

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA76/2016

In the matter between:

SOLIDARITY OBO DR BJE VAN TONDER

Appellant

and

ARMAMENTS CORPORATION OF SOUTH

AFRICA (SOC) LIMITED

First Respondent

L NOWOSENETZ N.O

Second Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 19 February 2019

Delivered: 08 March 2019

Summary: Constructive dismissal – employee resigning after filing a grievance in respect of the performance contract outputs and the appointment of staff and referred dispute to the CCMA –the review standard is correctness not reasonableness - as the issue is one going to jurisdiction – applicant must show that the decision was objectively wrong. If found that there was no dismissal, CCMA not having jurisdiction - principle related to constructive dismissal restated –

Held that employment must objectively have been rendered intolerable in the sense that no reasonable employee could be expected to put up with the conduct of the employer. Further that the employee must subjectively have found the conduct to be intolerable. Evidence proving that employee prematurely resigned prior to exhausting grievance procedures – court finding

that there was a tense and awkward clash over authority but that these issues did not objectively attained the level of intolerability - the problem then became one of compatibility at senior management level which in common to any workplace - Labour Court correct in its conclusion that there was no dismissal in terms of section 186 of the LRA and that the CCMA accordingly lacked jurisdiction. Appeal dismissed.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] This is an appeal against the judgment of the Labour Court (Ram AJ) holding that the appellant, Dr BJE van Tonder, was not constructively dismissed by the first respondent ("Armcor").
- [2] At the time of the termination of his employment, the appellant had been employed for approximately 19 years and held the position of Senior Manager: Quality Engineering Services. On 5 October 2007, he tendered his resignation and subsequently referred a dispute to the Commission for Conciliation Mediation and Arbitration ("the CCMA") claiming that he had been constructively dismissed. He thus alleged that he had terminated his contract of employment because the employer had made his continued employment intolerable.¹
- [3] On 10 November 2008, the CCMA handed down an arbitration award in the appellant's favour and ordered Armcor to pay him compensation in the amount of R441 162. Armcor took the matter on review to the Labour Court. On 28 October 2010, Van Niekerk J set aside the award, remitted it to the CCMA for a fresh determination by another commissioner on the transcribed record of the arbitration proceedings.
- [4] The matter was determined by the second respondent ("the commissioner") who issued a second arbitration award on 26 May 2011, holding that the

¹ As contemplated in section 186(1)(e) of the Labour Relations Act 66 of 1995 ("the LRA").

appellant was indeed constructively dismissed and ordering Armscor to pay compensation in the amount of R594 996.

- [5] Armscor took the second award on review to the Labour Court culminating in the judgment of Ram AJ that is the subject-matter of this appeal. The learned acting judge correctly applied the test confirmed in *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*.² An applicant seeking review of a finding of constructive dismissal must show that the decision was objectively wrong. The review standard is correctness not reasonableness - as the issue is one going to jurisdiction.³ Ram AJ held that the appellant was not constructively dismissed but resigned from his employment with the consequence that the CCMA lacked jurisdiction to entertain the dismissal referral.
- [6] The appellant has consistently maintained that his employment had become intolerable for three reasons, compelling him to tender his resignation. They related to firstly, the changing of performance scores and the negotiation of performance requirements; secondly, alleged interference in the appellant's division; and thirdly, inhibiting or interfering with the appointment of personnel.
- [7] As stated, the appellant was employed as Senior Manager: Quality Engineering Services. His department had a "watchdog" function and was required to evaluate the quality of work done by other departments and to ensure that all contracting processes were compliant.
- [8] The appellant's first grievance arose in the context of performance management. The evidence regarding this matter was poorly presented in the arbitration proceedings. However, it is possible to glean from the somewhat garbled testimony that there was a performance assessment system which involved a measure of self- assessment and scoring. The scores of the assessment were used for the purpose of determining bonuses for the appellant and the members of his department. In 2004/2005, the appellant and his team scored in the region of 110%, reflecting excellent performance

² [2014] 10 BLLR 987 LAC at para 19 read with para 35 (and in *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others*; *SA Rugby (Pty) Ltd v Sarpu and Another* [2008] 9 BLLR 845 LAC at para 41).

