REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR3240/10

REGENT INSURANCE COMPANY LIMITED **Applicant**

and

CCMA **First Respondent**

Rebecca Q Gungubele, N.O. **Second Respondent**

Boitumelo Elizabeth Letsholo **Third Respondent**

Heard: **24 May 2012**

Decided: **15 June 2012**

Summary: **Review – constructive dismissal**

JUDGMENT

GAIBIE AJ:

Introduction

1] This is an application to review and set aside the arbitration award issued by the second respondent ('the commissioner') under case number GAEK353-10 dated 26 October 2010. In terms of the award, the commissioner found the resignation of the third respondent ('the respondent') to have amounted to a constructive dismissal which was unfair.

Background facts

2] By and large the facts in this matter were common cause. Such common cause facts included the following:

(a) The respondent was, prior to her resignation employed by the applicant for a period of approximately ten years, initially as a Payroll Administrator and later as an Employee Benefits Consultant.

(b) During February 2010 the applicant outsourced its payroll department to an entity known as 'Cedar'. In consequence thereof, the applicant embarked upon a consultation process with the respondent. The applicant was, in this consultation process, represented by its General Manager – Human Resources: Dashnee Naidoo ('Naidoo') and the Employee Relations Manager: Iereshah Jacobs ('Jacobs'). The employee was given the option to retain her position as a Payroll Administrator with Cedar, or to remain with the applicant in a more senior position of Employee Benefits Consultant. By agreement, the respondent was appointed by the applicant in the position of Employee Benefits Consultant commencing on 1 March 2010. This position involved more responsibilities and a higher rate of pay. Her monthly gross income increased from R21 000 as Payroll Administrator to R24 000 as Employee Benefits Consultant.

(c) The respondent reported to Jeremy Beukes ('Beukes'), the applicant's HR Services Manager. Beukes was promoted to this position on 1 March 2010.

(d) For the purposes of outsourcing the payroll function to Cedar, the applicant also employed Anke van der Broek ('VD Broek') and Victoria Nkomo on a temporary basis to assist with the handover of the outsourcing function to Cedar. In this process, VD Broek also assisted the respondent in performing her functions. I will return to the nature of this assistance later in this judgment. It is necessary, at this stage, to record that whilst the respondent initially denied that she had not received any assistance from the applicant in her new position, she conceded under cross-examination that VD Broek had assisted her in the performance of her tasks as Employee Benefits Consultant.

(e) On 5 May 2010 the applicant issued a final written warning to the respondent for gross negligence in that she had failed to check and verify the April 2010 payroll schedules before they had been sent to Cedar. The respondent refused to sign for receipt of the final written warning.

(f) Approximately 6 days later, on 11 May 2010, the respondent tendered her resignation with effect from 11 June 2010.

<u>Period between March to April 2012</u>

3] It is apparent from the common cause facts that the respondent assumed her role as the Employee Benefits Consultant on 1 March 2010 and that she had handed in her resignation on 11 May 2010 with effect from 11 June 2010. The events that occurred during this period, from the beginning of March 2010 to the date on which the respondent handed in her resignation, must therefore be assessed carefully.

4] VD Broek testified that she had joined the applicant on 10 February 2010 initially on a temporary basis until the end of March 2010 and that her fixed term employment contract had been renewed on two further occasions, and was finally converted into a permanent arrangement upon the respondent's resignation.

5] She also testified that the respondent:

(a) was, in her post as Employee Benefits Consultant, responsible for various tasks, including two broad functions: to do the full payroll function up to and including the general ledger in respect of four payrolls and, to attend to the administration of employee benefits matters;

(b) was required, in respect of her payroll functions to: insert or input relevant information for the purposes of four payrolls into specific templates that had been designed by Cedar; validate the employee codes; consolidate the payroll results after each run into a spread sheet; balance the general ledger and handle all payroll queries following each run, from the staff;

(c) was required, in respect of the administration of employee benefits, to collate and complete application forms for medical aid and pension fund withdrawals and dispatch those to the respective third parties. This aspect effectively involved the management of employees' applications, membership details with the schemes, as well as assisting new employees to complete the relevant documentation when they commence employment with the applicant.

