



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No.: C08/24

In the matter between:

SAMWU OBO TM BEZUIDENHOUT

Applicant

and

KHAI-MA LOCAL MUNICIPALITY

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

M. FOBOTYI. N. O

Third Respondent

Heard: 2 September 2025

Delivered: 11 September 2025

JUDGMENT

KAHANOVITZ, AJ

Introduction

- [1] This is an application brought to review and set aside an arbitration award issued on 8 December 2023 by the third respondent (hereafter "the commissioner") on

behalf of the second respondent, in which the commissioner found that the applicant employee's dismissal was fair.

- [2] Prior to the hearing of this matter, the first respondent, represented by Mr. Davis from the Office of the State Attorney, Kimberly, filed written argument. Mr. Davis also appeared at the hearing and made oral submissions.
- [3] The applicant failed to timeously file heads of argument prior to the hearing, but Adv. Bosman, who appeared on behalf of the applicant at the hearing, sought leave to hand up short written heads of argument. There was no objection from the first respondent, and I have had regard to his oral submissions and written heads of argument.

Summary of the material facts

- [4] The applicant referred a dispute to the second respondent, alleging a constructive dismissal.
- [5] The applicant employee was employed in 2013 as an EPWP¹ officer.
- [6] He testified that he was, in his opinion, badly treated by certain of his superiors over a long period of time.
- [7] On 11 April 2023, he sent a letter to the municipal manager of the first respondent, submitting his resignation and notifying his employer that he would continue to work out his notice. In addition, he noted that he wished to express his thanks or gratitude for the 10 years during which he had been employed by the first respondent.
- [8] The employer wrote back on 14 April 2023, acknowledging receipt as well as its acceptance of his resignation. In addition, the first respondent's acting municipal manager recorded the first respondent's appreciation for his valuable contribution and wished him well with his future endeavours.

¹ This is a reference to the expanded public works programme.

- [9] The first respondent correctly submits that there is nothing in this resignation letter to say that the applicant was resigning because his working environment was hostile or intolerable. On the contrary, he thanked his employer for his 10 years of service.
- [10] Under cross-examination, the applicant said his version was not that his working conditions were unbearable but rather that they were hostile. On his version, this hostility had been present over a long period of time. These working conditions were, according to him, bearable but hostile.
- [11] He complained that over this 10-year period, the employer had hired as many as five municipal managers - each with his own personal baggage and own style of management. This meant that in each case it was up to him to '*adapt or die*'.
- [12] He did not wish to be reinstated on the same terms and conditions, as he did not like the post that he was in and would prefer to instead be put into a position better suited to his talents.
- [13] He had soldiered on for so long in these hostile conditions in the hope that one day things would become better. In cross-examination, he also said he had been a '*deployed official*' whose '*struggle credentials*' had required him to make the sacrifice of taking this job '*as a leader in society*' in an attempt on his part to make a difference. For these reasons, deciding to resign was not an easy decision for him.
- [14] As I understood his explanation, the applicant employee wanted to come back provided that the status quo improved. He clarified in his evidence that it was his view that the employment relationship was not '*that much unbearable*' and he would be able to return, provided that certain of his grievances would be properly attended to.
- [15] The Municipality called witnesses to refute the applicant's claim. It is not necessary for purposes of this decision to deal with their evidence in any detail. Mr Isaacs, the former municipal manager, testified that he had had a good working

relationship with the applicant employee, who was the chairperson of the local labour forum and a shop steward. He testified about the applicant employee's various grievances and the attempts that had been made to resolve them.

[16] As regards the visit by the police to the applicant employee's house, he said that the Municipality had received information that tools belonging to the Municipality, namely jackhammers and a generator, were being hired out to members of the community by the applicant employee for a fee.² By the time the Municipality arrived at the applicant employee's house to investigate these items had, according to information received, been removed. The Municipality had then reported the matter to the police. The witness did not know what had eventually become of the police case, as by that point, he was no longer working for the Municipality.

