



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1375/20

In the matter between:

SANITECH (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

TUMELO MNISI N.O

Second Respondent

JEANETTE MICHELLE VAN DER MERWE

Third Respondent

Heard: 15 October 2024

Delivered: 28 May 2025

(This judgment was handed down electronically by emailing a copy to the parties. The 28th May 2025 is deemed to be the date of delivery of this judgment).

JUDGMENT

MAHALELO, AJ

Introduction

[1] This is a review application brought in terms of section 145 of the Labour Relations Act¹ (LRA). The applicant (company) is challenging the arbitration award issued by the second respondent (Commissioner) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) dated 14 August 2020 in which the commissioner found that the dismissal of the third respondent (Ms van der Merwe) was procedurally and substantively unfair and ordered compensation equivalent to six months.

[2] The review application is opposed by Ms Van Der Merwe.

[3] In her answering affidavit Ms Van Der Merwe had raised several points *in limine* some of which were abandoned at the commencement of the hearing. I found that there was no merit in the once that remained and chose to deal with the merits of the review.

Background facts

[4] Ms Van Der Merwe commenced employment with Sanitech on 16 January 2016 as an integrated sales consultant. During July 2018, she was promoted to National Business Development Manager, the position she held until her termination of employment on 28 April 2020.

[5] March 2020 sparked an entirely new and unprecedented time for the world at large due to the Coronavirus. The applicant company, along with all other businesses in South Africa, were faced with immense uncertainty regarding how the national lockdown would impact its ability to operate indefinitely. The circumstances then called for the implementation of measures to limit and protect the financial

¹ Act 66 of 1995, as amended.

exposures of everybody, including the applicant company. The applicant company introduced various initiatives to this end with the goal of preserving the jobs of its employees, including Ms Van Der Merwe.

[6] On 26 March 2020, a meeting was held with the company's staff ahead of the hard lockdown due to the outbreak of the Coronavirus pandemic. On the same day, the employees were issued with a letter from the holding company WACO Africa informing them *inter alia*, that as a means '*to save cash and protect jobs the company is proposing a three months' salary cut of 17% on all employees earning above the threshold of R150 000.00 per annum, and 12% on all employees earning below threshold of R150 000.00 per annum*'. The former applied to Ms Van Der Merwe.

[7] On 3 April 2020, Ms Van Der Merwe telephonically communicated with her line manager, Mr Oliver, where she told him that she would be sending questions regarding the proposed salary cut. On 6 April 2020, she submitted her written questions and concerns to Mr Oliver and the HR Generalist and General Manager regarding the proposed salary cut. In the written communication, she expressly stated that:

'Unfortunately, my present financial position and obligations does not allow me to take the R8400.00 drop in my salary. I cannot consent to this deduction off my salary... before I make a financial decision regarding the salary reduction and retirement/provident fund hiatus I require some more information as outlined above.'

[8] On 6 April 2020, Mr Oliver responded that he would forward the letter to management. On 14 April 2020, Ms Van Der Merwe had a telephone conversation with Mr Erasmus, the Managing Director. During this conversation, Ms Van Der Merwe raised her concerns about not receiving an exemplary payslip so that she could see what the proposed salary cut would look like and what its impact would be. Nothing concrete came out of the discussion.

[9] On 17 April 2020, the company issued all its employees with a letter headed '*letter to all staff who will be taking a salary deduction of either 17% or 12% for 3*

months due to the corona virus pandemic'. The letter recorded that the company's staff's *'understanding of this difficult situation has been overwhelming, thank you'*. The letter went further to set out what steps the company will take to implement the salary reductions, and the right of employees to claim from the COVID-19 TERS UIF scheme. In conclusion, the company stated in the letter that if any of the employees had questions or concerns, they could speak to their managers or HR manager.