6] Given that the payroll aspect of her functions had been outsourced to Cedar from 1 March 2010, the respondent's obligations involved in the main, the input of relevant data and the dispatch thereof to Cedar. According to VD Broek, after the March payroll run, she found certain errors which she referred to as 'teething issues' that occurred on both sides that is on behalf of the applicant and on behalf of Cedar. Following the first month of the outsourcing of the payroll function and the teething problems experienced by both sides, a meeting was held with Cedar and measures were put in place to ensure that the information dispatched to them would improve in the next month.

7] In order to assist the respondent, VD Broek: created a document for her which recorded the process that she needed to follow from the beginning to the end of the month; separated the various phases of the process for her, in chronological fashion, so as to facilitate her input of the relevant information; and created a payroll calendar so that she was able to assess, on a daily basis, precisely what needed to be done.

8] VD Broek testified that she assisted the respondent with the aim of ensuring that she fell into a rhythm with her daily tasks and to teach her 'as much new things' as she could pick up. She also indicated that she attended to most of the difficult tasks and that she gave the respondent the easier tasks to attend to so that she could learn to cope with the four payrolls and the employee benefits administration. According to VD Broek she attended to 70% of the tasks that should ordinarily have been done by the respondent. The nature and extent of the assistance provided by VD Broek to the respondent was uncontested.

9] Despite such assistance, VD Broek indicated that there were a number of errors that emanated from the April 2010 payroll run that were caused by the respondent. According to her, the respondent's errors amounted to 'things that was either submitted to her on emails that was not submitted on the payroll vendor for input which basically meant then the person was not paid. We had to do manual payments to correct those, or where employee code was not correct and the wrong employee was paid overtime for example'.

10] VD Broek stated that the 'errors' made by the respondent were caused by a lack of attention to the detail required. For instance, she explained that the respondent did not process the issues that she was required to attend to, she did not keep track of what was submitted, what had not been submitted, queries raised and information that had been supplied.

11] On 3 May 2010, VD Broek wrote to the respondent about the errors. She informed the respondent that her errors included non-payment of commissions that were due to employees, the incorrect computation of leave owing to certain employees, the payment of overtime to the incorrect employee, the non-submission of traffic fines and personal insurance deductions. All of these errors had financial implications for the applicant.

12] Later that day the respondent provided a written response to issues raised by VD Broek. In the main, the respondent refused to acknowledge any responsibility for the errors except for her admission of one error which concerned the non-payment of commission to an employee. Thereafter a meeting was held with the respondent to discuss the errors.

13] On 5 May 2010, the applicant met with the respondent again and issued a final written warning to her for gross negligence in respect of her failure to check and verify the April 2010 payroll schedules in respect of four matters.

14] The final written warning records the following at the end thereof:

> 'This warning will be retained on your personal file and will remain valid for a period of nine months from the date of issue.
>
> Do you wish to appeal against this warning: Yes ☐ No ☐
>
> Please be informed that should you wish to appeal against this warning, such appeal must be submitted to the Employee Relations Manager within five days of receipt of this warning. You are required to detail the reasons for your appeal in writing.'

15] In a handwritten inscription on the final written warning, the following is recorded:

> '5h30 p.m. 5 May 2010
>
> Lizzie refused to sign warning.
>
> According to her warning is issued after hours.
>
> Risha explained that her concern is irrelevant –
>
> Warning still issued.'

<u>The reasons for her resignation</u>

16] It is apparent from the respondent's evidence, although inarticulate, disjointed and sometimes incomprehensible, that the final written warning was the trigger in respect of her decision to resign. In her evidence in chief the respondent proffered two reasons for her resignation. The first reason was based on her evidence that she did not challenge the final written warning because Jacobs had informed her that if she did so she would make the situation worse for herself given that she had in any event refused to sign for the receipt of the warning. In further amplification of that reason, the respondent indicated that her position was based in the HR Department and that: 'We are HR and then we are under IR and GM and they are the one who are running the company. So it was difficult for me to proceed with the matter further. That is why I did not challenge this'.