³ *Solid Doors (Pty) Ltd v Commissioner Theron and Others* 2004 (25) ILJ 2337 LAC at para 29.

exceeding expectations.

- [9] The 2004/2005 scores were altered and lowered to 102% by Mr. Sipho Mkwanaazi, the acting general manager of the Quality and IT Department. The appellant was aggrieved by this as he believed that Mkwanaazi did not have the authority to make the changes. However, neither the appellant nor any member of his team lodged a grievance regarding this matter. At the time of his resignation, some two years later, the issue had faded in significance and at most persisted as a rankling historic gripe.
- [10] After this, Mkwanaazi was transferred to another department. The appellant successfully negotiated the performance contract for the next year (2005/2006) with his new acting general manager, Mr Kaduka and, in his words, the "employment situation became tolerable again" until the end of September 2006 when Mr Kaduka stopped acting in the position.
- [11] In September 2006, Mr Matibe became the Acting General Manager of Quality and IT and the appellant was required to negotiate a new performance contract with him. The negotiations did not go well. According to the appellant, Matibe kept on postponing meetings and there were differences about the scores and the 2007/2008 performance requirements. This resulted in the performance contract not being finalised by midway in the year in question. The appellant was much frustrated by the experience - though it appears in this instance that the scores were not in fact changed.
- [12] The appellant's main concern was that Matibe wanted unacceptable requirements or outputs as part of the performance contract, such as requiring equity appointments to be finalised within unrealistic time frames.
- [13] The appellant ultimately took up the issue with Mr Potgieter in the human resources department in an e-mail sent on 2 August 2007. The relevant part of it reads:

'I request your assistance to be able to reach agreement with the Acting GM: Quality and IT Department on performance contract for 2007-8 (balanced scorecard) on outputs required from me and my team members.

Following my formal proposal for a performance contract several changes and additions were made by the Acting GM. Questions and concerns about the required items introduced to my performance contract were raised in several emails, as well as during a 35-minute discussion with my Acting GM on 24 July 2007. The meeting had been scheduled for the previous week and was then cancelled...After some discussions during which my concerns were raised, none of my proposals for the way forward were accepted. The Acting GM closed the meeting after 35 minutes with the words: "I think we're done".

Unresolved concerns include:

- Outputs to be contracted require inputs beyond my control.
- Problems related to high level adherence to plans where the internal clients determine the content and scheduling for reviews. Notwithstanding major management effort over the past few years, credible plans or the execution of tasks as scheduled could not be achieved.
- Outputs vaguely defined which can only be subjectively judged and where the contracted party cannot judge or manage progress toward attaining contracted output.
- Requirements for and structuring of outputs which are not in accordance with the Performance Management practice.
- Outputs and calculations for final results which cannot by the Performance Management system and probably will lead to unexpected calculation problems and misleading results.
- Outputs dependent on unknown and undefined standards.
- Unreasonable expectations to act in a way which would intrude on other departments areas of responsibility (This has happened recently).
- Deviations from prior decisions on the way forward with respect to performance management in Armscor to ensure fair results and prevent disputes.

Your assistance to resolve these matters in the interest of Armscor e.g. by conforming to standards which Armscor is internally and externally committed to will be appreciated.”

[14] Mr Potgieter replied on 13 August 2007 as follows:

‘I have discussed the matter with Mr Matibe. He has indicated that he considers the issue at this stage as an internal issue and thinks that the presence of the HR One Stopper should be enough to resolve it. In the case of not resolving the matter satisfactorily to the satisfaction of all parties, then any party will have the right to take it to the next level, at which point we will most probably be involved.

I sincerely hope that you find a way to resolve the differences in the spirit in which the Performance Management Practice was written.’