[17] Mr Christians, the Municipality's Senior Manager Technical Services testified about his relationship with the applicant employee. He noted in particular that the applicant employee had been absent from work without permission for prolonged periods and this had been referred to HR. The applicant employee had pleaded guilty to some charges and had received a final warning and suspension as a sanction. His relationship with the applicant employee had started cordially but had become strained in consequence of disciplinary issues.

The arbitration award

[18] The commissioner refers to the test adopted by the Labour Appeal Court (LAC) in *National Health Laboratory Service v Yona and Others*³, namely that the cumulative effect of the conduct of the employer towards the employee must be such that the employee could not reasonably be expected to cope with it. The resignation must have been a reasonable step to escape *intolerable* working conditions.

² The applicant drew attention to this police visit featuring as part of the buildup to his decision to resign.

³ (2015) 36 ILJ 2259 (LAC) at para 30.

- [19] The commissioner found that none of the reasons given by the applicant for his resignation included intolerability. The closest he came to this was to say that employment, although indeed not intolerable, was hostile. This was the theme of his testimony throughout the proceedings.
- [20] Despite recording that he had had problems with certain named officials, there was no record of the applicant employee having lodged any grievances against them. This begs the question as to why he had not complained against the very people whom he alleged made his work environment hostile.
- [21] He appeared to be suggesting that because he was senior politically (that is, outside of the workplace) to these two gentlemen, they should have treated him differently.
- [22] Some of the grievances relied on by him to bolster his claim did not bear out scrutiny, as these had been resolved years before he resigned.
- [23] Essentially, so found the arbitrator, he had resigned not because of intolerability but because he did not like the management style of certain functionaries in the Municipality, people against whom he had additionally never pursued formal complaints.
- [24] The applicant employee had accordingly failed to prove that he was constructively dismissed.

The review grounds

- [25] It was contended that the commissioner applied the wrong legal test in that it was not required for the applicant employee to prove that he had no alternative but to resign. In addition, it was contended that the commissioner failed to give sufficient emphasis to the uncontested evidence that the applicant employee had been maliciously accused of theft, which in turn caused his home to be raided by the police.

- [26] The third respondent had misconstrued the enquiry in that it was not required for the applicant employee to prove that he had no alternative but to resign. The proper test was whether, considering the circumstances holistically, it was reasonable for the applicant employee to resign to escape the intolerable working relationship.
- [27] The commissioner had also erred in finding that the applicant employee had failed to lodge complaints against his superiors. The applicant employee had testified about his complaints.

The respondent's submissions

- [28] The first respondent submitted that the applicant had not - even on his own evidence - made out a proper claim for constructive dismissal. Perceived hostility, which does not amount to intolerability, is not a sufficient ground for alleging constructive dismissal.
- [29] Authority was referred to the effect that intolerability must be the sole reason, and the continuance of employment following the alleged intolerable events or conduct tends to invalidate a claim of constructive dismissal, especially where the intolerability was not even raised with the employer during such period to give him or her an opportunity to remedy same.⁴

Discussion

- [30] The case law is clear. Unhappiness at work is by itself not intolerability. In other words, employees, especially senior employees, are expected to have a thick skin.
- [31] The following paragraphs of the decision in *Eastern Cape Tourism Board v CCMA and Others*⁵ per Molahlehi J (as he then was) aptly summarises the relevant legal requirements:

⁴ See: *Niland v Ntabeni NO and Others* (2017) 38 ILJ 1686 (LC) at para 35.

⁵ [2010] 11 BLLR 1161 (LC).

- [14] Grogan in the Workplace Law (9ed) in [discussing] the concept of constructive dismissal states as follows:

"It seems that on this view any form of serious and continuing misconduct constitutes 'repudiation in the wide sense' by the employee or employer. In either case, the employment relationship is rendered 'intolerable'. An employer can also repudiate in this sense by making it impossible for an employee to render the employment, a situation now recognised by the concept of 'constructive dismissal'."