17] The second reason is perhaps more clearly articulated in her own words and relates to her perception of what might have happened soon after her receipt of the final written warning. In that regard she indicated as follows:

> 'I was afraid that the situation will end up going to a disciplinary hearing and after a disciplinary hearing it will be a dismissal and I was scared that my job as payroll assistant or employee benefit it would be difficult for me to find another employment outside I was protecting myself'.

18] Under re-examination, she proffered an additional reason for her resignation ('the third reason') and provided further amplification in respect of the second reason. The third reason was that she was of the view that the pressure in the department was too high and that there was no room for any accommodation of errors. In amplification of the second reason, she contended that there were many other employees who were dismissed in circumstances similar to hers.

19] I turn now to deal with each of the reasons indicated by the respondent as the basis for her resignation and implicitly the reasons why she contends that she had been constructively dismissed.

Failure to challenge the final written warning

20] The respondent testified that she did not challenge the final written warning because Jacobs had informed her that if she did so she would make the situation worse given that she had already refused to sign for receipt of the warning ('the threat'). The respondent also indicated that her position was based in the HR Department and that they were under the IR Department and the authority of the GM and it is they who were running the company. By implication, she suggested that she felt constrained to challenge their authority.

21] Beukes, testifying for the applicant, denied that Jacobs had threatened the respondent. He explained that Jacobs was with him at the time that he had issued the warning to the respondent and he confirmed that Jacobs had informed the respondent that the validity of the final written warning was not affected by her refusal to sign for it.

22] In order to resolve this dispute of fact, it is necessary to look at the surrounding circumstances and the evidence in its totality to determine the probabilities of the evidence in respect of this matter. The following facts are relevant for this purpose:

(a) First, it was common cause that soon after the respondent's refusal to sign for receipt of the final written warning, Jacobs had sent the respondent an email, in which she confirmed the following advice in relation to the final written warning:

> 'You indicated that you will not sign today due it being after hours but that you will sign tomorrow. Jeremy Beukes is out of the office for the rest of the week. This aside, I explained that your refusal to sign does not render the warning invalid. The reason given for your refusal to sign the warning when issued, is of no relevance to this matter. You were already given an opportunity to respond to the issues both in writing and in discussion with your manager, prior to the issuing of the warning.
>
> The warning was therefore issued to you after a witness signed thereto. You are reminded of your right to appeal the decision within five days of receipt of the warning'.

(b) Second, the respondent was also informed in writing, on the final written warning, that she would be entitled to appeal the warning within five days of receipt of that warning.

(c) Third, the respondent had during the course of 2008 exercised her right of appeal in relation to a warning issued to her during that year. She exercised that right notwithstanding the fact that her position fell within the HR Department.

(d) Fourth, insofar as she had any misgivings about lodging an internal appeal in respect of the final written warning issued to her, she could have but did not refer the matter to the CCMA as an unfair labour practice dispute.

(e) Fifth and perhaps most importantly, VD Broek testified that there was no plan at that stage to take the respondent through a disciplinary process and that they wanted to help her to improve her performance. She explained that even in May 2010, they had continued to give her the same kind of guidance on a daily basis, by assisting her with her daily planning and ensuring that she met her deadlines.

23] In the context of these facts, it is improbable that Jacobs had threatened the respondent in the manner suggested by her. Accordingly and on a balance of probabilities the applicant's version was more probable than that of the respondent in respect of this issue.

<u>Anticipated disciplinary proceedings</u>

24] The respondent testified that she resigned because she was afraid that the situation would have resulted in a disciplinary hearing and thereafter a dismissal. She considered her resignation as a response to anticipated disciplinary proceedings and for the purposes of *"protecting"* herself.

25] It is apparent from the evidence that this was a bald and unsubstantiated assertion. Under cross examination she confirmed that nobody had informed her that a disciplinary process was an automatic consequence once a final written warning had been issued. In any event, it was the undisputed evidence of VD Broek that she continued to render full support and assistance to the respondent after the final written warning was issued until the point at which she had submitted her resignation. By implication, such support and assistance would not have been given to the respondent if the applicant intended to terminate her services through disciplinary proceedings.

