that the Respondent failed to call Mr Shingange as a witness. According to him Mr Shingange “*played a role in the direction of the grievance process even in absentia. He had super-powers*”. Again, the complaint loses sight of the fact that the onus was on the Applicant to establish the three requirements in his constructive dismissal case. The onus was not on the Respondent and its failure to call a witness is of no moment and could not have had any bearing on the Applicant's case and the onus he had to discharge.

[132] The Applicant sought different outcomes in his step 2 and step 3 grievances – in step 2 he sought to be transferred to another department and in step 3 he sought

to remain in his position and for all his delegations and functions, as per his post, to be restored. The relief or the outcomes sought were mutually exclusive.

[133] The step 2 grievance process which had the possibility of a transfer or secondment, was overtaken by a step 3 process, with an outcome that granted the Applicant the relief that he required as a solution. This renders the relief sought by the Applicant in this application problematic – he seeks to be reinstated retrospectively to his position, from the date of resignation, and for the Respondent to comply with the outcome of step 2 of the grievance process and for him to be transferred to another department.

[134] It seems that the Applicant seeks to dictate to the Respondent the outcome and the only outcome that would be acceptable to him, is a transfer and he wants this Court on review to grant him what he wanted but could not get through an internal grievance process.

[135] In my view, considering the facts presented and the evidence that was before the arbitrator, she was correct to find that the Applicant could not satisfy the requirements to establish constructive dismissal.

[136] The application for review has to fail.

Costs

[137] The last issue to be decided is the issue of costs.

[138] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[139] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and *mala fides*, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[140] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*¹⁸, the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[141] Mr Phathela for the Respondent submitted that a cost order in favour of the Respondent should be made as there was no constructive dismissal and the Respondent had to incur unnecessary costs to defend this unmeritorious application.

[142] Mr Mkhize for the Applicant argued that the Applicant was entitled to a punitive cost order as the matter is old, the Applicant was aggrieved and the Respondent was not interested in resolving the issues.

[143] This is a matter where this Court has to strike a balance.

[144] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[145] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*¹⁹ it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

¹⁸ [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

¹⁹ (2012) 33 ILJ 2117 (LC) at para 176.

[146] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[147] In my view, this is a case where a cost order is warranted. This is more so as the Applicant was legally represented and did not approach this Court as an unrepresented layperson. The Applicant has filed a review application which had no merit. This application compelled the Respondent to oppose it and the Respondent is entitled to the cost incurred in doing so – minding the fact that the costs incurred by the Respondent are paid from public funds. The ratepayers of the municipality should not be burdened to pay the costs of defending meritless applications and the Respondent's funds should rather be utilized to deliver services and to fulfil its mandate.

[148] This Court is ordinarily reluctant to make orders for costs against individual litigants, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is however not an immutable or inflexible rule.

[149] Fairness dictates that the Respondent cannot be expected to endure enormous costs defending meritless litigation. I am alive to the fact that the Applicant is an individual, but I cannot ignore the fact that he ultimately initiated a review application without merit and that he was legally represented throughout the proceedings. So too the fact that the Applicant was also seeking a cost order against the Respondent.

[150] In the present circumstances, the interests of justice require that the Applicant pays at least a portion of the Respondent's costs. In my view, a sum equivalent to 25% of the Respondent's costs will best serve those interests.

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

Order

1. The application for review is dismissed;

2. The Applicant is to pay the Third Respondent's costs, limited to 25% of the taxed costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr N Mkhize from Mkhize Attorneys

For the Third Respondent:

Advocate M C Phathela

Instructed by:

Rambevha Morobane Attorneys