



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 2519/14

In the matter between:

UNISA

Applicant

and

L NOWOSENETZ N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

E N NGCINGWANA

Third Respondent

Heard: 12 July 2016

Delivered: 23 March 2017

JUDGMENT

MOTHIBI AJ

Introduction

- [1] The applicant in this review application seeks an order reviewing, correcting and setting aside the arbitration award made by the first respondent (Arbitrator), dated 28 October 2014, in terms of which he concluded that the applicant had constructively unfairly dismissed the third respondent and granted her compensation equivalent to eight months of her salary amounting to R733 333.32.
- [2] The application was opposed by the third respondent.

Preliminary issues

- [3] The parties have asked the Court to condone an arrangement reached between their legal representatives in terms of which they agreed to vary the time periods within which they could file their respective notices and affidavits as provided for in terms of rule 7A. I agree with the parties that it is in the interest of justice to grant them leave condoning the arrangements between them in this regard. In the circumstances the arrangements are condoned.

Background facts

- [4] The third respondent was employed by the applicant in terms of the fixed term contract for the period 1 April 2010 until 31 March 2015 and in the position of Deputy Director in the applicant's Information and Communication Technology Department (ICT). It is common cause that this was a senior position. She reported to the Executive Director (ED), who heads the department.
- [5] At the time of the third respondent's employment the ED position was vacant.

[6] It is common cause between the parties that the ED position was filled with the appointment, in September 2010, of one Ms Lungi Sangqu (hereinafter referred to as the ED).

[7] On 27 March 2014 and by way of a letter addressed to UNISA's principal one Professor M Makhanya, the third respondent tendered her resignation "effective immediately". She purported in her letter of resignation to be doing so on 24 hours' notice. She gave the reason for her resignation as follows:

"My resignation is due to continuous intolerable working relationship, unfair labour practice (constructive dismissal) and workplace harassment. I can no longer endure the treatment as it has a negative impact on my health."

[8] No further details were set out by the third respondent in her letter of resignation other than what is captured above.

[9] She then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging that she had been unfairly constructively dismissed by UNISA.

[10] The arbitrator presided over the arbitration and issued his award on 28 October 2014 (the award).

[11] UNISA seeks to review the award in terms of section 145(2)(a)(i) to (iii) of the Labour Relations Act.¹ It has asked that the award be reviewed,

¹ 66 of 1995 (LRA). Section 145(2)(a)(i)-(iii) provides:

"(2) A defect referred to in subsection (1), means—

(a) that the commissioner—

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

corrected and/or set aside and in particular, it pivoted the application on the submission that the arbitrator's finding that the third respondent had been dismissed – notwithstanding her resignation – was incorrect. UNISA alleges that the award should be reviewed and set aside in its totality because, considering the facts associated to and of relevance in the arbitration, the arbitrator incorrectly found that there was a dismissal and that the dismissal was of a constructive nature. It is alleged that the arbitrator, in making this finding, committed a gross irregularity. In the alternative, it has submitted that in the event that this Court finds that there was indeed a dismissal, it ought to make a finding, having regard to the record and bundles filed, that the dismissal was nevertheless fair.

- [12] It follows that should this Court find that the arbitrator's award was incorrect in making a finding that there was a dismissal, in those circumstances it will not be necessary to consider the applicant's alternative ground of attack.
- [13] The third respondent has opposed the review application.
- [14] For the reasons that are fully set out below I find that the arbitrator's finding that the third respondent had been dismissed by the applicant, notwithstanding her letter of resignation of 27 March 2014 was incorrect. In addition, the decision reached by the arbitrator in this regard is not one which a reasonable decision maker could have reached having regard to the evidence before him.
- [15] I am satisfied, having regard to what I deal with in full below, that the evidence presented at the arbitration and which is in any event common cause between the parties indicates that the third respondent's

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- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers"

resignation was premature having regard to the fact that UNISA had, pursuant to a joint grievance which had been dealt with, communicated to her and the ED a plan of action which was aimed at restoring the strained relationship between them which it would appear was the main cause of the third respondent's unhappiness.