26] The respondent attempted under re-examination to suggest that her resignation was also premised on the basis that there were numerous other employees who were dismissed in similar circumstances. In that regard she produced the evidence of an ex-employee of the applicant, Amanda Fromont (‘Fromont’), in support of her contention. Fromont was however unable to support the contention or to give any evidence in relation to the circumstances in which the respondent had resigned given that she had already left the employment of the applicant at the relevant time.

Pressures of employment

27] Under re-examination, the respondent’s union representative suggested to her that she should demonstrate how Beukes had assisted VD Broek to take over her position as Employee Benefits Consultant. Taking her cue from a leading question, in sweeping fashion and with a deliberate lack of specificity, the respondent simply indicated that it was apparent to her that VD Broek did not accommodate or allow any room for error and that the pressure in the department was too high. In the absence of a reasonable articulation and explanation for this assertion and in light of VD Broek’s undisputed evidence that she continued to assist the respondent in April and in May beyond the date upon which she was issued with a final written warning, the assertion constitutes at best an empty comment and is clearly improbable.

The resignation and the events that followed

28] On 11 May 2010 the respondent handed in her resignation and informed Beukes that:

> 'I hereby wish to inform you of my resignation as an employee of Regent Insurance, my resignation will be effective from 11/05/2010. My last working day will be 11/06/2010.
>
> I appreciate the opportunities and support I have been given at Regent for the past 10 years. I wish the HR Team success in the future.
>
> Thank you.
>
> Regards
>
> .....'.

29] Upon receipt of the respondent's resignation, Naidoo testified that she and Beukes had invited the respondent to discuss the reason for her departure. The respondent had informed them that she was passionate about performing tasks associated with payroll and that she wanted to look for positions in other companies within the payroll department. Naidoo also testified that the respondent had informed her of interviews that she had arranged at several companies for positions within the payroll department, and that she had provided her with assistance in the form of time off to attend such interviews and general advice about how to prepare for and to conduct herself in the interviews.

30] The applicant also arranged a farewell party for the respondent and she received numerous gifts. According to Naidoo the respondent was complementary about the HR Department, and she thanked her and Beukes for the support. She also indicated that she would miss everybody in the Department and that she would miss the 'team' in particular. According to Naidoo:

> 'We ate and laughed and made jokes and had a great time at the farewell which is why I am very taken aback right now at this referral'.

31] On 10 June 2010, one day before her departure, the respondent sent an e-mail to employees, thanking them for their support and friendship. The last paragraph of her e-mail read as follows:

> 'Are you wondering where Lizzy is going, I will be waiting upon God's promises, put your trust in God. My time at Regent has expired, KENAKO. There is time for everything and it is time for me to leave Regent. Things happen for a reason, it is not easy but it is worth it.'

32] Accordingly and in the period between her resignation and her final day of departure, a period constituting a month, the respondent did not indicate either in her communications referred to above or in her discussions with Naidoo or Beukes about the 'intolerable conditions', if any, under which she had submitted her resignation. The reasons for her resignation emerged for the first time during the arbitration proceedings.

Grounds for review

33] The applicant contends that the commissioner in arriving at the conclusion that the resignation of the respondent amounted to constructive dismissal, relied on broad, sweeping and unsubstantiated findings and in so doing committed a gross irregularity, exceeded her powers as an arbitrator and failed to act as a reasonable decision maker.

34] In this regard, the commissioner is criticised, in general, for not considering the facts in their totality, for relying on irrelevant instead of relevant evidence, and for not properly considering the evidence before her on a balance of probabilities. In this respect, the commissioner is criticised for making various findings, all of which are premised on the assumption that the review test established by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*,[1] ['*Sidumo*'] is applicable to this matter. For reasons that are referred to later in this judgment, that test is not applicable in the circumstances of this matter.

The legal framework

35] Section 186(1)(e) of the LRA defines a constructive dismissal in the following terms:

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

36] What section 186(1)(e) provides for is that there would be a dismissal in circumstances where an employee terminated the employment relationship in circumstances were the employer had made continued employment intolerable. The operative terms in section 186 are that the employer had made continued employment intolerable, and that the employee had terminated the contract of employment in such circumstances. The termination of employment is deemed to be involuntary and it is treated as if the termination had been precipitated, compelled or caused by an act of the employer.

