



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C302/2024

In the matter between:

ADELE LEWIS

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

GERT VAN DER BERG N.O.

Second Respondent

VAN DE VENTER MOJAPELO (PTY) LTD

Third Respondent

Heard: 20 August 2025

Delivered: 25 November 2025

JUDGMENT

MacKENZIE, AJ

Introduction

[1] This matter concerns a constructive dismissal. The Applicant seeks a substitution of that decision with one declaring that she was constructively dismissed, appropriate compensation and costs.

- [2] The Third Respondent opposes the review.
- [3] Mr Bosch appeared for the Applicant. Mr Snyman of Snyman Attorneys appeared for the Third Respondent. The Court is indebted to both for their comprehensive and helpful submissions.
- [4] The Third Respondent raised an *in limine* objection in its answering affidavit to the effect that the founding affidavit does not contain a concise statement of facts and is therefore an irregular step.¹ That contention was not dealt with in oral argument – and wisely so considering that the lion's share of the facts are common cause. Nor did the Third Respondent demonstrate any of the requisite prejudice.²

The undisputed factual background

- [5] The Third Respondent conducts a debt collections business in Randburg, Gauteng and Umhlanga, KwaZulu-Natal. It has about 600 employees.
- [6] The Applicant commenced her employment with the Third Respondent in March 2019. At that time, she was employed on a fixed-term contract and based in Randburg, Gauteng. Her position was that of a revenue manager. Throughout her tenure, the Applicant reported to the Third Respondent's chief executive officer, Mr Woznica.
- [7] In 2020, during the infamous covid-19 national lockdown, the Applicant requested that she be allowed to work remotely and move to Cape Town. Her request emanated from the fact that her son had been offered a place at prestigious school. The Third Respondent agreed. In this regard, there is dispute regarding the permanency of the Applicant's move:

7.1 The Applicant contends that she was permitted to permanently relocate to Cape Town in light of her new personal circumstances.

¹ Unlike its predecessor, the new Labour Court Rules which commenced on 3 May 2024 expressly regulates, under Rule 57, irregular proceedings. That rule applies *in casu* since this application was brought on 2 August 2024.

² As to the generally applicable principles to irregular proceedings in this Court, see *Chirwa v Commission for Conciliation, Mediation and Arbitration and Others* (JR2165/19) [2021] ZALCJHB 262 (1 September 2021).

7.2 The Third Respondent, on the other hand, considered this move to be only temporary, and could be withdrawn subject to its operational needs. This arrangement, according to Mr Woznica, was at that stage feasible as it did not matter where the Applicant would work. Further bearing out the temporary nature of the indulgence, argues the Third Respondent, is the fact that it has no office in Cape Town.

[8] The Third Respondent also paid the Applicant's moving costs. Again, there is a dispute on this aspect:

8.1 The Applicant contends that this was a contribution from the Third Respondent, indicative of its understanding that she was relocating to Cape Town permanently.

8.2 The Third Respondent contends that it had merely used the Applicant's bonus, at the latter's request, to pay her moving expenses directly. Moreover, argues the Third Respondent, it was beneficial to the Applicant since that entailed no tax deductions from her bonus as would have been the case had her bonus been paid directly to the Applicant.

[9] The Applicant relocated to Cape Town. She bought a house and enrolled her children in local schools and university.

[10] On 21 April 2021, the Applicant concluded a new written contract for permanent employment. Her position changed; henceforth she held a senior position as the Third Respondent's chief performance officer. She was also part of the executive committee (exco).

[11] In 2023, the Third Respondent's business suffered a blow when it lost a number of large clients. It lost a significant chunk of its monthly revenue of about R1,5 million.

[12] During October 2023, a flurry of WhatsApp messages were exchanged between the Applicant and Mr Woznica.

[13] Then, on 25 October 2023, Mr Woznica convened an urgent exco meeting. The Applicant attended that meeting. It was decided that the

Third Respondent had to urgently improve its performance to obviate any further loss of clients. Possible retrenchments were also discussed. (In a Whatsapp message to Mr Woznica on 25 October 2023, the Applicant asked whether she was going to be retrenched. Mr Woznica replied that *'final lists or (sic) still being considered'*.)

[14] (In those Whatsapp messages, the Applicant's name appears as 'Adele – EXP Realty SA'. I return to this below.)

[15] At the same meeting, it was also decided to dissolve the exco and create a revenue committee, of which the Applicant did not form part.

[16] Accordingly, pursuant to the exco meeting, in order to enhance its operational efficiency, on 6 November 2023, the Third Respondent circulated notice to senior management, including the Applicant, of its decision to cancel all remote work with effect from 1 January 2024. All employees were required to report back to the Third Respondent's offices in Randburg and KwaZulu-Natal by that date. That self-evidently affected their personal circumstances.

[17] All employees, including the Applicant were, in effect, given about two months to report back to the office.

[18] Mr Woznica explained the decision as one of necessity, the Third Respondent needing 'all hands on deck'. As part of senior management, said Mr Woznica, it was imperative that the Applicant likewise return to the office. She was personally informed of that decision on 6 November 2023 by Mr Gert Louw, the Third Respondent's human resources executive.

[19] On the same day, the Applicant enquired from the Third Respondent's payroll manager, Ms Linda Mellet, as to the number of sick leave days that were available to the Applicant. The reason given was that the Applicant required to undergo an operation (the significance of which will become apparent).

