



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1796/2023

In the matter between:

MASOKO SOFONIA MOKWALASE Applicant

and

FIDELITY SECURITY SERVICES (PTY) LTD First Respondent

NATIONAL BARGAINING COUNCIL FOR THE PRIVATE SECURITY CENTRE (NBCPSS) Second Respondent

COMMISSIONER PATRICK PERCY MAKGOPELA N.O. Third Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) RUSTENBURG Fourth Respondent

Heard: 4 September 2025

Delivered: 09 September 2025

JUDGMENT

DE WITT, AJ

Introduction

1. This is an application to review and set aside the decision of the third respondent dated 23 October 2022 under reference number NWRB 1045-22.

Background facts

2. The applicant was employed by the first respondent from about 11 December 2007 in the position of Operational Manager and in terms of which he was given the task of managing approximately 28 sites, including a site for Engen.

3. The applicant was given notice to attend a disciplinary hearing on or about 12 November 2021. The applicant was charged with gross insubordination and gross insolence (two counts). The applicant was found guilty with a sanction of dismissal (suspended for 12 months) on 15 December 2021. The applicant subsequently appealed against the suspended dismissal which resulted in the third charge being set aside (as it occurred more than three months prior to the hearing) but the sanction and decision otherwise being upheld on 28 January 2022.

4. The only relevance hereof is that the applicant was still subject to the 12-month suspended sanction at the time when he resigned and claimed a constructive dismissal.

5. The facts surrounding his resignation are as follows: The applicant received an email on 11 February 2022 from the Regional General Manager of the first respondent, Mr Baartman, on 16 February 2022 wherein Mr Baartman advised the applicant that *“there is an investigation in progress. You are hereby instructed to withdraw with immediate effect until the investigation is concluded. Failure to adhere*

to this instruction will lead to the initiation of your suspended dismissal.” The investigation was initiated by Engen and the applicant was asked to withdraw from Engen’s site.

6. On 16 February 2022, the applicant tendered his written resignation which provided as follows:

“This letter serve to confirm that, I am resigning from the company with immediate affect due to the following reasons

I was investigated by the client without letting me know that I am under investigation.

I am reliable informed by the officers working on site at Engen that they are being forced to write a false statements regarding me.

Which goes to suspended dismissal that was not warranted, so now it’s a way of actually dismissing me with false accusation.

So it is clear that Fidelity does not want me anymore so rather I leave before it gives an unfavourable image on myself and also such incidents make it hard for me to work anymore as I’ve been targeted.

So I am making things easy for all and leaving you in peace. Today is my last day of work.

7. On 22 April 2022, the applicant referred the matter to the CCMA, the fourth respondent. The CCMA, per Commissioner Danisa, condoned the late referral on 1 June 2022 and issued a certificate of non-resolution. The CCMA received the applicant’s request for arbitration, and the dispute was heard before the third respondent. The third respondent held that the applicant had not been constructively dismissed.

8. In this review application, the applicant contends that the third respondent did not (i) take due regard to his reasons for the termination and the fact that his reasons for resignation were due to the duress resulting from the intolerable conduct (sic) in which he was placed at his employment, (ii) the first respondent’s representative, Mr Loui Kluin persistently threatened the proceedings and threatened to take actions (sic) against the third respondent if the outcome did not favour him or the first respondent and (iii) the third respondent did not take due regard to the sequence of

events and the complete reasons which gave rise to his resignation.

9. The applicant in his supplementary founding affidavit added that the third respondent had disregarded WhatsApp communications which were indicative of harassment on the ground that the WhatsApp communications were hearsay, but the third respondent allowed the first respondent to rely on an email without raising the issue of it being hearsay.