A fundamental point made by the learned author is that:

"Mere unhappiness at work is not enough. Managers in particular are expected to be able to put up with ambiguity, conflict in relationships, power struggles, office politics and the demand for performance where if not delivered no payment is made."

- [15] In *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC), (at 985A-C), the case also relied on by the commissioner, the Court framed the test for determining the existence of constructive dismissal in the following terms:

"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 the contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it."

The Court went further at 984D-F to say:

"When an employee resigns or terminates the contract as a result of constructive dismissal such an 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."

- [16] The onus in a constructive [dismissal] claim rests with the employee who has to show that the working environment has been made "intolerable" and could therefore not be expected to continue with the employment relationship. The use of the word "intolerable" in the LRA has been interpreted to have introduced a much stricter test than the one which was applied under the previous 1956 Labour Relations Act. The word "intolerable" according to Grogan in *Employment Law* observes further (9ed) at 114 suggests that constructive dismissal should be confined to situations in which the employer behaved in a deliberate oppressive manner and left the employee with no option but to resign in order to protect his or her interests. There are various situations in which the employer can be said to have behaved in such a manner that that left the employee with no option but to resign.

- [17] An objective test is used in the determination of the existence or otherwise of a constructive dismissal claim. Thus the subjective state of mind of the employee is not a critical factor in the assessment of the existence or otherwise of constructive dismissal. In general in order to succeed with a constructive dismissal claim the employee must show that he or she resigned because of coercion, duress or undue influence. Failure by the employee to use the internal grievance procedure, although not a determinative factor, is an important aspect in the objective assessment of whether or not the employee was left with option but to resign.'

- [32] Constructive dismissal, therefore, amounts to a state of affairs where the employee terminates the employment contract in circumstances where the conduct of the employer compels the termination by the employee. Accordingly, it is treated as if the termination had taken place by way of an act of the employer.⁶ If the termination is not treated as if the resignation is held to amount to a dismissal, then one is simply dealing with a resignation and any questions of the possible unfairness of 'a dismissal' do not even arise.
- [33] The decision of the arbitrator, in my view, falls well within the band of reasonableness. In addition, the applicant - who bore an onus on this leg - also did not, in my view, come close to proving that his working conditions satisfied the intolerability test. Indeed, one gains the impression that he decided to voluntarily resign at a time of his own choosing and then somewhat opportunistically decided to change his mind to pursue a claim.
- [34] His contemporaneous interactions with his employer at the time of his resignation are inconsistent with the subsequent claims given by him of an involuntary or forced resignation. The contents of his letter of resignation, as well as the fact that he, although having been a shop steward, did not lodge formal grievances about his alleged mistreatment, are of significance in this regard.
- [35] That he no longer liked his job or his current set of superiors is obviously not a sufficient basis for alleging constructive dismissal. I am satisfied that the Municipality gave a reasonable explanation for why it needed to investigate allegations about the alleged abuse of its property and why it was proper in the circumstances for them to lay a charge with the police.
- [36] I am also satisfied that the commissioner applied the correct legal test. The award is well reasoned, carefully constructed and indeed contains references to a number of relevant decided cases.

⁶ *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 2331 (LAC) at 2335D.

Conclusion

[37] The application, therefore, stands to be dismissed.

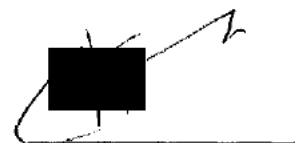
[38] Mr. Davis submitted that, were the Court to dismiss the application, I should consider making a cost order against the applicant, but only in respect of the first respondent's disbursements.

[39] I am not satisfied that any cost order can, in the circumstances of the present case, be made against the applicant if regard is had to the prevailing legal authorities.

[40] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. No order is made as to costs.



C.S. Kahanovitz
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Bosman

Instructed by: Kramer Weihmann Inc, Bloemfontein.

For the First Respondent: Mr. Davis, Office of the State Attorney, Kimberly

LABOUR COURT