- [20] On 9 November 2023, considering her personal circumstances, the Applicant requested, in writing, an extension of that deadline to March 2024.
- [21] Mr Louw responded in an e-mail on the same day. He stated that the decision to recall all employees applied across the board. The deadline of 1 January 2024, he said, had been one taken by the board of directors. He concluded his e-mail thus: *'Kindly let us know by tomorrow COB'*.
- [22] The Applicant replied on the same day and sought clarity on what she was supposed to advise Mr Louw of *'by COB tomorrow'*. Mr Louw responded the next day. He confirmed that, in line with a board instruction, all duties were to be performed full-time from the Randburg office with effect from 1 January 2024.
- [23] The Applicant replied that she did not understand his e-mail. Mr Louw replied that remote work had been cancelled *'as per the notice'*. He asked the Applicant to confirm her understanding that she would report for duty in person at the Randburg office from 1 January 2024.
- [24] On 10 November 2023, the Applicant responded: *'Yes'*.
- [25] On 13 November 2023, the Applicant informed Mr Lior that she was feeling unwell and was going to consult a medical professional. On the same day, the Applicant furnished a medical certificate, signed by her general practitioner Dr Lunette van der Merwe, which booked her off until 23 December 2023. The certificate records that the Applicant was booked off for *'anxiety and depression due to severe work related issues'*.
- [26] On 15 November 2023, the Applicant informed Mr Louw that she had been booked off until 23 December 2023. On the same day, the Third Respondent (*per* Mr Louw) informed the Applicant that, unless she provided further information to change its view, her absence would be treated as unauthorised and unpaid. It also reserved the right to take disciplinary action for alleged abuse of sick leave, while stating that the

letter was intended to give her a fair opportunity to respond and avoid further prejudice to either party.

[27] On 17 November 2023, the Applicant wrote to the Third Respondent in response to the above letter. While the letter is marked '*without prejudice*', it clearly does not meet the requirements for it to be protected from privilege.³ There is no settlement proposal therein, whether *bona fide* or otherwise. Instead, the letter records the Applicant's position regarding her medical condition, specifically the detrimental effect upon her well-being of being '*subjected to a pattern of harassment and victimization by the management ... characterized by constant criticism, bullying, insults, degrading accusations and unfair treatment, [which] commenced in October 2023*'. Consequently, wrote the Applicant, she was compelled to seek medical assistance from Dr van der Merwe.

[28] On the same day, the Applicant furnished the Third Respondent with a letter from Dr van der Merwe, a general practitioner, confirmed that the Applicant had a history of depression which had worsened because of work-related stress. She advised that the Applicant be granted medical leave in her best interests and requested the company's understanding and cooperation to support her recovery, inviting them to contact her for any clarification.

[29] On 20 November 2023, Mr Louw acknowledged receipt of the Applicant's medical certificate and confirmed that her sick leave would be with full pay for as long as she had entitlement available. He noted that her allegations of mistreatment were new to Human Resources and asked that she follow the company's grievance process once she was able to do so, so the matter could be properly addressed.

[30] However, four days later, on 24 November 2023, the Third Respondent – acting through Mr Louw – retracted the latter's earlier assurance, stating that his email had been sent prematurely and without shareholder approval. It reinstated its earlier stance, asserting a *prima facie* view that

³ *NUMSA and Others v John Thompson Africa* (2002) 23 ILJ 517 (LC) at paras 2–7.

the Applicant was malingering and that her absence would be unpaid. The letter denied all allegations of harassment or unfair treatment and warned that disciplinary action might follow for abuse of sick leave and unauthorised absence.

[31] The Third Respondent carried through with its intent to withhold the Applicant's remuneration for the duration of her sick leave. The Applicant was remunerated for only eight days in November 2023; a 62% reduction of her normal monthly remuneration.

[32] On 30 November 2023, the Applicant tendered her written resignation with immediate effect. She wrote that her employment conditions had been intolerable over the last two months.

[33] On the same day, the Applicant filed a constructive dismissal dispute with the CCMA. The dispute referral form records that the date upon which the dispute arose was 6 November 2023 – the same date as the notice cancelling all remote work. The facts of the dispute are summarised thus: 'employment made intolerable by employer and impossible to work under'. The substantive issues are recorded as '*no reasonable alternative given; forced relocation despite various promises etc*'.

[34] The dispute proceeded to arbitration before the second respondent.

The arbitration proceedings

[35] The arbitration lasted three days on 8 March, 9 April and 4 June 2024.

[36] Both parties produced respective bundles of documents. The authenticity thereof was not challenged by either party.

[37] In support of her case, only the Applicant testified. Pursuant to a substantive application, the Third Respondent was permitted and called three witnesses.

[38] The factual detail of the evidence requires some consideration at length.

The Applicant

- [39] The Applicant testified that Mr Woznica supported her relocation to Cape Town, subject to shareholder approval, which was later granted. WhatsApp and email records confirmed that the Third Respondent authorised the move and funded it with an R80 000 relocation budget for transport, accommodation, uniforms, and school expenses.
- [40] She emphasised this was not a temporary remote work setup but a permanent relocation, formally sanctioned by the Third Respondent.
- [41] After relocating, her role changed significantly. Although formally Chief People Officer, Mr Woznica frequently reassigned her to struggling departments – such as recruitment, quality assurance, and book management – sometimes outside her expertise, but she nonetheless accepted the tasks.
- [42] Between 2021 and 2022, Mr Woznica tasked her with leading a client liaison project in the Western Cape. She became the company's representative to key clients, responsible for monitoring visits, keeping records, and ensuring service compliance. Despite asking for structured guidance and phased implementation, she received little support; Mr Woznica criticised her for being overly detailed and urged her to solve problems independently.
- [43] She described difficulty obtaining meetings or responses from Mr Woznica, despite repeated messages and requests. He dismissed her requests for role clarity as over-engagement, leaving her uncertain about expectations. Under cross-examination, the Third Respondent argued she could have used the EXCO platform, but she insisted she was marginalised and that her direct requests to Mr Woznica were ignored.
- [44] From September 2023, communication shifted from informal WhatsApps to formal, critical emails. She viewed this as deliberate marginalisation, noting her proposals were dismissed as generic. She felt targeted and set

up to fail. The Third Respondent denied any shift in style, but she maintained that the September 2023 change was intentional and hostile.