- [16] The third respondent's unhappiness seems to have started shortly after the ED's appointment in September 2010. As is apparent from her letter of resignation she resigned approximately four years later. I am indebted to the applicant for setting out, in some detail, the chronology of events that transpired between September 2010 to 27 March 2014, in its affidavit. I agree with the applicant that the third respondent, in its answering affidavit, does not thoroughly grapple with the allegations made in the applicant's founding affidavit regarding the chronology of events that eventually led to the resignation of the third respondent on 27 March 2014. The chronology therefore as set out by the applicant, is largely undisputed.

The History

- [17] The chronology is summarily set out in the paragraphs that follow.
- [18] Shortly after the ED's commencement of employment, she commenced a process aimed at addressing various structural and operational shortfalls within the ICT Department (the restructuring). The applicant, through the ED, alleges that the affected employees (including the applicant) were consulted in respect of the restructuring of the ICT department. This however is denied by the third respondent who states that upon learning about the proposed changes to the ICT Department and asking the ED—*"... where are the new job descriptions they talked to us, what was our role there she could not answer"*. In any event, on or about 17 January 2011 the approved new organogram for the restructured ICT Department was announced.

[19] It would appear that in the midst of the proposed restructuring and during November 2010, an incident occurred which seems to have been the beginning of what would become, at best, a fractious relationship between the ED and the third respondent. This related to a complaint by the ED that the third respondent had allegedly skipped a departmental meeting and further related to an allegation by the ED that the third respondent had failed to liaise directly with her regarding a request for her to take annual leave from 3 January 2011 to 14 January 2011. It is not necessary for purposes of this judgment to make a finding on whether the ED's complaints in this regard were well founded nor to make a determination on whether the third respondent's reply to an email from ED taking issue with the above was appropriate or not. It is only important to note here that this seems to be the start of what would become a tumultuous relationship between the two parties. The third respondent on her part took issue with an email sent to her by the ED dated 16 November 2010 in which the ED accused her of being— "*an irresponsible person or an immature junior clerk*". In response, the third respondent informed the ED that she considered her email as containing what she called repugnant remarks and asked her to refrain from making personal attacks on her and to treat her professionally. Thus the interpersonal conflict between the two commenced.

[20] In 2011, and upon UNISA becoming aware of interdepartmental conflict in the ICT Department, it appointed a consultant to investigate the alleged interdepartmental conflict which had been reported by the applicant and a colleague employed also as a Deputy Executive Director by the name of Mr Deon Van der Merwe (Van der Merwe). The aim of the consultant's appointment by UNISA and their eventual report was to suggest to UNISA a way forward in dealing with what appeared to be interdepartmental conflict between the ED, the third respondent and Van der Merwe. It is common cause between the parties that the consultant's report was tabled in February 2011 and that it made various suggestions

aimed at ameliorating the strained relations, among which was a suggestion that “coffee meetings” be held between the third respondent and the ED.

- [21] Notwithstanding the above commissioned investigation by an outside consultant and their report, it does not appear as if the interpersonal conflict between the third respondent and the ED improved. This much is apparent from an email sent by the ED to the third respondent on or about 6 April 2011 in which she appears to have taken issue with the third respondent apparently not attending the full session of an infrastructure planning meeting on 4 April 2011. She concludes by stating the following in her email:

“I cannot accept that. You will have to show me respect as the ED of this department and to constructively contribute to make this department a success. If you find you cannot do that, then there is no way but for us to part ways.”

- [22] A further email was sent by the ED to the third respondent on or about 11 April 2011 in which she took issue with an apparent request by the third respondent that she be given the ED’s performance agreement. Nothing further seems to have happened thereafter except for what appears below.

- [23] The next issue that flared up between the ED and the third respondent relates to the performance rating score given to the third respondent by the ED. In this regard the third respondent had given herself a performance rating of 3.8 as against the ED’s rating of 3. It is common cause that she lodged an appeal against the performance rating of 3. The appeal against the performance rating of 3 was lodged on or about 22 November 2011. An appeal was held pursuant to which the third respondent’s performance rating was adjusted to 3.1. This allowed her to qualify for a performance bonus.