[15] The performance contract-issue was not resolved to the satisfaction of the appellant. Without a formal performance contract, the appellant’s work and output could not be defined or assessed. The appellant testified at the arbitration hearing that he had reached breaking-point. He said:

‘But yes, this was the point I would say what-waterskeidings point, where it was quite clear that there was a breakdown in relations, that I was not trusted, nothing that I proposed was accepted – well nothing (inaudible) ... the important problems which I tried to resolve in the performance contract were not accepted, my concerns were ignored and I could not continue this way in the department because there is – I am being managed against something which is vague or which I do not agree with and cannot do.’

[16] The second issue that the appellant maintained rendered his employment intolerable was unwarranted interference in the work of his division. He again referred to historical issues. He complained about subordinates in 2005 being asked to write reports in which he had an interest but could make no input. Likewise, he was aggrieved by Matibe addressing disciplinary issues with one of his team members directly.

[17] The appellant was most aggrieved by the altering of a report of one of his team members. The exact date of this event is not clear. Ms. Ingrid Crossley

(one of the appellant's subordinates) was the author of the so-called Pilatus report pertaining to an acquisition. Mkwanazi (at that stage working in the acquisitions department and a "client") wanted changes and additions to the report. While the appellant and Crossley were on leave, Mkwanazi approached Matibe for an electronic copy of the report, changed it by inserting a statement (two sentences) that may have misrepresented information and then submitted it to the board. The appellant and Crossley were unhappy with these changes which they did not approve but for which they could be responsible. The record does not disclose (for reasons of confidentiality) the exact nature and content of the amendments to the report.

- [18] The third complaint of intolerability related to the appointment of new staff to the appellant's division. The appellant (as Senior Manager) was tasked to define the job requirements or specifications of any position. The human resources department would then advertise the vacancies, shortlist and interview potential candidates. The problem of ensuring demographic representivity was the issue that led to conflict.
- [19] The appointment of a Chief Process Assurer was a particular source of tension. In August 2004, Mr Oosthuizen, the then General Manager of the Quality Department, instructed Mkwanazi to appoint a white candidate, Mr Peters, while he, Oosthuizen, was on leave. Mkwanazi apparently refused to do so and the appellant formally objected. It is not entirely clear what happened regarding this appointment, but tension around appointments clearly persisted. The appellant made various attempts to get Peters appointed but did not succeed. The position was advertised several times during 2005-2006.
- [20] In 2004- 2005, the appellant agreed (reluctantly) to transfer a black candidate, Mr Molotse, to his division after the CEO instructed him to appoint at least three people of which one must be black. Molotse was transferred to the appellant's department although he did not meet all the job requirements. The appellant was not happy with this.

- [21] On 1 August 2005, the appellant addressed a memorandum to Mr Pieter van Dyk, the then Acting General Manager of the Quality Department. In his memorandum, he complained that he had “no capacity to mentor anymore appointees not fulfilling all the requirements for the position of Chief Process Assurer” and that this was due mainly to the failure “during August / September 2004 to allow QES to appoint a candidate fully meeting the job requirements”. He complained further that “HR should support and not prescribe to us as Senior Managers, as we are responsible for the management of our divisions and not HR” and that “I cannot see the problem in motivating a properly selected candidate on merit for an important position such as this to the CEO”. Management insisted that the appointment of a suitable affirmative action candidate was to form part of his performance contract.
- [22] The matter came to a head in mid-2007, at about the same time the appellant was in dispute with Matibe about his performance contract. The appellant provided Matibe with a report about his failed attempts to find suitable black candidates. The appellant was then summoned by Mr Thomo, the CEO, and was accused of dragging his feet with appointments and was threatened with disciplinary action and possible re-organisation of his division. This was something of a “final straw” for the appellant.
- [23] On 27 August 2007, the appellant addressed the following letter to Matibe:
- ‘After careful consideration of Armscor’s best interests as well as my personal work situation, I came to the conclusion that it would be to the interest of both parties if an amicable parting of our ways can be effected.
- I am therefore now prepared to consider an offer from Armscor including early retirement – depending on the terms and conditions included in such an offer. I request that it will be taken into account that I have the commitment to the lifelong caring for my disabled son and therefore had the intention up to now to continue my employment within Armscor until age 65.’
- [24] The appellant testified that he was no longer able to do his job but that he wished to resolve his unhappiness with the employer before lodging any

formal complaint or grievance. He viewed his employment as having broken down and summarised his perception of the situation as follows:

'It is obvious that they do not want me here, I cannot do my job, I have not got the people, I cannot have proper performance contracts, I cannot apply my service level agreement, they are interfering in my division and taking all this together I said it is not going to work, there is no trust in me, I am attacked, I am threatened, I am intimidated, it is not going to work, let us get this employment situation, try to resolve it and then even though, as I mentioned here, in my personal situation it is definitely a problem but I said my family said they are going to kill you so I decided to propose page 130.'

- [25] His reference to "page 130" is to the letter of 27 August 2007.
- [26] Various meetings and negotiations then took place in which the request for early retirement was considered. In the final analysis, they came to nought, except that the publication of the appellant's request among the staff added to the appellant's sense of grievance in that he saw it as a breach of confidentiality.
- [27] At a departmental meeting on 11 September 2007, the appellant was requested to provide additional motivation for his proposal. The appellant prepared a letter dated 14 September 2007 and transmitted it by e-mail to Matibe on 17 September 2007. The appellant received no feedback in response to this letter and perceived that management was not genuinely considering his request to take early retirement. Three days later he submitted a grievance dated 20 September 2007 in terms of Armscor's grievance procedure.
- [28] The grievance was a lengthy document written in Afrikaans. It focused primarily on the three areas of concern and frustration subsequently raised by the appellant in the CCMA proceedings. In summary, the appellant alleged *inter alia*: i) unilateral non-compliance with prescribed managerial practice by Mkwanazi; ii) interference, disempowering and misconception of reporting guidelines and delegations; iii) non-compliance with contractual performance assessment; iv) victimisation, false accusations and extortion; v)

compromising of the appellant's and his department's professionalism and integrity; and vi) other procedural and substantive unfairness. For reasons that will become apparent presently, it is not necessary to examine the appellant's allegations in any detail. He, in any event, narrowed the scope of his complaints in the CCMA arbitration proceedings as set out earlier in this judgment.

[29] The appellant concluded his written grievance as follows:

'Ek het reeds by verskeie geleenthede aan mnr Matibe gestel dat ek skeiding van weë tans as die enigste oplossing vir die huidige onmoontlike situasie wat vir my geskep is deur Krygkor se bestuur se optrede sien en dat ek 'n redelike voorstel vir vriendskaplike skeiding (severance) sou verkies wat vervroegde aftrede insluit (die saak sloer nou reeds sedert 27 Augustus).

Die huidige ontwikkelinge (en optrede en gebrek aan tydige optrede deur Krygkor bestuur) is besig om die skade wat ek en my gesin in vele opsigte ly te vererger in omvang en te laat toeneem en te laat verdiep. ... Op hierdie stadium van die griewe proses behoort dit nog haalbaar te wees om op 'n gepaste onderhandelde remedie ooreen te kan kom. ... Ek herhaal ten slotte weer soos aangedui in my memorandum aan mnr Matibe op 27 Augustus 2007 dat 'n vriendskaplike skeiding van weë waarskynlik in die beste belang van Krygkor en myself is en dat dit bereik kan word deur 'n skeidingsooreenkoms met billike bepalings vir my aan te bied wat vervroegde aftrede insluit, wat ek kan oorweeg. ... Ek behou die reg voor om indien hierdie proses nie binne die minimum tyd afgehandel en tot finaliteit gebring kan word en bevestig word in 'n wedersyds ooreenkome skriftelike ooreenkoms nie, volgende stappe te neem ooreenkomstig wettige optredes, werkswyses en eise wat vir my regtens beskikbaar is.'