[10] Following this communication and the conversation Ms Van Der Merwe had with Mr Erasmus, she, on 18 April 2020, sent communication to Mr Erasmus wherein she confirmed that her stance in the matter remained the same and that she is not able to consent to a salary reduction. On 24 April 2020, the Financial Director informed Ms Van Der Merwe that the salary cut had indeed been implemented on her salary. On 28 April 2020, Ms Van Der Merwe tendered her immediate resignation, stating that the company unilaterally made the salary cut and withheld paying over the pension fund contributions in her April 2020 salary in the amount of R8486.40.

[11] Subsequently, she referred a dispute of constructive dismissal to the CCMA. The matter was conciliated, and a certificate of non-resolution was issued. The dispute was then referred to arbitration, which culminated in an award issued on 14 August 2020.

The arbitration proceedings

[12] Ms Van Der Merwe was the only witness in her case. The company led the evidence of Mr Wesley Smith, its General Manager.

[13] Before the commissioner, Ms Van Der Merwe testified that the company issued her with a proposal to cut her salary by 17% and put her provident fund on payment holiday for three months. In the proposal, it was stated that should she refuse to accept the proposal, she will either be placed on unpaid leave, take voluntary severance pay or be subjected to a section 189 process. She responded by informing her employer that it was illegal to cut her salary and that she does not accept the salary cut and payment holiday on the provident fund. She testified that

she informed her employer on three occasions that she was not accepting the proposal.

[14] On 14 April 2020, she received a call from the Managing Director informing her of the reasons the company had to implement the salary cuts. She informed the Managing Director that since the company was doing financially well despite COVID-19 restrictions, there was no need for her salary to be cut.

[15] The Managing Director informed her that her salary would be reduced by 17% for three months and that it was non-negotiable. Indeed, in April 2020, her salary was reduced by 17%, and her provident fund was also not paid. According to her, reducing her salary and placing her provident fund on a payment holiday were major amendments which should not have been effected without her consent, as her contract of employment stipulated that: *'Amendments and extensions. The Company reserves the right to alter, amend or extend its conditions of employment from time to time, provided that such changes shall not be unreasonable or in conflict with prevailing legislation. Any major amendments to the conditions of employment shall be mutually agreed upon and reduced to writing'*. She tendered her resignation on 28 April 2020. Thereafter, the amount of R8486.40 that was cut from her salary was repaid to her at the end of May 2020.

[16] According to Ms Van Der Merwe, there was no business rationale for the reduction of salaries of employees, including herself, as the company was profitable during that period and two of its staff members received increases and promotions. In her view, the company, by its conduct, was making continued employment untenable for her.

[17] Mr Smith testified that Ms Van Der Merwe's salary was not affected by the salary reduction because TERS covered a portion of her salary. In April 2020, she received slightly more money than in other months. Management had discussions and negotiated with her before the salary cut was implemented. In April 2020, her salary was cut by 17%; however, in May 2020, a reversal adjustment for the deduction that was made in April 2020 was made. He confirmed that two of the company's employees received increases and promotions during the same period.

The award

[18] In the award, the commissioner noted that she had to decide if Ms Van der Merwe was constructively dismissed by the company. Should she find that there was constructive dismissal, she then had to decide on the appropriate relief.

[19] She referred to the decision of *Niland v Ntabeni NO and Others*² where it was held that in order for a dismissal to fall within the ambit of section 186(1)(e) and thus be considered to be constructive dismissal, the facts must prove that the sole reason the employee left her employment was due to the continued intolerable employment relationship caused by the employer. The continuance of employment, even following the intolerable event or conduct, may invalidate a claim of constructive dismissal, especially where intolerability was not raised with the employer during such period so as to give him an opportunity to remedy same.

[20] The commissioner analysed the evidence presented before her and recorded that:

‘20. It is common cause that Ms Van der Merwe did not accept the salary cut and the payment holiday on her Provident fund. It is further common cause that the respondent still went ahead and cut her salary by 17% and did not deduct Provident fund. The bone of contention is whether such changes made continued employment intolerable. According to the respondent, Ms Van Der Merwe still received her full pay because TERS paid a portion of her salary.