37] The primary enquiry before the commissioner was therefore whether there had been a dismissal or not. It is accordingly an issue that goes to the jurisdiction of the CCMA. In other words the importance of establishing

1 (2007) 28 ILJ 2405 (CC).

whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain this dispute. In *Hickman v Tsatsimpe NO*,[2] the Court held that the standard of review established by *Sidumo* which poses the enquiry as to whether the decision reached by a commissioner is one that a reasonable decision maker could not reach, is not applicable in the context of an enquiry into the CCMA's jurisdiction, and in particular whether a dismissal in terms of section 186(1)(e) has happened or not.

38] The test was in fact formulated in *S.A. Rugby Players' Association (SARPA) and Others v S.A. Rugby (Pty) Limited and Others; S.A. Rugby (Pty) Limited v SARPU and Another (2008) 29 ILJ 2218 (LAC)* ['*SARPA*']. The LAC encapsulated the enquiry in the following terms:

> '[40] The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court....This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties...
>
> [41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the

2 [2012] 5 BLLR 493 (LC) at para [6].

contrary.'

39] The anomaly of the Labour Appeal Court's decision is that in the event of an alleged constructive dismissal in terms of section 186(1)(e), the commissioner has to investigate the merits of the dispute referred. Only after an analysis of the facts placed before it can the commissioner determine whether a dismissal has occurred. After having undertaken this enquiry, only at that stage, is the CCMA in a position to establish whether it has jurisdiction to determine the dispute.

40] In *Asara Wine Estate and Hotel (Pty) Limited v J.C. Van Rooyen and Others*,[3] the Labour Court had regard to the SARPA case and concluded that :

> '[23] The test I have to apply, therefore, is not whether the conclusion reached by the commissioner was so unreasonable that no commissioner could have come to the same conclusion, as set out in Sidumo, but whether the commissioner correctly found that Van Rooyen had been dismissed.'

41] In the circumstances of this case, it is accordingly necessary for me to determine whether the respondent had been dismissed within the meaning of section 186(1)(b).

42] In order to determine whether a constructive dismissal has been established, the LAC in *Solid Doors (Pty) Limited v Commissioner Veron and Others*,[4] ['*Solid Doors*'] held as follows:

> '[28] ... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination

3 (2012) 33 ILJ 363 (LC).
4 (2004) 25 ILJ 2337 (LAC) at para 28.

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

43] In this decision, the first requirement is an explicit requirement of section 186(1)(e), and the second and third requirements are conflated into one requirement in that section. Accordingly, what is stated by the LAC as three requirements in fact amounts to one requirement without any factoring in of the 'fairness' requirement.

44] Although the decision in *Solid Doors* was not referred to by the LAC in its recent decision in *Jordaan v Commissioner for Conciliation, Mediation and Arbitration and Others*,[5] ['Jordaan'], it implicitly recognised the fallacy of that approach and instead reformulated the test. Relying on the dictum in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others*,[6] the LAC in *Jordaan* set out a two stage approach for the purposes of determining constructive dismissal disputes:

> 'In the first place, an employee who leaves a place of employment bears the onus of showing that the employer effectively dismissed the employee by making her continued employment intolerable. Once this is established, a second stage must be applied and this concerns an evaluation of whether the dismissal was unfair.'

45] As indicated in *Jordaan*, the two stages are not necessarily independent stages, and depending on the circumstances, the facts relevant to the first stage may also be relevant to the second stage.

5 (2010) 31 ILJ 2331 (LAC) at 2335.
6 (1998) 19 ILJ 1240 (LC) at 1250.

46] In respect of the first stage, the onus is accordingly on the employee to demonstrate 'that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to an employee, save for termination of their relationship'.[7] The onus is an onerous one and clearly constitutes a cautious reminder that the test may be satisfied in only the rarest of cases. This test sits comfortably with the test established by the Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others*,[8] in which it was held that the test for constructive dismissal does not require that the employee should have no choice but to resign, but only that the employer should have made continued employment intolerable.