[30] Armscor's grievance procedure defines a grievance as "any dissatisfaction or feeling of injustice which an employee may have which arises out of and in the course of the performance of his or her work, which is brought to the attention of Management". Clause 6 of the grievance procedure deals with general principles. The relevant part of it reads:

- '6.1 The parties agree that it is in their mutual interest to observe a formal procedure for raising and resolving grievances without prejudicing the employment conditions of employees.
- 6.2 Grievances will be handled as close to the division of the complainant as possible, i.e. by the most immediate superior, before being referred to a higher authority
- 6.3 Grievances should be resolved as soon as possible and in any case within set time limits at each level of authority. However, circumstances beyond the control of Management may make an extension of these times necessary. Should this be the case a mutually agreed time will be arranged with the complainant(s).'

[31] Clause 7 of the grievance procedure prescribes the steps in the procedure for grievances. It sets out five distinct steps. Step 1 provides that the complainant must approach his or her immediate superior in order to submit a written grievance and to discuss it. The immediate superior must attempt to resolve the grievance within two working days. If the immediate supervisor fails to resolve the grievance to the complainant's satisfaction, the complainant proceeds to Step 2 by submitting a written grievance to the first line manager setting out the facts and the desired solution. Efforts must be made to resolve the grievance within five working days. If not resolved to the complainant's satisfaction, the line manager should note this and hand the grievance to the next level of management. The applicable manager shall convene a grievance committee meeting, ideally within five working days to resolve grievance (Step 3). The committee shall be comprised of the applicable manager, the complainant, his/her representative and a representative of the human resources department. The committee has the right to call witnesses. If the Step 3 meeting fails to resolve the grievance, and the complainant wants to take the matter further, the relevant facts must be noted in writing and in-house conciliation (Step 4) must be attempted by the next level of management. In the event of a grievance not being resolved in Steps 1-4, it may be dealt with in Step 5 "in terms of the statutory Dispute Settlement Procedure, i.e. CCMA or Labour Court, as the case may be."

[32] The appellant's superior, Matibe, was therefore required in terms of Step 1 of the grievance procedure to consider the grievance and hold a meeting with him within two days. That was not possible because Matibe was due to depart on a trip to Germany and Sweden and would only return on 29 September 2007. Moreover, Matibe was not proficient in Afrikaans and needed to translate the grievance into English to understand it. The appellant insisted on his right to submit his grievance in his mother tongue.

[33] On 4 October 2007, Matibe met with the appellant in a grievance meeting. A representative from human resources was present and the appellant was represented by Mr Mecer Potgieter. The appellant initially was reluctant to attend the meeting because he was not given sufficient indication of its scope and purpose; he had to be coaxed by his shop steward to do so.

[34] The grievance meeting was lengthy. The appellant testified that nothing was resolved. He believed that the other participants were dragging out the process and the facilitator was biased. He was also of the view that Mr. Thomo, the CEO, and Mkwanazi ought to have been present. He perceived their absence as an indication that management did not want to resolve his grievance and that there was no reasonable prospect of any progress. The meeting ultimately deadlocked. A further meeting was arranged to resolve the matter. In his evidence in chief, the appellant then said:

'I went and I said I would consider my options, I slept over that and on the next morning I decided I had – they are forcing me out of this organisation, they do not want me here, they do not want to resolve the problem, they do not try, they do not follow the procedures, I asked for independents to assist with this, nothing was taken into consideration or accepted...everything was just disregarded.'

[35] The appellant resigned the following day, 5 October 2007. The letter of resignation sets out the appellant's grievances. After referring to his prior service, he stated:

'This situation has changed drastically after a few incidents with Mr. Matibe, Mr. Mkwanazi and Mr. Thomo (the CEO). These incidents amounted to

harassment, and are detailed in a grievance I have laid against these three gentlemen.