21. According to the proposal that was made to Ms Van der Merwe, it was mentioned that if she does not accept the salary cut, the respondent will be forced to either place her on no work no pay, voluntary severance pay or embark on Section 189 of the LRA. The respondent implemented the changes without Ms Van Der Merwe's consent and despite their proposal of what will happen should she not accept the changes.

² [2019] JOL 43777 (LC).

22. It is immaterial that TERS paid part of Ms van der Merwe's salary. The respondent reduced her salary by 17% and did not make payment to her Provident fund. All this was done without her consent. The amount paid by TERS does not even cover the 17% reduction that was made to her salary. TERS paid R4027.56 and the salary reduction amount to R8486.40

23. It was put to Miss Van der Merwe during cross examination that the reason her salary was cut was because she only refused to accept the changes after the month end salary cut off date. Hence the deductions were paid back to her in the month of May 2020.

24. If indeed the above mentioned is a fact, then the question that remains unanswered satisfactorily is why did the respondent not communicate such to her when it received her resignation letter. Ms Van Merwe stipulated on her resignation that the reason for her resignation is the changes that the respondent made to her terms and conditions of employment. Instead of the respondent remedying the situation, it gladly accepted her resignation. The respondent had an opportunity to remedy the situation but failed to do so.

25. It was unfair for the respondent to make such major amendments to her terms and conditions without her consent. This was a clear infringement of a right to fair labour practice and it was in contravention of clause 14 of her contract of employment. Even if the respondent had a business rationale to make such amendment, which in this case I am of the view that it did not, it was obliged to consult and obtain her consent. Ms Van Der Merwe led unchallenged testimony that the respondent was in a good financial state as it was making money during lockdown. Furthermore, it makes no business sense that you want to reduce your employees' salary but at the same time you give others an increase.

26. Based on the above, I am of a considered view that. Ms Van Der Merwe was constructively dismissed by the respondent. Ms Van der Merwe sought compensation, and I do not see any reason why such relief should not be granted. She has been working for the respondent for four years prior to her dismissal. She would not have resigned if it was not for the continued employment that was made intolerable by the respondent. She is currently employed, however, with a lower salary than what she used to receive from the respondent."

27. I am of the view that six months' compensation is just an equitable in these circumstances. The respondent is ordered to compensate Ms Van der Merwe a total amount of R49920.00 X 6 months = R299 520.00.'

[21] It is clear in the present award that the arbitrator does not separate the analysis by dealing first with the existence of the dismissal, then with the fairness thereof. Instead, having weighed up all the considerations, the arbitrator held that Ms Van Der Merwe was constructively dismissed.

Grounds for review

[22] The company alleges that the commissioner committed an irregularity in that:

22.1 She accepted the argument, logic and rationale of Ms Van Der Merwe when finding that the company had made continued employment untenable for her;

22.2 She failed to consider that, had Ms Van Der Merwe exercised a little restraint and proceeded to initiate a grievance, her resignation might have in fact been averted,

22.3 She failed to consider the evidence of the applicant that there was minimal prejudice which would be sustained by Ms Van Der Merwe in these circumstances.

22.4 She failed to appreciate the fact that the deduction was made good, so to speak, at the end of May 2020; and

22.5 She shifted the onus to the company, contrary to the principles related to the onus being on the employee to prove that she was constructively dismissed, by asking the company why it had not provided Ms Van Der Merwe with reasons that the company had advanced for the salary deductions being made at the end of April 2020.

22.6 She gave undue weight to the financial circumstances of Ms Van Der Merwe and in so doing derailed the course of action by relying heavily on immaterial circumstances.

22.7 She acted beyond the scope of her duties as a commissioner and made a ruling which was irregular and unreasonable.

22.8 She failed to adequately consider that Ms Van der Merwe failed to provide sufficient evidence to support her claim that the applicant had made her employment intolerable and untenable in justification for bringing the constructive dismissal claim.