[45] She pointed to being excluded from key events, such as not being told of a colleague's passing or memorial. She saw this as part of her exclusion. She stressed her clean record with no prior warnings until late 2023. When she later requested meeting recordings, she was told none existed, though she claimed to have prior confirmation and accused the company of withholding them.

[46] Addressing criticism of weak colleague relations, she explained that she was deliberately deployed into failing departments because of her strong, results-driven approach. While this occasionally created tension, she believed it demonstrated her effectiveness.

[47] On relocation to Gauteng, she argued that, unlike others, she was uniquely impacted as the only EXCO member outside the province. The Third Respondent countered that others, such as a Mr Maurits Maritz, were also recalled, but she rejected this since he was not on EXCO. She also pointed out that many call centre staff remained remote, showing inconsistency.

[48] She emphasised that her request for an extension to remain in Cape Town was refused without meaningful engagement, despite her history of successful performance from there.

[49] She testified that her grievance procedure inquiries were ignored. The Third Respondent argued she never filed a formal grievance, but she said her repeated requests to Mr Woznica and human resources were obstructed. She even offered after-hours availability, but her requests were ignored or burdened with agenda demands, which she interpreted as deliberate obstruction of internal remedies.

[50] On 7 November 2023, she requested her leave balances and submitted a medical certificate booking her off until 23 December for anxiety and depression. She insisted this was genuine and doctor-supported. The

Third Respondent accused her of abusing sick leave and initially rejected the certificate, suggesting it was a tactic to avoid returning to work and potential discipline. She denied this, affirming the legitimacy of her condition, the credibility of her long-standing doctor, and her good faith.

Mr Gert Louw

[51] Mr Louw admitted knowing of the Applicant's relocation to Cape Town in 2020 and confirmed she received R80 000. However, he said this was part of a general Covid-era EXCO bonus scheme, not a relocation allowance, and confirmed that he too had received a similar amount.

[52] He testified that he was tasked to issue written notices to all affected staff.

[53] Mr Louw conceded that the Applicant was affected due to her location but insisted the directive was operational, not personal, and unrelated to performance or discipline.

[54] Mr Louw testified that others, including Mr Mauritz Smit, were also affected, and reiterated that remote work was only ever a temporary privilege.

[55] When it was put to him that the Third Respondent's instruction to return to Randburg was unreasonable for someone relocating provinces with family duties, Mr Louw insisted that business survival came first.

[56] Mr Louw testified that the Applicant's request for her sick leave balance raised suspicions of malingering.

[57] Mr Louw admitted that he had verified Dr van der Merwe status as a medical professional but questioned her diagnosis, claiming the company believed the illness was fabricated to abuse leave. He confirmed that the Third Respondent sought no independent medical assessment.

[58] While he conceded the existence of Dr van der Merwe's letter, he maintained that the Third Respondent still doubted the Applicant's condition.

- [59] Mr Louw conceded that employees have a right to ask about their sick leave days, but maintained the timing was suspicious.
- [60] Mr Louw testified that grievance procedures were clearly outlined in the Applicant's contract and the employee handbook, but that she had never lodged formal complaints of bullying or harassment before her sick leave.
- [61] He testified that the Third Respondent accepted the Applicant's resignation but maintained remote work was never guaranteed and operational needs justified the recall.
- [62] Mr Louw acknowledged that although his relationship with the Applicant was sometimes difficult, no formal complaints were lodged against her by colleagues. He admitted Mr Woznica enjoyed working with her, which helped ease tensions.

Mr Woznica

- [63] Mr Woznica denied that the Applicant's move was a permanent relocation under company policy. He testified that the R80 000 she had received was her annual bonus redirected for moving costs; not a relocation allowance. When confronted with the relocation policy in the handbook, which obliged the Third Respondent to pay for relocation costs, Mr Woznica insisted that the Applicant's situation had been discretionary support, and not a formal relocation.
- [64] He explained that remote work in 2020 was introduced as an emergency response to the lockdown, affecting most employees. Remote work was therefore a survival strategy supported by clients: it was therefore never a personal arrangement unique to the Applicant.
- [65] At the exco meeting, he testified that the formation of a revenue committee was to manage client exits, restructure, and enhance communications. He emphasised that the Third Respondent was, at that time, in serious crisis and therefore transparency with executives was vital.
- [66] Mr Woznica confirmed that the decision to terminate remote work applied universally, even to other executives facing personal difficulties. He

testified that in his view two months' notice was fair and also preferable to retrenchments.

[67] When questioned about refusing the Applicant's extension request, Mr Woznica testified that it had been a board decision, and not his alone. He stressed that the Applicant had never escalated her request directly to him.

[68] He described his relationship with the Applicant as professional, and confirmed that he had had meetings at his Cape Town apartment. He denied receiving complaints of harassment or mistreatment and said communication occurred through various channels. He denied ignoring her, explaining his communication style became more formal during crisis periods.