My grievance was not properly dealt with in terms of the Armscor grievance practice, even after the problem was stated and the grievance escalated to Mr. Thomo's level. I regard this as unacceptable, and as a clear indication that my line manager and his superior do not wish to attempt to resolve this matter, even though I was willing to find an amicable solution for which I even attended a so-called "grievance meeting" which arrangements were fraught with bias and irregularities.'

- [36] The appellant went on in the letter to discuss the Armscor grievance procedure and alleged that the requirements therein were "blatantly disregarded at almost every step of the way – both procedurally and substantively." He does not precisely set out how that was so. Close analysis indicates that he was aggrieved by the fact that Step 1 had not taken place within two days of his lodging the grievance. Thus, he stated:

'The eventual first attempt by my line management to react to the grievance only happened on the thirteenth day of the grievance and only by way of an Outlook meeting request on 2 October for 4 October 2007, blatantly disregarding my rights as the person lodging the grievance as inter alia explicitly stated in the Grievance Practice.'

- [37] After discussing the events at the meeting of 4 October 2007, he concluded:

'The only conclusion which could be reached after what happened and after the so-called "grievance meeting" of 4 October 2007, is that there was no honest attempt by my line management (up to the CEO) to move towards a fair resolution of the grievance...

Given the circumstances and the unacceptable and irregular way in which my situation was managed, I cannot have any trust in the bona fides of management or the fairness of any future process arranged or dominated by Armscor in my case anymore.

It is therefore with deep regret that I find myself forced to resign notwithstanding likely damages to the interests of my family (which includes a

disabled son) and probable hardships, away from the unbearable situation in Armscor created by my line management.

I wish to state clearly that I reserve all of my rights of recourse in terms of legislation and common law and that I regard myself as having been forced to resign. I also would like to point out that I now have no other option than to follow the route as stated in paragraph 7.5 of the Grievance Practice...to urgently have this matter “dealt with in terms of the statutory Dispute Settlement Procedure i.e. CCMA or Labour Court.’

[38] It appears thus that the appellant was well acquainted with Armscor’s grievance procedure and acted consciously with it in mind.

[39] As stated at the outset, the question for determination is whether the appellant was in fact dismissed. The existence of a “*dismissal*” is a jurisdictional fact necessary for the CCMA to determine the dispute by way of arbitration. If the jurisdictional fact is absent, the CCMA is not entitled to arbitrate the matter.⁴ Section 186(1)(e) of the LRA essentially defines a constructive dismissal as an employee terminating his or her contract of employment because the employer made continued employment intolerable. The word “intolerable” implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance.

[39] The relevant principles were stated many years ago in *Pretoria Society for the Care of the Retarded v Loots*⁵ as follows:

‘When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption

⁴ *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SA Rugby Players Union and Another* (2008) 29 ILJ 2218 (LAC) at paras 40-41. .

⁵ (1997) 18 ILJ 981 (LAC).

and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.'

- [40] Thus, employment must objectively have been rendered intolerable in the sense that no reasonable employee could be expected to put up with the conduct of the employer.⁶ At the same time, the employee must subjectively have found the conduct to be intolerable. In *National Health Laboratory Service v Yona and Others*⁷, this Court held:

'[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 towards 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 towards the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with it. Resignation must have been a reasonable step for the employee to take in the circumstances.'

- [41] In *Albany Bakeries Limited v Van Wyk and Others*⁸ this Court emphasised the importance of an employee exhausting reasonable alternatives to resignation. It stated:

'How will an employee ever prove that [the employment had been made intolerable] 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.'

⁶ *Lubbe v ABSA Bank Beperk* [1998] 12 BLLR 1224 (LAC), at para 8; *Smith Kline Beecham (Pty) Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 988 (LC).

⁷ (2015) 36 ILJ 2259 (LAC).

⁸ 2005 (26) ILJ 2142 (LAC) at 2150C – E.