[23] In essence, the case for the company pivots on the finding that the arbitrator failed to properly identify the issue to be decided before him, the nature of the dispute, and that as Ms Van Der Merwe had not followed the internal grievance procedure before resigning in circumstances where dismissal was not a last resort, the arbitrator had committed gross irregularity in finding that the company's conduct had made continued employment intolerable for Ms Van Der Merwe.

The law on constructive dismissal

[24] In challenging any dismissal, it is the employee who bears the onus to prove that she was dismissed and the employer who must prove that the dismissal was fair.³

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

‘(A)n employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.’

[26] Whilst it might seem that it is always unfair to make continued employment intolerable, our courts have stressed that a constructive dismissal is not inherently unfair. Constructive dismissal disputes accordingly must undertake the usual two-stage inquiry, which is firstly, whether the employees' resignation amounted to a dismissal and secondly, whether the dismissal was fair.

[27] In *Bakker v Commission for Conciliation, Mediation and Arbitration and Others*⁴ Witcher J stated as follows:

³ Section 192 of the LRA.

⁴ (2018) 39 ILJ 1568 (LC) at para 10.

'Once it has been proven that a constructive dismissal has occurred, the onus shifts to the employer to prove that it did not act unfairly. A two-stage approach is thus envisaged. The central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair. A court will consider the circumstances with a view to establishing whether the employer's conduct was justified. The focus will be on the substantive fairness of the dismissal as procedural fairness plays little or no role in most constructive dismissal cases.'

[28] In *National Health Laboratory Service v Yona and Others*⁵, the Labour Appeal Court stated:

'In other words, 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. Ms Yona terminated her employment relationship with the appellant by resigning with a month's notice. She alleged that the resignation constituted a constructive dismissal in terms of s 186(1)(e) of the LRA. The appellant denied that Ms Yona was dismissed at all. Ms Yona bore the onus to prove her alleged constructive dismissal. 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.'

Test on review in constructive dismissal disputes

[29] The review test on whether a resignation amounted to a constructive dismissal is correctness, not reasonableness.⁶ If the Court is satisfied that the

⁵ (2015) 36 ILJ 2259 (LAC) at para 30. See also *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) (*Loots*) at 984E – F.

⁶ *Conti Print CC v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2245 (LAC) at para 6. See also *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) at paras 39 – 40, *NUMSA obo Zahela and Others v Volkswagen SA*

employee was dismissed, it must apply the usual *Sidumo*⁷ reasonableness tests on review of the decision as to fairness. The test focuses on the outcome; in other words, the question to be asked is whether the arbitrator's decision is capable of reasonable justification on all the material that was before the arbitrator.

[30] For a claimant of constructive dismissal to succeed, he/she must prove that the employer has made continued employment intolerable.

Intolerability

[31] The test for intolerability is objective. The court examines both the circumstances themselves and the employee's response thereto. The circumstances must be demonstrated to be insufferable and too great to bear, to the extent that no reasonable employee can be expected to put up with them. The employee must show something more than bad treatment or a difficult, unpleasant or stressful working environment. An employee faced with an unbearable circumstance should not opportunistically resign but should make a reasonable effort to preserve the employment relationship. The Labour Court has held that if an employee is too impatient to wait for the outcome of the employer's attempts to find a solution to the perceived intolerable situation and resigns, then constructive dismissal is almost always out of the question.⁸ Furthermore, the Court has held that an employee who resigns instead of taking an opportunity to defend herself in terms of an LRA process, such as a disciplinary enquiry or a performance counselling process, cannot claim constructive dismissal.⁹

[32] In *Strategic Liquor Services v Mvumbi NO and Others*¹⁰ (*Strategic Liquor Services*), the Constitutional Court 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. There is thus

(Pty) Ltd and Others, unreported judgment under case no: PR137/13 delivered 18 November 2016 at paras 5 – 6.

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

⁸ *Smithkline Beechman (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2000) 21 ILJ 988 (LC) (*Smithkline*)

⁹ *Hickman v Tsatsimpe N.O. and Others* [2012] 5 BLLR 493 (LC) at para 52.