- [24] The conflict continued. On or about 8 December 2011 the third respondent and Van der Merwe filed a joint grievance which raised various issues against the ED.
- [25] On or about 19 January 2012 the third respondent was informed by UNISA's Professor Baijnath (Baijnath) that UNISA had decided to first conclude a disciplinary process that had been initiated against Van der Merwe before proceeding to deal with the joint grievance lodged by the two.
- [26] Prior to that and at the beginning of the 2012 academic year, the ICT Department had undergone a substantial change in respect of its old structure and a new structure which had been approved had been given its full effect. In addition, and due to what appeared to be no end in sight to the interdepartmental conflict within the ICT Department, UNISA through Baijnath, placed the third respondent on purported special leave from 5 January 2012. She was apparently placed on special leave due to the fact that she was subordinate to the ED and the ED as head of department fulfilled a pivotal function as head of the division. It was UNISA's view at the time that it would—*“only be common sense to rather retain the services of the ED in the circumstances.”*. It was also a condition of the special leave that the third respondent's conditions of employment, salary package and the like would remain unchanged and that she would remain operational from home during that time.
- [27] Thus it should be apparent that it was during the period of her special leave that the third respondent was informed on or about 19 January 2015 that the joint grievance that she and Van der Merwe had lodged against the ED would be dealt with once UNISA had finalised the disciplinary process into Van der Merwe's alleged misconduct. The third respondent was advised that it was UNISA's view that it would be prudent, having regard to the joint nature of the grievance lodged, to first

dispose of the disciplinary hearing of Van der Merwe prior to their joint grievance being dealt with by UNISA.

[28] Be that as it may, the third respondent remained on special leave for a period of five months. Her special leave ended on 30 May 2012. She was back at work on 1 June 2012. This much is common cause. The uplifting of her special leave came after the third respondent had raised a number of concerns regarding projects assigned to her during her special leave and during which period she had been instructed to report to Professor Baijnath rather than to the ED. In addition, the uplifting of her special leave occurred after her union, the National Education Health and Allied Workers Union (NEHAWU) had taken issue with the special leave and demanded her "reinstatement". In uplifting her special leave, UNISA proposed that the third respondent be given an office space external to the ICT Department. Indeed upon the third respondent return to work on 1 June 2012, this was the position that prevailed.

[29] It is also important to record that during her special leave UNISA had appointed the firm PricewaterhouseCoopers (PWC) to conduct an audit of the ICT Department and had requested the third respondent to undergo a polygraph examination. This request to the third respondent was part of a broader investigation by PWC on the instruction of UNISA.

[30] In any event, returning to the issue regarding the third respondent's special leave, it is material to highlight the fact that the special leave was uplifted effective 1 June 2012. At this time, she and NEHAWU had been informed that the joint grievance that she had lodged with Van der Merwe would only be dealt with once Van der Merwe's disciplinary hearing had been disposed of. Accordingly, and as an interim arrangement pending the resolution of the joint grievance, the third respondent was required to render her services in terms of her job description and in terms of projects assigned to her albeit that she would be reporting to Baijnath

instead of the ED. This arrangement endured until at least February/March 2014.

- [31] On or about 17 September 2012 and by way of a letter addressed to the applicant's Professor Makhanya, the third respondent asked to be paid out the balance of her fixed term contract plus an additional five years in line with her conditions of employment as a measure of terminating the relationship with UNISA. In doing so, she highlighted various issues among which were allegations of— *"continuous torture and the assassination of my character by the institution"*. She concluded her letter by reserving her rights to— *"... litigate and to forward the matter to the Public Protector or my appropriate tribunal or court should UNISA fail to respond within seven calendar days"*.
- [32] UNISA did not accede to her request. It instead, through a letter dated 6 October 2012 to NEHAWU, expressed the view that it would be in the interests of all parties concerned that the joint grievance be dealt with as it dealt with various allegations that in the interests of justice should be properly ventilated. UNISA reiterated its view that in terms of sound practice the joint grievance hearing could only be dealt with once the disciplinary hearing of Van der Merwe had been finalised.
- [33] On or about 5 October 2012 NEHAWU referred an unfair labour practice dispute to the CCMA under case number GATW 13697/12 which dispute was conciliated on 23 January 2013. A certificate of outcome was issued by the CCMA under case number GATW 13697/12 on the same day and in terms of which the dispute was characterised as an interpretation and application of section 186(2)(a).² The latter section of the LRA refers to