[69] Mr Woznica acknowledged that the Applicant had asked him operational questions via WhatsApp in October 2023. He admitted sometimes not responding, attributing this to personal crises, such as his daughter's evacuation from Israel. He also admitted postponing meetings but denied deliberately avoiding her.

[70] He confirmed that the Applicant was not included in the revenue committee, as her role was not directly relevant to client exits.

[71] Mr Woznica explained that the January deadline for employees to return aligned with school calendars and was necessary given the crisis, prioritising fairness and consistency across staff.

[72] Regarding the Applicant's medical certificate, Mr Woznica said its timing was suspicious given her prior enquiry about leave balances. He found it unusual for a senior executive to suddenly become incapacitated without disclosure. He authorised human resources to warn her about possible abuse of sick leave and unpaid absence, saying he would have investigated further had she not resigned.

[73] On Dr van der Merwe's certificate, Mr Woznica admitted approving HR's letters labelling it abuse but maintained that his concerns were genuine. He questioned the timing and content but conceded that he did not verify the doctor's legitimacy. He acknowledged employees could query leave

balances but said he avoided contacting the Applicant during her sick leave to protect her mental health, citing family experience with mental illness.

[74] Mr Woznica rejected the Applicant's claims in her resignation letter. He denied separate relocation expenses were paid, insisting her relocation was funded through her bonus. He said remote work was conditional, not permanent, and denied ignoring her communications. He considered her allegations of intolerable conditions unfounded.

[75] Asked why he never contacted the Applicant after her resignation, Mr Woznica said he felt betrayed by her failure to disclose mental health issues earlier. He admitted he did not view her as one of his top employees and considered his responsibility ended once she resigned.

Ms Tabetha van der Walt

[76] Ms Van der Walt testified that she was aware that the Applicant's relocation had been approved by Mr Woznica.

[77] Ms Van der Walt testified that during covid, the Third Respondent had moved to a per-seat client model, which stabilised revenue. When the year ended profitably, Mr Woznica had awarded bonuses to all staff. In the Applicant's case, her bonus was redirected to cover her relocation expenses via invoices, while other employees received cash.

[78] She testified that she had personally processed payments, including the Applicant's relocation expenses.

[79] She stressed that this was not a contractual relocation allowance but merely a restructuring of the Applicant's annual bonus, overseen by the chief financial officer and the company's auditors. She reiterated this was a tax-efficient restructuring of her bonus, not an additional benefit.

[80] Ms Van der Walt explained she also had worked remotely during covid, balancing homeschooling and her husband's illness. Although difficult, she complied with the return-to-office directive, stressing it applied universally and was not targeted at the Applicant specifically.

- [81] She described her relationship with the Applicant as collegial and supportive. They exchanged personal advice, but the Applicant never lodged formal harassment or bullying complaints with her; any issues were informal advice-seeking.
- [82] She knew the Applicant had undergone a brain operation years earlier but was unaware of any ongoing medical conditions. No such issues were raised with her in the workplace.
- [83] She testified that until August 2023, the payroll system only showed annual leave. After a September 2023 upgrade to a cloud-based system, payslips also reflected sick and family responsibility leave. Before that, monthly leave reports were manually compiled and distributed to managers.
- [84] She acknowledged that employees could not see sick leave on old payslips and had to request it manually. She said that this explained the Applicant's November 2023 enquiry about her balance, though Van der Walt noted the new system by then displayed the information.
- [85] She confirmed that payroll manager – Ms Linda Mellett – was the contact for leave and payroll queries. Employees could email or meet her directly. She accepted that although the Applicant technically had access to her leave balances after September 2023, she had nonetheless approached human resources for confirmation.

The award

- [86] The Commissioner delivered his award on 24 June 2024. It spans 22 pages over 74 paragraphs.
- [87] Just over half of the award is a summary of the witnesses' evidence. The remainder is the commissioner's analysis of the evidence and a consideration of the parties' respective arguments. The lion's share of the latter refers extensively to relevant authority.

[88] However, the gravamen of the commissioner's analysis is framed in paragraph 72. He found the Third Respondent's witnesses to be more credible than the Applicant. The commissioner went on to conclude thus:

'I find that after listening to all the evidence many probabilities exist in the matter, but no reasonable Commissioner could find that based on the relevant evidence heard, that the Applicant's version is more probable than that of the respondent. The Applicant failed to prove on a balance of probabilities that such an intolerable situation was caused by the respondent that she had absolutely no alternative but to tender her resignation on 30 November 2023. I find that if unhappiness exists in the workplace, which I think was most likely the case, it was reasonable. I do not find that the respondent's conduct caused intolerable working conditions for the Applicant and the relationship issues could have been resolved through discussions with the CEO, Human Resources and Board members. The Applicant certainly did not convince me that she stood in this case with clean hands either. Her medical condition existed for some time, but Gert Louw and the CEO only became aware of it when she sent the medical certificate to Human Resources on 13 November 2023.'
(emphasis added)

[89] Accordingly, the commissioner found that the Applicant had not been constructively dismissed.

The parties' respective contentions

The Applicant's grounds of review

[90] The Applicant relies upon the following grounds of review:

- 90.1 The commissioner failed to consider that the Applicant's request for an extension was unreasonably declined.