¹⁰ (2009) 30 ILJ 1526 (CC) at para 4.

a fundamental shift from the test from one in which the employee had no option to resign, to one in which no other option was reasonably available to an employee save for resignation. The shift is thus from a strict test to one that is slightly less strict.¹¹

[33] In *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) and Others*,¹² Hulley AJ opined that what the court said in *Strategic Liquor Services* must be understood to mean the absence of reasonable alternatives. He said:¹³

‘[129] It seems to me that this latter statement must be understood to exclude a ‘reasonable’ choice. If it was intended to mean that an employee was not required to demonstrate that he or she had no ‘reasonable’ alternatives to resignation it would be in conflict with the language of the section. Quite apart from all the authorities on the question, the ordinary meaning of the word “intolerable” connotes the absence of a (reasonable) choice. I emphasise the meaning of the phrase intolerable, and its various synonyms as set out above. If an employee has reasonable alternatives, it implies that the conduct of the employer is not unbearable or not beyond the limits of tolerance.

[130] Thus, in *Albany Bakeries, supra*, Pillay AJA, with reference to the judgment of Conradie JA in *Old Mutual Group Schemes v Dreyer and Another* held:

“[28] Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it

¹¹ *Experian Regent Insurance Co Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2013) 34 ILJ 410 (LC) at para 47.

¹² (2013) 34 ILJ 3184 (LC).

¹³ At paras 129 - 131.

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. ...

[30] In addition, even if an employee was dissatisfied with the manner in which he was dealt with in terms of the grievance procedure, he could have made use of the machinery of the Act. Schedule 7 item 2(1)(b) of the Act provides that an employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the provision of benefits to an employee. A person alleging an unfair labour practice relating to demotion may refer the matter to a council or if no council has jurisdiction to the CCMA for conciliation and arbitration. The first respondent did not make use of any of these procedures.”

[131] If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s 23 of the Constitution which requires that fairness be viewed from the perspective of both employer and employee.”

Evaluation and conclusion

[34] This Court is called upon to decide whether the finding by the arbitrator that Ms Van Der Merwe’s resignation amounted to a constructive dismissal is right or wrong and, if it determined that Ms Van Der Merwe had indeed been dismissed, whether the outcome reached by the arbitrator was one that a reasonable decision maker would reach on all the evidence.

Was Ms Van Der Merwe constructively dismissed?

[35] The applicant company attacked the arbitrator’s decision on this question on grounds of unreasonableness, whereas the test is in fact correctness. Generally, a

reviewing court is limited to deciding issues raised on the papers. An applicant may not advance a review ground which was not pleaded. This principle yields, however, to the principle of legality. This court is entitled to and even obliged *mero motu* to raise the issue of jurisdiction where the parties have proceeded on a wrong perception of the law.¹⁴

[36] This Court must accordingly determine whether Ms Van Der Merwe's resignation meets the test for constructive dismissal. Did she terminate her employment? Was the reason for her resignation that continued employment was intolerable? Was the employer the cause of the intolerable ability? In *Solid Doors (Pty) Ltd v Commissioner Theron and Others*¹⁵, the Court said:

'... 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 of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.'

[37] *In casu*, it is clear that Ms Van Der Merwe indeed terminated the contract of employment. The next question then is whether she did so because her continued employment became intolerable for her, as a result of the conduct of her employer reducing her salary by 17%. That the unilateral salary cut amounted to a breach of contract is in my view not enough; the question is whether it made her continued employment intolerable.

¹⁴ *Commercial Workers Union of SA v Tao Ying Industries and Others* (2008) 29 ILJ 2461 (CC) at para 68.

¹⁵ 2004) 25 ILJ 2337 (LAC) at para 28.

[38] In *Albany Bakeries Ltd v Van Wyk and Others*¹⁶ (*Albany Bakeries*), the Court specifically referred, with approval, to the following ratio in the judgment of *Pretoria Society for the Care of the Retarded v Loots*¹⁷ (*Loots*):

‘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 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.’

[39] The Court in *Albany Bakeries* then, in applying this ratio, said the following:¹⁸

‘[28] Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.