47] The dicta explicit in *Strategic Liquor Services* and *Jordaan*, and implicit in *Murray v Minister of Defence*,[9] represent a fundamental shift of the test from one in which the employee had no option but to resign, to one in which no other option is reasonably available to an employee save for resignation. The shift is from a strict test to one that is slightly less strict.

48] It is in the determination of the second stage (of the two stage approach) that John Grogan[10] indicates that it is not all circumstances of intolerability that can be relied on for the purposes of establishing a constructive dismissal. In this regard he states that:

> 'In making out a case of constructive of dismissal, employees who have resigned must generally show that they were subject to coercion, duress or undue influence. Mere unhappiness at work is not enough.'

49] The LAC in *Jordaan* also indicated 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'.

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7 Above n4 at 2336.
8 (2009) 30 ILJ 1526 (CC) at para 4
9 [2008] 6 BLLR 513 (SCA).
10 John Grogan *Workplace Law (9ed) (2007) JUTA at 116.*

50] The Supreme Court of Appeal in *Murray* held that even if the employer is responsible for the intolerable conditions, this will not be sufficient to constitute a constructive dismissal. Something more is required. In that regard the SCA held that:

> '[13] ...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'. Culpability does not mean that the employer must have wanted to or intended to get rid of the employee though in many instances of constructive dismissal that is the case.'

51] In *Old Mutual Group Schemes v Dreyer and Another*,[11] the Court held that the mere holding of a disciplinary enquiry does not amount to duress entitling the employees to bypass the internal appeal processes. The Court found that the employees' contention that the internal processes would have been futile to appeal was without foundation. The LAC went on to hold that the appeal processes would have been an ideal opportunity to air their grievances, especially because there was no suggestion that the company wished to discipline the employees but wanted them to improve their performance. The Court held as follows:

> '[9] As die respondent met die sanksie of die vereiste vir voldoening aan hulle mikpunte ontevrede was, kon hulle appelleer en op appèl 'n verdere debat oor die redelikheid van die appellant se vereistes voer. Dit was myns insien hulle enigste uitweg. Hulle kon nie die beslissing met betrekking tot wat redelikerwys van hulle verwag kon word indirek aanveg deur te beweer dat die appellant se onredelike vereistes hulle genoop het om te bedank en dat hulle derhalwe konstruktief ontslaan is nie. Hulle was ingevolge die personeelreglement aan 'n betrokke prosedure gebonde en moes daarby hou. Normaalweg moet 'n

11 (1999) 20 ILJ 2030 (LAC).

werknemer die voorgeskrewe interne procedures ten volle benut voordat die hof se hulp ingeroep word. (Sien *Reckitt and Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union and Others (1991) 12 ILJ 806 (LAC) te 813B-D*; asook *Baxter 'Curing Defects of Natural Justice by Appeal' (1980) 97 SALJ 113 te 119*).'[12]

52] In *L.M. Wulfsohn Motors (Pty) Limited T/A Lionel Motors v Dispute Resolution Centre and Others*,[13] ['*Wulfsohn Motors*'] the Court found that there had been no constructive dismissal on the basis that a grievance procedure had not been exhausted. Whilst the Court in this decision purports to apply the strict test, it does so by invoking the requirement of reasonableness. It is cited in this matter purely in the context of its factual relevance, particularly the relevance of internal processes in the context of constructive dismissal disputes. The Court made the following useful comment in that regard:

'[12] ... Where an employee could reasonably be expected to invoke a grievance procedure, the resignation will not be regarded as a constructive dismissal. See in this regard *Lubbe v ABSA Bank BPK* [1998] 12 BLLR 1224 (LAC) where it was held that, because the employee had the opportunity to take up the dispute with other levels of management, the resignation was therefore not an action of 'the last resort'. I agree with the sentiments expressed by Grogan that this test should not be applied too stringently but that it does protect employers from unscrupulous employees resigning from their employment without informing the employer about their grievance in order to claim compensation from them. Where it appears from the circumstances of a particular case that an employee could or should have reasonably channelled the dispute or cause of unhappiness through the grievance channels available in the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudged against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in these circumstances.'