- 90.2 The commissioner failed to consider that Mr Woznica gave contradictory evidence relating to the rejection of the Applicant's extension request.
- 90.3 The commissioner failed to consider that no reason was given for the rejection of her extension request.
- 90.4 The commissioner ignored evidence why it was not viable for the Applicant to pursue a grievance procedure, thereby erring in his conclusion that she enjoyed a reasonable alternative remedy.
- 90.5 The commissioner ignored Mr Louw's evidence that the Third Respondent found no evidence of fraud by the medical practitioner and that none of its witnesses could not offer a medical opinion on whether the Applicant's booking off was justified. Accordingly, argues the Applicant, the Third Respondent's decision to decline the Applicant's sick leave was unsubstantiated and speculative.
- 90.6 The commissioner ignored the evidence that the Applicant had, despite valid medical certificate and letter by her medical practitioner, been accused of abusing her sick leave on two separate occasions.
- 90.7 The commissioner failed to consider that, consequent upon its view that the Applicant had abused her sick leave, the Third Respondent paid the Applicant for just one week in November 2023.
- 90.8 The commissioner erred in concluding that the Applicant had resigned because she had already secured alternative employment.
- 90.9 The commissioner ignored the Applicant's evidence regarding her e-mail to Mr Louw in response to the latter's request for confirmation that she would return to Gauteng. Accordingly, he erred in concluding that the Applicant had agreed to return to Gauteng.

[91] Moreover, the Applicant argued that the record bears out a reasonable apprehension that the commissioner was biased. However, Mr Bosch did not pursue this ground of review.

The Third Respondent's grounds of opposition

[92] In its answering affidavit, the Third Respondent advances several reasons why the Applicant had failed to make out a case for constructive dismissal and why the commissioner's decision was therefore reasonable:

92.1 The Applicant's permanent employment contract, which was never amended and had been signed after the Applicant's relocation to Cape Town, stated her place of work to be in Randburg.

92.2 The Applicant's relocation request was on the back of the Third Respondent's decision to permit its employees to work remotely as a result of the lockdown.

92.3 At that time, Mr Woznica had no objection to the Applicant's relocation given '*that it did not matter where an employee would work remotely from*'. However, that, argued the Third Respondent, was never an agreement for permanent relocation. Moreover, the relocation had been effected at the Applicant's instance – and was not a decision by the Third Respondent.

92.4 The decision to terminate all remote working was made as a result of significant losses to the Third Respondent and, as the chief performance officer, it was imperative for the Applicant to return to office.

92.5 The Applicant was not the only employee affected by the decision despite differing personal circumstances.

92.6 The Applicant had, in her email one-word response ('yes') on 10 November 2023, signalled her confirmation that she would return to office by 1 January 2024.

92.7 The Applicant had never protested the instruction to return to work or raised a grievance in this regard.

- 92.8 There was no legitimate reason why the Applicant could not follow the grievance process.
- 92.9 The real reason for the Applicant's resignation was that she had found alternative employment as a real estate agent with EXP Realty. That was borne out by the fact that the Applicant resigned at the end of November 2023.
- 92.10 The Applicant's complaint regarding her sick leave was a red herring. Surely, argues the Third Respondent, someone whose continued employment is intolerable does not apply for sick leave of more than a month, which even stretched to after her 30 November 2023 resignation date.

[93] The Applicant did not deliver a replying affidavit.

The test for constructive dismissal

- [94] Section 186(1)(e) which defines '*dismissal*' as including the situation where an employee resigns – with or without notice – because the employer's conduct has made continued employment intolerable.
- [95] The test on review is whether the decision was objectively correct.⁴
- [96] The *locus classicus* framing the test for the existence of a constructive dismissal is Labour Appeal Court's decision in *National Health Laboratory Service v Yona and Others*.⁵ In paragraph 30, Ndlovu JA summarised the position thus:

'The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.'

⁴ *SA Rugby Players' Association (SARPA) and others v SA Rugby (Pty) Ltd and others; SA Rugby Pty Ltd v SARPU and another* (2008) 29 ILJ 2218 (LAC) at para 41.

⁵ (2015) 36 ILJ 2259 (LAC).

[97] A constructive dismissal thus comprises three base elements:

- 97.1 The employment contract must have been terminated by the employee.
- 97.2 The termination must not have been voluntary.
- 97.3 Continued employment, assessed objectively, must have been intolerable. The corollary is that continued employment is not intolerable where an employee has a reasonable alternative remedy.

[98] Regarding the third element in particular:

- 98.1 The gradual escalation of mere unhappiness, considerable tension, stress and frustration does not constitute intolerable circumstances.⁶
- 98.2 The intolerable circumstances must have been of the employer's making.⁷ Put differently, the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee.⁸
- 98.3 It must be shown that the employer was aware of those circumstances and able to address them. The employee does not have to show that the employer wanted or intended to get rid of the employee.⁹

Analysis and evaluation

[99] As I see it, this matter turns upon four aspects:

- 99.1 First, the Applicant's contention of a gradual decline in communication.

⁶ *Old Mutual Group Schemes v D Dreyer & another* (1999) 20 ILJ 2030 (LAC) at 2036.

⁷ *Murray v Minister of Defence* 2009 (3) SA 130 (SCA), at para 13.

⁸ *Western Cape Education Department v General Public Service Sectoral Bargaining Council and others* [2014] 10 BLLR 987 (LAC) at para 27.

⁹ *Murray*, at para 13.

- 99.2 Second, the decision to terminate all remote work and deadline for the Applicant to return to Randburg.
- 99.3 Third, the legitimacy of the Applicant's sick-note and the Third Respondent's actions in response thereto.
- 99.4 Finally, whether the Applicant had any reasonable alternatives to her resignation.