- [42] The appellant's various grievances arose over a three-year period. They reflect that he was experiencing difficulty in having his way at work. He believed that he knew what was best for Armscor, that his superiors did not and that they acted without due regard to prescribed rules, procedures and practices. This left him indignant and frustrated. He subjectively found the situation to be intolerable. That is however not enough. The authorities just cited make it clear that the situation must be intolerable objectively. Armscor submits that at both a subjective and objective level the continued employment relationship had not become intolerable.
- [43] The appellant's claim of intolerability mostly related to events that transpired in 2004, 2005 and 2006. He acknowledged during his testimony that the previous complaints (regarding issues in 2004, 2005 and 2006) had fallen away because his situation had "*become tolerable again*". It was only in April 2007 that he began experiencing similar problems, but this time with different personnel. He filed a grievance in September 2007 when he was not getting his way with the performance contract outputs and the appointment of staff. No doubt there was a tense and awkward clash over authority and the requirements of Armscor. However, it is more than doubtful that a dispute regarding these admittedly sensitive issues objectively attained the level of intolerability. The appellant evidently struggled to yield to the different perspective advanced by his superiors. The problem then became one of compatibility at senior management level. When he could not get his way, he proposed early retirement as a settlement to resolve the impasse. When his proposals were not accepted, he lodged a grievance.
- [44] It may be that the appellant had a legitimate complaint about the performance outputs and appointments to his division. But such matters occur often and are run of the mill points of difference or tension in any workplace. Grievance procedures exist for that very purpose. They are the compulsory means of resolving conflict over run of the mill disagreements between subordinates and their superiors. A proper application of the grievance procedure aims at testing the legitimacy of any difference of opinion and through conciliation hopes to find workable remedial solutions.

[45] Armscor contends that the appellant through his conduct undermined the proper resolution of his grievance. First, he submitted his grievance in Afrikaans, well-knowing that Matibe was not sufficiently *au fait* with Afrikaans. Despite his evincing a high level of comprehension of English in his prior correspondence, the appellant rejected Matibe's request for him to translate it. In addition, he insisted that the dispute had to be resolved within the prescribed two-day period when it was clear that it was not reasonable to expect Matibe to do so as he was about to take a trip out of the country. He ignored the provision in clause 6.3 of the grievance procedure that extensions of time may be reasonably justified by the circumstances. In his indignant view, the non-compliance with the two-day requirement was a "blatant disregard" of his rights causing him to lose confidence in the internal processes. Moreover, he acknowledged that he had to be coaxed by Mr Potgieter to attend the grievance meeting in the first place. When the matter was postponed to continue the meeting, he tendered his resignation rather than attend.

[46] In our view, there is merit in Armscor's submission. The appellant in effect resigned before the grievance procedure progressed beyond the first step. Moreover, in terms of the grievance procedure, there was no obligation on Thomo or Mkwana to be in attendance at the Step 1 grievance meeting. But most importantly, even if there were merit in his assertion that he justifiably had no confidence in the internal grievance process, his letter of resignation indicates that he was aware of Step 5 of the process which required him to refer the grievance to the CCMA. He resigned before he invoked that remedy. The appellant was too hasty in his decision to resign. His conviction in the merit of his cause, fuelled by his obvious outrage and indignation, may well have been misplaced. His assumption that his superiors' views about the performance contract outputs and appointments were wrong or unacceptable needed to be objectively tested and there was a legitimate, prescribed remedy available for that very purpose, which he opted not to pursue. In the circumstances, his resignation was petulant, premature and ill-considered. In the premises, it cannot be concluded that he was constructively dismissed.

[47] Therefore, the Labour Court did not err in its conclusion that there was no dismissal in terms of section 186 of the LRA and that the CCMA accordingly lacked jurisdiction. The appeal cannot succeed. This is not a case in which the appellant should be mulcted in costs. He reasonably sought a determination of his rights, after many years of service, and having secured two arbitration awards in his favour.

[48] In the premises, the appeal is dismissed.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

K Savage

Acting Judge of Appeal

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LABOUR APPEAL COURT