² Section 186(2)(a) provides:

- "(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—
- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to

an unfair labour practice in respect of any act or omission involving unfair conduct by an employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee. In terms of the certificate, the third respondent was entitled to refer, should she wish, the dispute to arbitration. It is common cause between the parties that neither she nor NEHAWU pursued the dispute. In referring the dispute to the CCMA which was ultimately conciliated on 23 January 2013, the third respondent in her referral form summarises the facts of the dispute as:

“The employee lodged a grievance of unfair labour practice against the employer jointly with Mr Deon Van der Merwe. Now the employer does not want to deal with the joint grievance.”

[34] In the outcome required for conciliation she states:

“I need the dispute to include Mr Deon Van der Merwe as a joint grievance.”

[35] From February to May 2013 it appears that various correspondence was exchanged between NEHAWU, UNISA and the third respondent in respect of the as yet unresolved joint grievance.

[36] On 22 August 2013 one of UNISA’s employee’s, a certain Mr Willem Du Plessis, reported to it and the ED that the third respondent had allegedly uttered words to the effect that she had wanted to stab the ED in the neck with a long knife.

[37] It would appear that the ED, upon hearing about the alleged statement uttered by the third respondent stated that she felt threatened and

probation) or training of an employee or relating to the provision of benefits to an employee.”

accordingly instructed a firm of attorneys, namely MacRoberts Attorneys (who also represent UNISA) to pen a letter of demand on her behalf to the third respondent in which they demanded a written undertaking from her that she will not threaten their client. The MacRoberts letter appears to have been sent to the third respondent on or about September 2013.

- [38] In the meantime, on or about 9 September 2013 UNISA had issued the third respondent with a notice of intention to suspend and invited her to make representations on why she ought not to be suspended so that it could investigate the alleged threat that she had made against the ED. Submissions were made, the upshot of which was that UNISA decided not to suspend her. She was however informed that UNISA viewed the allegation of a threat against the ED in a serious light and would investigate the allegations. It is important to remember that at this stage, the interim arrangements were in place in terms of which the ED was not in the same building as the third respondent which interim arrangements also included the third respondent reporting to Baijnath rather than the ED. Furthermore, the organisational restructuring initiated by the ED had been implemented and was fully functional for quite some time at that stage. The latter allegation made in the applicant's founding affidavit was not denied by the third respondent.
- [39] On or about 21 October 2013 the third respondent was issued with a notice to attend a disciplinary hearing which was to have taken place on 26 November 2013 but was not held on that date.
- [40] Early in 2014 and upon the reopening for the academic year a fresh notice to attend a disciplinary hearing was issued to the third respondent, this time scheduling the hearing for 3 March 2014. Again the hearing scheduled for 3 March 2014 did not take place. The hearing was rescheduled to be heard on 11 April 2014.

- [41] At the same time and during February 2014 the joint grievance lodged by Van der Merwe and the third respondent was eventually heard. A report was issued into the joint grievance on 24 February 2014. The outcome was communicated to the third respondent by Professor Makhanya in which he stated, among other things, that the university would not be paying out the third respondent's remaining term of her employment contract, it had requested that the Portfolio Manager prepare a detailed plan of action through which the third respondent will *"engage the relational issues in the department"*. The detailed plan, she was informed, will be focused *"unambiguously on rebuilding the trust that appears to be absent at this point in the department"*. Professor Makhanya ended her letter by stating that she was hopeful that despite all that had happened the third respondent will make all efforts towards rebuilding the ICT Department and that if all parties worked together they will be able to put the past behind them and move forward towards a more positive relationship. Most importantly she stated that:

"My door remains open to you: so, please do not hesitate to discuss any further concerns with me should a need arise during this process of rebuilding and growth."