The applicable legal principles

10. A constructive dismissal occurs when an employee is the one who terminates the contract of employment and he does so owing to the continued employment having been intolerable for him due to the conduct of the employer. The concept of constructive dismissal is defined in s 186(1)(e) which in part reads as follows:

“Dismissal’ means that –

(a)

(b) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”¹

11. 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.²

12. The correctness standard applies because “dismissal” (including constructive

¹ Solid Doors (Pty) Ltd v Thereon and Others (CA4/03) [2004] ZALC 69 (22 September 2004) at para 26

² Solid Doors (Pty) Ltd v Thereon at para 28

dismissal) is a jurisdictional fact. Where the commissioner's jurisdiction turns on whether a dismissal occurred, the reviewing court asks whether that fact objectively existed (not whether the arbitrator's view was merely reasonable).³

13. The onus rests on the employee to prove that the resignation was not voluntary, constituted a constructive dismissal and was not intended to terminate the employment relationship. The enquiry is whether the employer 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 the employer and employee. The court must 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 test does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.⁴

The merits

14. The test on review remains whether the fact that the applicant was constructively dismissed objectively existed – not whether the third respondent's view was merely reasonable.

15. The enquiry is whether the employer 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 the employer and employee. The court must 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.

16. What conduct on the part of the first respondent is relied upon by the applicant? The fact that the applicant was subject to an investigation by Engen at a time when he already had a suspended dismissal is not conduct on the part of the

³ Solid Doors (Pty) Ltd v Thereon at para 29; *SA Rugby Player Association and Others v SA Rugby (Pty) Ltd; SA Rugby Players Association* (2008) 29 ILJ 2218 (LAC) at para 39-41.

⁴ *Nokeng Tsa Taemane Municipality v Louw* (JA7/16) [2018] ZALAC 37 [2019] BLLR 35 (LAC) at para

first respondent as envisaged in the test. Its conduct in requiring the applicant to withdraw from site pending the conclusion of the investigation was legitimate, appropriate and defensible and of an order that the applicant might reasonably be expected to put up with it.

17. The nub of the applicant's complaint, however, is that Mr Baartman, in his email quoted fully above, referred to the investigation being conducted and "threatened" the applicant with dismissal if he did not obey the instruction to withdraw from site immediately. As correctly pointed out by the first respondent, Mr Baartman's email served two purposes (i) to inform the applicant of the investigation and to instruct him to withdraw from site and (ii) to remind him of the consequence that would follow should he not obey the instruction – that is, given the suspended dismissal, if the applicant did not immediately obey, it could trigger his dismissal.

18. The third respondent found that there was no wrongdoing on the part of Mr Baartman in reminding the applicant about the suspended dismissal. I must agree. There was no threat implicit in the email – rather a lawful instruction accompanied by a statement of fact as to the prevailing circumstances (that is, as a fact, the applicant had a suspended dismissal sanction which he must remain cognisant of).

19. As to the WhatsApp conversations relied upon by the applicant, the question remains whether, having regard thereto, I can conclude that the first respondent, 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 the first respondent and the applicant. The first observation is that the WhatsApp discussions occurred the day after the first respondent resigned. He submitted that it nonetheless provides context as to the circumstances with which he was faced at the time. The WhatsApp communications allude to employees "not knowing anything" but being told to "write statements" and "tell the truth".

20. It seems, having regard to the WhatsApp conversation, that the applicant considered the outcome of the investigation to be a *fait accompli*, but that is not at all

apparent from the WhatsApp. By resigning, the applicant pre-empted the possibility of a proper investigation and determination of any misconduct on his part. The applicant made an informed decision to resign in order to avoid disciplinary action and having made his choice, the applicant cannot now claim that he was constructively dismissed.

21. Mr Kluin's behaviour in the arbitration and him having apparently intimidated the third respondent is also irrelevant given that I consider the review by applying the correctness standard – objectively assessed. In doing so, I find that the applicant resigned so as to avoid the disciplinary action consequent upon the Engen investigation. There was conduct on the part of the first respondent that the applicant could not be expected to put up with.

22. In considering whether to award costs and in exercising my discretion based on the requirements of law and fairness, I do not consider this an appropriate case to mulct the applicant in costs despite being unsuccessful in his review application. In the circumstances, there is no order as to costs.

Order

1. The application for review is dismissed.
2. There is no order as to costs.

C De Witt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr Mokwalase

For the First Respondent:

Ms T Runciman

Instructed by:

Hinrichsen Attorneys