The gradual breakdown in communication

- [100] The evidence clearly established a gradual breakdown in communication between the Applicant and Mr Woznica, in particular.
- [101] In my view, the onset of that breakdown transpired between August 2023 and October 2023.
- [102] The catalyst of that pressure was the internal pressures mounted upon the Third Respondent's business as a result of the loss of major clients and revenue.
- [103] Moreover, it is evident that the Applicant began to feel excluded from the management functions that she had, until then, been privy.
- [104] Accordingly, on the first issue, I conclude that:
- 104.1 In light of the considerable prejudice to the Third Respondent's business, the breakdown in communication was not *per se* unreasonable or unexpected.
- 104.2 The Applicant was aware of the state of affairs and ought to have appreciated that her concerns could not be dealt with by Mr Woznica exclusively and she ought to have been proactive finding alternative solutions and assistance regarding her concerns.
- 104.3 This complaint was not as a result of the Third Respondent's making.

104.4 This complaint constitutes mere unhappiness on the Applicant's part which does not in itself bear out the existence of a constructive dismissal.

104.5 However, this complaint is nevertheless an important contextual indicator.

The decision to terminate all remote work

[105] The evidence established that the gradual breakdown was exacerbated by the decision to terminate all remote work.

[106] In my view, the Third Respondent's decision and action to terminate all remote work was not unreasonable. To the contrary, it was an eminently logical, sensible and reasonable thing to do.

[107] However, the evidence and correspondence bears out that the Applicant felt that the Third Respondent had not given sufficient consideration to her situation. That appears, in the first instance, from the Applicant's request, on 9 November 2023, to be given until 1 March 2024 to return to office which was rejected on 10 November 2023 per Mr Louw's e-mail to the Applicant. Secondly, the Applicant's requests to Mr Woznica to meet to discuss the directive which were either postponed or redirected via e-mail to the human resources department.

[108] However, the evidence also bears out, in my view, that the Applicant did not fully appreciate the prejudice occasioned to the Third Respondent's business. Nor did she appreciate that the situation had placed Mr Woznica under pressure. Accordingly, I do not consider that his conduct or that of the Third Respondent itself, in relation to the Applicant's proposal, can be fairly described as conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence with the Applicant.

[109] On the decision to terminate all remote work, I conclude that:

109.1 The Third Respondent's decision was not unreasonable in the circumstances.

109.2 The Third Respondent did not act culpably.

109.3 However, this factor too is nevertheless an important contextual indicator.

The sick note and the Third Respondent's response

[110] Taking into account the above contextual factors, the tipping point was the Third Respondent's conduct in relation to the Applicant's sick leave.

[111] While the evidence established that the Applicant had not previously disclosed her condition relating to workplace-induced stress, the Third Respondent, through Mr Woznica, became aware of her condition upon receipt of the Applicant's letter of 13 November 2023 and the medical certificate of Dr Van Der Merwe submitted on the same day.

[112] Yet, the Third Respondent's response was not a sympathetic one. Instead, on the same day, the Third Respondent – acting through Mr Louw – accused her of abusing her sick leave, questioned the legitimacy of her medical certificate, and stated that her absence would be treated as unauthorised and unpaid, reserving the right to discipline her.

[113] Two days later, on 17 November, the Applicant engaged with the Third Respondent on this issue. Her '*without prejudice*' letter explained the reason for her sick leave. More importantly, it was supported by a formal letter by Dr Van der Merwe, who confirmed a diagnosis of work-related stress and recommended medical leave, urging the company to support her recovery and to contact him if clarification was needed.

[114] Significantly, in his response of 20 November, Mr Louw confirmed that the Applicant's sick leave would be with full pay for as long as her entitlement allowed, and invited her to use the internal grievance process once she was well enough.

- [115] However, on 24 November, the company abruptly reversed course. It withdrew Mr Louw's earlier assurance, denied her allegations of harassment, accused her of malingering, and warned that disciplinary proceedings might follow.
- [116] The Third Respondent then withheld the Applicant's remuneration for the balance of the month, paying her for only eight days — a 62 percent reduction in her normal salary.
- [117] The above events must be considered within the contractual context framed in the employee handbook and the Applicant's permanent employment contract.
- [118] Clause 5.4 of the employee handbook requires employees who will be late or absent to notify their immediate superior within thirty minutes before or after the start of their shift, giving the reason and expected return time. Such notification does not excuse the employee from complying with company rules or providing proper proof. The employee must furnish acceptable supporting documentation, and bears the responsibility of proving that the absence is legitimate.
- [119] The Applicant clearly conducted herself within the parameters of the above clause.
- [120] Then, clause 12.4 of the Applicant's permanent employment contract provides that the Third Respondent is not obliged to remunerate an employee who fails to produce a valid medical certificate.
- [121] Clause 12.5 empowers the employer to enquire with the medical professional, for which the employee consents.
- [122] Finally, clause 18, headed '*leave without remuneration*' provides that the employer may grant unpaid leave if an employee's sick-leave claim cannot be reasonably substantiated. If an employee is absent without permission or prior arrangement, that absence may be treated as unpaid leave, and disciplinary action may still follow.

[123] The significance of the above is that the Third Respondent had less drastic and more constructive alternatives open to it. Yet, inexplicably, it elected not to use them.

[124] Once the Third Respondent knew the Applicant was medically unwell, it was required to act within its own policies – to verify or record the absence appropriately – not to question her integrity or weaponize the sick-leave inquiry as disciplinary leverage. The employer's failure to follow its own procedures, coupled with accusatory communication, constituted a breach of the implied term of mutual trust and confidence.