- [42] On or about 26 February 2014 NEHAWU responded to Makhanya's letter, presumably on behalf of the third respondent, in essence accepting the need for all parties to commit themselves to building the university in order to allow it to continue with its business.
- [43] The ED in turn replied to the report by stating that before moving to an action plan she suggested that a conversation between all affected parties takes place so that— *"we are able to talk about each other's intentions and how we are going to create a safe environment to work in for all of us"*.

[44] On 27 March 2014 the third respondent resigned in accordance with the letter dealt with above.

[45] It is common cause between the parties that UNISA initially purported not to accept the third respondent's resignation and decided to proceed with her disciplinary hearing. However, it eventually conceded that having regard to the immediate nature of the resignation it could not proceed with the disciplinary hearing. Consequently, the third respondent referred the dispute to the CCMA alleging unfair constructive dismissal.

Analysis

[46] The arbitrator has found that the third respondent's resignation amounted to a dismissal and that the dismissal was constructively unfair.

[47] I will return to the arbitrator's award shortly. Before doing so it is important to have regard to what the third respondent says was the reason for her resignation as captured in her answering affidavit.³ She states at paragraph 32 of her answering affidavit that:

"I realised that the attempts to resolve the issues between Ms Sangqu and myself were futile and I decided to resign based on constructive dismissal as it was clear the Ms Sangqu did not want to work with me, taking into account further the way I had been treated all this time."

[48] Going back to the arbitrator's award, he records the submissions made by the third respondent in support of her contention that she was unfairly dismissed as follows:

48.1 The restructuring was done without consultation with her and had a detrimental effect on her;

³ See page 144 of the paginated record.

- 48.2 her contract was not amended in spite of her original job description being unsigned it was *de facto* applicable;
- 48.3 her contract provided for direct supervision over the director but the new structure provided only a dotted line reporting function to her and a solid line reporting to the ED;
- 48.4 there was a material reduction in her responsibilities and status - she was demoted;
- 48.5 the special leave letter by the PVC implies she was the cause of the deteriorating relationship with the ED and fails to address why she was singled out and not the ED – in principle the special leave was unjust and in bad faith;
- 48.6 she was unable to perform her usual tasks in isolation from the ICT in her special office;
- 48.7 the special leave instilled a sense of fear, discrimination and victimisation in her;
- 48.8 the cumulative effect of the special leave, being excluded from ICT meetings and MacRobert's letter was to deny her the contractual right to perform her duties and also destroyed the relationship between her and the ED;
- 48.9 the ED's conduct was bullying towards her and calculated to drive her from employment as shown by the ED's email of 6 April 2011;
- 48.10 she took all reasonable steps to exhaust her grievances;
- 48.11 the last straw was the decision of the principal accepting the grievance report, rejecting a financial settlement and that she return to the ICT department despite MacRobert's letter, under an action plan by the PVC; her letter of resignation summarises her grounds of constructive dismissal; and
- 48.12 lastly, that she took issue with the delay in finalising her grievance which she alleged was contrary to UNISA's grievance policy and amounted to a denial of justice and a violation of her rights.

[49] The commissioner correctly summarises in his award the legal test for ascertaining whether an employee who resigned had been constructively dismissed. He records that the main events that were ventilated during the arbitration were not in dispute and that it was accordingly not necessary to make specific findings as to fault or misconduct in the *“mainly relational disputes in this case”*.

[50] He then proceeds to state that there are two basic separable aspects to the third respondent's grievance. He says these are:

50.1 The restructuring; and

50.2 Secondly, *“the relational problem with the ED”*.

[51] I fail to understand the commissioner's reasoning when he then goes on to find that there was a drastic curtailment of the third respondent's responsibilities and status when this very allegation was disputed by UNISA. It is noteworthy that the record of the arbitration confirms that the third respondent conceded during cross-examination that the structural changes introduced in January 2011 were in accordance with UNISA's prerogative. This is an important concession because it suggest that the third respondent conceded that the changes which were introduced were not so material as to affect her terms and conditions of employment materially. In other words, were the changes in respect of work practices (requiring consultation) or fundamental terms of the contract (requiring agreement) changes to the letter cannot be done without agreement and would amount to a breach of contract entitling, in certain circumstances, the employee to accept the breach and claim constructive dismissal. However, a change to work practices which requires consultation, does not go to the heart of the contract between the parties. A failure to consult can hardly be used as the justification to resile from the contact as a whole. The importance of this distinction seems to have been lost to the arbitrator. He accordingly misconstrued