12 Id ata para 9.
13 (2008) 29 ILJ 356 (LC).

53] In the context of the above jurisprudence, the Court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Marsland v New Way Motor and Diesel Engineering*.[14]

54] I turn now to the facts on which I conclude that the respondent was not constructively dismissed. Consequentially, the CCMA had no jurisdiction to entertain this dispute.

<u>Evaluation</u>

55] In the context of this matter, it is my contention that the facts relevant to the first stage are in fact relevant to the second stage of the two stage approach established by the LAC in *Jordaan*.

56] The respondent contended that she had taken a decision to resign from her employment because she feared being subjected to disciplinary proceedings in circumstances where she had been issued with a final written warning.

57] This fear it appears, emanated from her contention that Jacobs had threatened her. In re-examination, she contended that this fear emanated from a bald allegation that numerous other employees' services had been terminated in similar circumstances.

58] As indicated in the background facts, the respondent was unable to establish

14 (2009) 30 ILJ 169 (LC) at 188G.

in light of the probabilities that Jacobs had threatened her in relation to a challenge if any to the final written warning, and secondly, that insofar as she relied on the evidence of termination of other employees, she had not provided the relevant evidence in that regard. In the circumstances, and in the absence of her failure to challenge the final written warning in terms of the applicant's internal appeal procedure, or in terms of the unfair labour practice provisions of the LRA, it is clear that she did not resign in circumstances that were "intolerable" and she is not entitled to seek the assistance of the CCMA or the Court in the absence of her exhaustion of reasonable alternative remedies or procedures.

59] It is clear that the respondent had, by her resignation, intended to terminate her employment with the applicant permanently based on the totality of the facts, and more specifically in light of the following common cause facts:

a) In her discussions with Naidoo, she indicated that she had a passion for performing payroll tasks and that she had arranged for several interviews with other entities in that regard. Naidoo had provided her with assistance in the form of time off for such interviews and advice in relation to the preparation for such interviews;

b) She gave notice and worked a further thirty days until the date of her departure, and shortly before that she attended a farewell party where she thanked staff and management for the support given to her, and a day before her departure she repeated those sentiments;

c) At no stage prior to her resignation, nor for a period of thirty days thereafter did she indicate any unhappiness or displeasure with the circumstances in which she had resigned.

60] I interpose at this stage to record that the imposition of a final written warning on the respondent was probably unfair in the circumstances given that the employer had relied on a previous written warning that it had issued to the respondent in 2008. The reliance on that warning was probably misconceived and irrational. However, the respondent still had the option of invoking the grievance procedure or the internal appeal process as she had done in respect of the warning issued in 2008 and of referring an unfair labour practice dispute to the CCMA. Her resignation in the circumstances, insofar as she wished to claim that she had been constructively dismissed, was voluntary, premature and unreasonable.

61] In these circumstances, there can be no talk of constructive dismissal. The employee had reasonable alternative options and did not make use of them.

62] The conclusions that the commissioner reached were based on the respondent’s version alone. On the consideration of the evidence as a whole, the commissioner, would have reached a different conclusion and one in which she would have found that the respondent had failed to discharge the onus in respect of both enquiries applicable in constructive dismissal cases. It was apparent that the commissioner had slavishly followed the respondent’s version without any assessment of the totality of the evidence placed before her.

63] In the circumstances, I find that the respondent was not dismissed, but resigned voluntarily.

64] I do not, however, believe that the law and fairness would support the view that costs should follow the result. Armed with an award in her favour, she was faced with an application to review the award, and had little choice but to try and oppose it. In walking this path, she had to incur legal costs in circumstances where she had no security of income. In fairness, she should not be saddled with the applicant's costs.

Ruling

65] In the premises, I make the following order:

(1) The arbitration award issued by the second respondent under case GAEK353-10 dated 26 October 2010 is reviewed and set aside;

(2) There is no order as to costs.

Gaibie, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: P Maserumule of Maserumule Inc Attorneys

For the Respondent: No appearance (although she had been previously represented by attorneys who withdrew prior to the hearing of the matter)