[125] Accordingly, I conclude on the sick note issue:

125.1 The Applicant disclosed her illness in good faith; the Third Respondent turned that disclosure into an accusation. Compassion was replaced with confrontation, converting a medical issue into a disciplinary dispute. The Third Respondent's swift reversal – from acceptance to accusation – destroyed any remaining trust.

125.2 The decision to cut the Applicant's pay compounded the damage, both financially and emotionally.

125.3 The Third Respondent ignored its own contractual procedures that allowed verification or unpaid leave instead of punishment. By acting outside its own rules, the Third Respondent signalled hostility and bad faith.

125.4 The Third Respondent's actions breached the implied term of mutual trust and confidence.

125.5 What should have been a routine sick-leave process became the decisive rupture that made continued employment intolerable. The cause thereof was managerial overreaction and inconsistency, resulting in a total breakdown of the employment relationship.

The remedies open to the Applicant in respect of her reduced November salary

[126] In response to the Applicant's reliance upon the reduction of her November 2023 salary as a contributing factor to her case for constructive dismissal, Mr Snyman argued that the Applicant was obliged to explore external remedies. He relied upon the Labour Appeal Court's decision in *Albany Bakeries*¹⁰ to support that proposition.

[127] In that case, Mr Van Wyk had been Albany's Gauteng regional manager. When Albany restructured and told him he would be redeployed as Pretoria branch manager – a move he viewed as a demotion – he refused, sought a severance package, which was turned down. In response, he resigned alleging intolerability and claiming constructive dismissal. The Labour Appeal Court (*per* Pillay AJA) found that, in restricting and offering Mr Van Wyk a new post, Albany's conduct did not render continued employment objectively intolerable. A unilateral alteration may be unfair, but it does not automatically make employment intolerable. The ratio of that finding is that intolerability inherently implies that there is no other practical or reasonable alternative to resignation. Pillay AJA reasoned that "... *any solution falling short of resignation [must] be attempted as it preserves the working relationship, which is clearly what both parties presumably desire*".¹¹ Among those remedies are those provided in the LRA such as a claim for an unfair labour practice.¹²

[128] In his supplementary written submissions on this point, Mr Bosch argued that the Third Respondent's reliance on *Albany Bakeries* is misplaced. He argued that case only held that an employee *may* use a grievance procedure or the unfair labour practice route – not that they *must* do so before claiming constructive dismissal. Mr Bosch pointed out that some judgments have read *Albany* as imposing such a

¹⁰ *Albany Bakeries Ltd v Van Wyk and Others* (2005) 26 ILJ 2142 (LAC).

¹¹ At para 28.

¹² At para 30.

requirement (like *Bandat*¹³), but others had rejected that interpretation (like *Bakker*¹⁴). Mr Bosch submitted, correctly in my view, that each case turns on its own facts. He argued that the facts *in casu* show that the applicant neither knew of the LRA mechanisms, nor could she have been reasonably expected to use them, given her deteriorating mental health and the fact that an unpaid salary is not an unfair labour practice under the LRA. In any event, the November salary issue was only one element of the intolerability. Accordingly, *Albany* is altogether distinguishable and inapplicable.

[129] I agree. In *Albany*, the case for constructive dismissal was based only upon a demotion complaint, which falls squarely within the definition of an unfair labour practice in section 186(2) of the LRA. The Applicant's case has multiple facets, of which this is but one, bearing upon intolerability and ultimately her case for unfair dismissal.

[130] Accordingly, in my view, the Applicant was not, on these particular facts, obliged to explore external remedies as contemplated in the *Albany* decision.

The existence of reasonable alternatives to resignation

[131] As set out above, it is important to consider the existence and tenability of any reasonable alternatives open to the Applicant.

[132] The first and most obvious is whether it was reasonably feasible for the parties to open a constructive dialogue on this issue. In my view, the events as summarised above, clearly bear out that this was not a reasonable or feasible option.

¹³ *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at paras 52 and 62.

¹⁴ *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 1568 (LC)

[133] The second alternative are the formal structures framed in the Applicant's permanent employment contract read with the employee handbook.

[134] First, clause 19 of her contract, headed 'discipline' reads:

'19.1 The Employer has available an internal policy relevant to Company's rules and regulations. The Employee's signature hereto confirms acceptance thereof, and a commitment to abide by these.'

19.2 An internal Dispute Resolution Mechanism is established in the instance of a dispute arising between the Employee and Company. The parties are, in terms of this Agreement, irrevocably bound to exhaust the internal dispute channels prior to referring the dispute to other statutory forums'

19.3 On signature of this agreement, the staff member agrees that the company may enforce internal processes and or investigation against the employee if and when required. This includes but is not limited to the possible suspension of the employee, before and or during such investigations or internal processes.'

[135] Second, clause 20 of her contract, headed 'grievances' reads:

'20.1 In the event that the Employee wishes to raise a grievance it is required that the steps and the procedure outlined in the Grievance Policy be utilized. The Employee may refer any queries in this regard to the Human Resources Representative.'

[136] Finally, clause 5.22 of the employee handbook, in relevant part, reads:

'Employees who have a job-related issue, question, or complaint should first discuss it with their immediate supervisor. If the issue

cannot be resolved at this level, VVM encourages employees to contact their line manager ...'