the issue before him and committed a reviewable irregularity. His finding that the applicant's "superficial" consultation with the third respondent somehow justifies her resignation or renders it constructive dismissal is not sustainable having regard to the evidence. The arbitrator's conflation of the joint grievance and the restructuring is also curious. He says that the joint grievance was filed in December 2011 but the outcome only conveyed by the principal on 24 February 2014 some two years and a few weeks later. What the arbitrator does not explain is why then, if he is correct, the third respondent only resigned in 2014 if on the common cause facts the restructuring was in full swing at least as at January 2012. What then, the question remains, was the proverbial straw that broke the camel's back? It is clear that on the arbitrator's own reasoning the employee endured the restructured position for at least two years prior to resigning on 27 March 2014. What had changed?

[52] The joint grievance lodged by the third respondent and Van der Merwe was dealt with. This much is common cause. Also common cause is that UNISA had explained to the third respondent that the reason that it could not immediately deal with the joint grievance was due to the pending disciplinary hearing of Van der Merwe. The third respondent did not take issue with it nor did NEHAWU. In any event, even if she did, it is important to take note of the fact that having referred a dispute to the CCMA, alleging that the employer had failed to deal with her grievance, she pointedly asked that her grievance be dealt with as a joint grievance with Van der Merwe. She herself did not want her grievance to be separated from Van der Merwe. The arbitrator fails to take this into account and which failure indicates to me that he committed a gross irregularity and failed to consider the evidence before him.

[53] He then further goes on to state, when dealing with what he calls the "*relational issues*", that those issues did affect the disciplinary case against Van der Merwe and that accordingly "*it is accepted that the Respondent (UNISA) was reasonable in first wishing to complete the*

disciplinary hearing". He seems to accept that there was at least reason to delay finally disposing of the joint grievance. What he seems to take issue with is the fact that there was an additional delay from January 2013 when the disciplinary hearing of Van der Merwe was apparently finalised to February 2014 when the joint grievance was disposed of. However, key to all of this is a failure by the arbitrator to consider what is a common cause fact between the parties. That is that the joint grievance was eventually dealt with and the outcome communicated to all parties concerned including the third respondent. Furthermore, and most importantly, that in communicating the outcome of the joint grievance to the third respondent, UNISA had informed her that its door remained open to her and she should not hesitate to discuss any further concerns with it should the need arise in respect of the mooted process of rebuilding and growth. This to me means that there was a reasonable alternative available to the third respondent rather than resigning when the outcome of the joint grievance was communicated to her. The arbitrator should have considered whether this reason, objectively and reasonably viewed is substantiated on the facts. It is clearly not having regard to the invitation extended to the third respondent to discuss any concerns she may have had regarding the proposed way forward to rebuild the Department.

- [54] It seems to me that a reasonable alternative is apparent from the fact that UNISA had committed itself, and to some extent the ED too, to rebuilding the relationship between the third respondent and the ED. One would have expected a reasonable person in the third respondent's position to have given the mooted processes space to see if, with time, the strained relationship between her and the ED could be mended. Her resignation on 27 March 2014 seems to me to have been premature having regard to the commitment by UNISA and to some extent the ED to move forward and the fact that if in any event she was not happy with the outcome of the joint grievance UNISA's door "*remains open*". She chose

not to make use of this open door and resigned. Her conduct in this regard objectively viewed, was unreasonable.

The test on review

[55] In a case of an alleged constructive dismissal the enquiry is centred on whether or not there was a dismissal. This question must be determined prior to looking into the fairness thereof. The question of whether a dismissal has taken place, goes to jurisdiction. The Labour Appeal Court in *South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another*⁴ held that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ does not find application in reviewing a jurisdictional ruling.