[29] As is clear from the remarks of Conradie JA an employee should make use of a grievance procedure. ...

¹⁶ (2005) 26 ILJ 2142 (LAC) at para 27.

¹⁷ *Loots supra* at 984D-F.

¹⁸ *Albany Bakeries supra* at paras 28 – 30.

[30] In addition, even if an employee was dissatisfied with the manner in which he was dealt with in terms of the grievance procedure, he could have made use of the machinery of the Act. ...'

[40] In addition to the above, the conduct of the employer which causes the intolerability must be without proper or at least reasonable cause. In deciding this, the court has to consider the conduct of the employer as a whole.

In *Loots*, the Court said:

'The enquiry [is] whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of a contract; the court's function is to look at the employer's conduct as a whole and determine whether... its effect, judged reasonable and sensibly, is such that the employee cannot be expected to put up with it.'¹⁹

[41] I will now proceed to apply the above principles to the facts *in casu*. In objectively considering the facts as a whole, I have little hesitation in finding that Ms Van Der Merwe has simply not discharged the onus of showing that her continued employment was rendered intolerable to the extent that she had no other reasonable option but to resign.

[42] I will now set out the reasons for so finding. The applicant effected a temporary variation in her conditions of employment. This can be seen from the letter from WACO on 26 March 2020, which recorded that '*cutting costs is the only available option to Waco. The only option that remains is to reduce salary and wage costs. The reduction will be for a period of three months*'.

[43] The applicant was facing exceptional circumstances and took steps not only to protect itself but further to preserve the jobs of over 6000 employees.

¹⁹ *Loots supra* at 985A-B.

[44] In *Ferrant v Key Delta*²⁰, the court referred to *McMillan v ARP & P Noordhoek Development Trust*²¹ where it was held that:

‘if the court concludes that the employer’s action amounts to constructive dismissal the question then is whether or not it was justified... The court therefore held that though the changes were made without following a fair procedure and even though the applicant might have been entitled to cancel the employment contract at common law, the court was not convinced that termination of his services amounted to constructive dismissal and to unfair labour practice on that account.’

[45] In *casu*, because there was a letter from the holding company indicating that the salary cut would be only for three months, Ms Van Der Merwe, in my view, could foresee a reversion to the normal work circumstances. She refused steadfastly notwithstanding effective consultation to consent to a temporary cut in her salary under the circumstances. Her impulsive decision to resign was premature and does not constitute dismissal.

[46] Following the deduction of a salary in April 2020, she tendered her resignation without pursuing a formal grievance process and immediately proceeded to secure employment elsewhere. Her circumstances were not unique in any way, nor had she been singled out or victimised by the process which the applicant had undertaken. In my view, had she initiated and followed the policies and procedures, her resignation would have been averted in some way. Ms Van Der Merwe failed to prove the intolerability of the working environment. Her actions do not satisfy the statutory and common law requirements of a constructive dismissal. The arbitrator therefore failed to appreciate the true nature of the enquiry, considered irrelevant evidence, failed to consider relevant evidence by the company and failed to identify and appreciate the true nature of the dispute and failed to apply his mind to the applicable legal principles, and consequently failed to reach a conclusion which a reasonable decision maker could reach in the circumstances. The review application, therefore, stands to succeed.

²⁰ (1993) 14 ILJ 464 (IC) at 468

²¹ (1991) 2 (3) SALLR 1 (IC).

Costs

[47] In consideration of law and fairness, I deem it appropriate to make no order as to costs.

[48] In the result, the following order is made:

Order

1. The arbitration award of the commissioner dated 14 August 2020 is reviewed and set aside, and substituted with the following order:
'The referral to the CCMA is dismissed on the grounds of a lack of jurisdiction.'
2. There is no order as to costs

B Mahalelo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Ms Nina Robertson
Instructed by:	Soldatos Cooper Inc Attorneys
For the Respondent:	Adv B Van Der Merwe
Instructed by:	Allardyce & Partners Attorneys