In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others*⁶ Steenkamp J explained this test as follows:

“In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration - or on review by the Labour Court - is whether the dismissal was fair, and whether the finding of the arbitrator in this regard was reasonable.

In the case of an alleged constructive dismissal in terms of s 186(1)(e), though, the prior question is whether there was a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case. Only then can the commissioner decide if there was a dismissal as defined. If so, the commissioner must still decide whether it was fair. If not, though, the

⁴ [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); [2008] 29 ILJ 2218 (LAC) at paras 39-41.

⁵ [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

⁶ (2012) 33 ILJ 363 (LC) at para 20-1.

CCMA did not have jurisdiction in the first place, even though the commissioner can only make that finding ex post facto.”

The test for constructive dismissal

[56] Section 186(1)(e) of the LRA defines a constructive dismissal to mean—

“an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”⁷

It is trite in our law that where alleged constructive dismissal is concerned, the onus rests squarely on the shoulders of the party alleging it and that such a party must prove that her resignation was not voluntary and not intended to terminate the employment relationship.⁸ Once this onus has been discharged, the conduct of the employer must be assessed and the question then is whether the employee could reasonably have been expected to put up with the conduct of the employer.⁹ The mere fact that an employee resigns because work

⁷ In *Eagleton v You Asked Services (Pty) Ltd* [2008] ZALC 102; [2008] 11 BLLR 1040 (LC); (2009) 30 ILJ 320 (LC) at para 22 this Court set out the requirements for a constructive dismissal as follows:

“In order to prove a claim for constructive dismissal, the employee must satisfy the Court that the following three requirements are present:

- (i) The employee terminated the contract of employment (the employee has resigned).
- (ii) Continued employment has become intolerable for the employee;
- (iii) The employer must have made continued employment intolerable.”

⁸ *Murray v Minister of Defence* [2008] ZASCA 44; [2008] 6 BLLR 513 (SCA) ; 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at para 12.

⁹ Id. The Supreme Court of Appeal reasoned that—

“These cases have established that the onus rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the

became intolerable does not, in and by itself, make for a constructive dismissal.¹⁰ I agree with the applicant that this indeed is the law.

- [57] Having regard to the conspectus of the facts as summarised above, I am satisfied that the commissioner's award must be reviewed and set aside in circumstances where he failed to correctly consider whether a dismissal took place in this case. The facts presented to him and as set out above, did not allow for the finding that there was a dismissal. The third respondent had other reasonable options available to her rather than resign on 27 March 2014. In addition, to the extent that the third respondent pivots her case on the restructuring that took place, it is of some importance to take note of the fact that the restructuring had been in effect for some years prior to her resignation on 27 March 2014. She endured it for two years, why then come 2014 this was all of a sudden too much for her. In any event, it is also worth noting that she did not, as she had previously done, refer any dispute to either the CCMA or the Labour Court challenging the restructuring if she was indeed aggrieved. It is particularly important to have regard to the fact during her saga with the ED, she had NEHAWU in her corner. She quite evidently had another reasonable option, if indeed the restructuring was the cause of her resignation, to have pursued an unfair labour practice against UNISA at the CCMA. The fact that she chose not to do so would suggest that she was prepared to endure the state of affairs.¹¹

employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it." (Footnotes omitted.)

¹⁰ Id at para 13.

¹¹ In *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 984 the Labour Appeal Court held:

"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

[58] Furthermore, insofar as what the commissioner calls “relational issues” are concerned, I agree with the applicant that the third respondent was prepared over a number of years to endure the conflict between herself and the ED without resigning and to be transferred to a different building. The suggestion that somehow being placed on special leave could have led to her dismissal is with respect, a red herring. It will be recalled that she was on special leave for a period of only five months. Her special leave was uplifted effective 1 June 2012 from which point she worked in terms of an interim arrangement pending the resolution of the joint grievance that had been filed by her and Van der Merwe. This is not an issue which should have weighed on the commissioner’s mind.

[59] The outcome of the joint grievance hearing indicates that the grievance had been resolved and that a plan was to be implemented to manage the relational issues within the Department and furthermore that the third respondent was invited, should she have concerns regarding the mooted plan, to raise these with UNISA. She chose not to do so but resigned. Her conduct in this regard objectively viewed is unreasonable and indeed indicates that she intended to sever the employment relationship between herself and UNISA and cannot be said to have been dismissed. I find that her resignation could not have been as a result of the

the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.

Where she proves the creation of the unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end. . . .” (Emphasis added.)

Further, the Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others* [2009] ZACC 17; (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC); 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC); [2009] 9 BLLR 847 (CC) at para 4 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.

employment relationship or working conditions becoming intolerable.¹² I agree with the applicant that the only inference that can be drawn from the facts is that the third respondent resigned to avoid the looming disciplinary hearing into the allegation that she made a serious threat against the ED.¹³

Bias

[60] The applicant had also attacked the arbitration award on the basis that the commissioner's conduct viewed in the context of what took place at the arbitration hearing raised a reasonable apprehension of bias. I do not agree with this contention. The applicant alleges that the manner in which the arbitrator engaged the ED surrounding her version on how the new structure had been approved by UNISA, having regard to his tone and body language, suggests that he was biased. As I say, I do not agree. This is because I do not find any evidence of bias or that could lead to a reasonable apprehension of bias. It should be remembered that a commissioner and indeed any adjudicator of fact, is entitled to interact with witnesses for purposes of clarification and requesting them to assist him or her in respect of the difficulties that they may have with a particular version. Indeed, this is particularly so in circumstances where litigants are not represented by legal practitioners. It seems to me that the commissioner's interaction with the ED regarding the reporting lines

¹² In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen & others* above n 6 at para 34 Steenkamp J reasoned thus—

“The authorities referred to above seem to me to establish that, *where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee*. By referring to these authorities, the Constitutional Court appears to have affirmed this principle, while at the same time pointing out that the employee need not establish that he or she had no choice whatsoever but to resign. *The emphasis is on whether a reasonable alternative exists.*” (Emphasis added.)

¹³ Id at para 38 where Steenkamp J pointed out that—

“... it was held in *You Asked Services* that resignation in the face of poor performance management does not give rise to a constructive dismissal claim. What about resignation in the face of possible dismissal following a disciplinary hearing? In terms of the dictum in *Smithkline Beecham*, an applicant who resigns pending a disciplinary hearing would have a hard case to meet in order to prove constructive dismissal.”

properly viewed, was nothing more than an attempt to afford UNISA an opportunity to assist him with the difficulty he was having in respect of a particular aspect of its case. I do not agree that he misconceived his role and the nature of the enquiry he was called upon to decide. In the circumstances the attack, based on the bias of the commissioner, is dismissed.

Conclusion

- [61] In conclusion therefore, I find that the commissioner, notwithstanding the fact that he was aware that resignation should be a last resort and that there must be no other reasonable options open to an employee who claims constructive dismissal, but to resign, failed to take into account the totality of the evidence before him. He should have considered the cumulative impact of the conduct complained of by the third respondent and adjudged whether such conduct, viewed reasonably and sensibly was such that the third respondent could not be expected to put up with it. His finding in respect of the restructuring exercise at UNISA was simply incorrect on the facts. In addition his finding regarding the relationship between the third respondent and the ED is also incorrect. The probabilities are that the third respondent resigned to avoid her upcoming disciplinary hearing.
- [62] Having regard to my findings it is not necessary to deal with the challenge brought by the applicant in respect of the compensation that was ultimately awarded by the arbitrator. I have found that the commissioner's reasoning is not justifiable having regard to the evidence before him and that in any event, based on the facts it was incorrect. It follows that there was no constructive dismissal and as such there can be no unfairness justifying compensation. The order for compensation is accordingly set aside.

Order

[63] In the premises I make the following order:

1. The second respondent's arbitration award dated 28 October 2014 under case number GATW4148-14 is reviewed and set aside in its entirety;
2. The award is substituted with the finding that the third respondent was not dismissed by the applicant and consequently was not constructively dismissed.
3. There is no order as to costs.

J Mothibi

Acting Judge of the Labour Court of South Africa

APPEARANCES

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LABOUR COURT