- [137] The contractual framework, borne out by the excerpts above, established a mandatory, internal grievance system that employees are obliged to follow before approaching any external forum. In terms of the agreement and the employee handbook, disputes or complaints must first be raised with the immediate supervisor, then escalated to the line manager or Human Resources if unresolved. The company retains the right to investigate such matters internally, including the power to suspend an employee pending inquiry. In effect, the grievance structure is hierarchical, self-contained, and designed to ensure that workplace disputes are addressed and exhausted through internal channels.
- [138] It is common cause that those avenues were not pursued. The Applicant did not consider them a feasible or reasonable option. The Third Respondent argued the contrary.
- [139] In light of its position regarding the abuse of sick leave in circumstances where it not only purported to accept it through its human resources manager before withdrawing it, but also unreasonably rejected the certificate and letter without any rational basis to do so, the only inference that can be drawn is that any internal grievance procedure, had it been pursued, would have resulted in a foregone conclusion against the Applicant.
- [140] In all the circumstances, I conclude that the Third Respondent's internal grievance procedure was not a reasonable alternative. Nor did the Applicant have any other reasonable alternative remedy.
- [141] Before setting out my conclusion on the existence of a constructive dismissal, there remains one procedural aspect to consider.

Was the Applicant limited to the reasons given in her referral form to make her case for constructive dismissal?

[142] In her referral form, the Applicant recorded the reasons for her dismissal as '*no reasonable alternatives given; forced relocation despite various promises, etc*'. Citing the decision in *Masoga*,¹⁵ Mr Snyman argued that the Applicant was limited to those grounds.

[143] In reply, Mr Bosch argued that an employee is not limited to the grounds given in the referral form. He submitted that *Masoga* was not about the merits or about what a party can or cannot do in a referral form. Accordingly, he argued that *Masoga* is distinguishable and unhelpful.

[144] I agree with Mr Bosch. *Masoga* turned on whether two workers, employed by a contractor, but stationed at Pick 'n Pay, were in law employees of Pick n Pay under section 200B of the LRA. However, the employees had never mentioned that section in their referral, the commissioner *mero motu* invoked section 200B and, on that basis, found that Pick 'n Pay and the contractor were co-employers. On review, the Labour Court (and later the Labour Appeal Court) overturned the commissioner's decision. Both courts held that the commissioner had exceeded his mandate in *mero motu* invoking section 200B and had therefore decided the wrong dispute.

[145] In contrast to *Masoga*, here the Applicant's case has always been about a constructive dismissal. It would be untenable for an Applicant to be limited to those reasons given in their referral. I say so for two reasons. First, the reasons given for the constructive dismissal are facts to be established in evidence. Second, an arbitrator is bound to determine the real dispute between the parties.

[146] Accordingly, I consider that *Masoga* is neither helpful nor applicable.

¹⁵ *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others* [2019] 12 BLLR 1311 (LAC).

Conclusion regarding the existence of constructive dismissal

[147] The common cause facts bear out that there was a gradual deterioration of the work relationship between the parties.

[148] In *Murray*, the Supreme Court of Appeal (*per* Cameron JA, as he then was) held that mere intolerability is not enough; more is required.¹⁶ Mr Bosch submitted that the '*more*' in this instance is a consideration of everything that had happened until her resignation. The threshold, he argued, was crossed at the end when the Applicant had resigned.

[149] I am inclined to agree. In my view, the proverbial straw that broke the camel's back was the sick note issue. I find that the Third Respondent's conduct was not justifiable in the circumstances. The Applicant complied with the Third Respondent's internal policy by immediately informing her direct superior, Mr Woznica. On the same day, she furnished medical evidence supporting her justification for sick leave. The Applicant also took up the Third Respondent's invitation to respond to the latter's criticism of her medical certificate and allegation of abuse of sick leave by furnishing Dr van der Merwe's letter. The Third Respondent's criticism of the medical certificate and Dr van der Merwe's letter was objectively unfounded and unreasonable. This is underscored by the fact that the Third Respondent did not pursue its own investigation.

[150] What is more, the Third Respondent acted outside its own policy in docking the Applicant's salary for November 2023. While clause 18.2 of the employee manual provides that the Third Respondent may consider an employee's sick leave as unpaid leave '*absent from duty without prior arrangement or permission*', the Applicant's absence was both notified and supported by a medical certificate, and thus did not fall within the ambit of unauthorised leave contemplated in clause 18.2.

¹⁶ At para 13.

- [151] The Third Respondent plainly and objectively acted with intent. It failed, without justifiable reason, to heed Dr van der Merwe's plea to act with compassion in relation to the Applicant, as it was required to do.¹⁷ Worse still, despite Mr Louw – who it must be remembered is the Third Respondent's human resources manager – informing the Applicant that her sick leave was approved and would have no effect on her remuneration, the Third Respondent, without good cause, withdrew that approval and doubled down on its position that the Applicant had abused her sick leave and would be docked her salary for November 2023.
- [152] Under those circumstances, there was clearly an irretrievable breakdown in the working relationship and therefore unreasonable to expect the Applicant to pursue any internal grievance procedure.
- [153] In sum, upon an objective consideration of the evidence, I conclude that the Applicant established on a balance of probabilities that she was constructively dismissed.

Was the Applicant's dismissal fair?

- [154] It remains to be considered whether the Applicant's dismissal was fair. The Third Respondent bore the onus to do so.
- [155] In this regard, the Third Respondent's case was only that the Applicant was not constructively dismissed. It advanced no evidence justifying the fairness thereof. Accordingly, the Third Respondent failed to discharge its onus.
- [156] Accordingly, the award cannot stand.

¹⁷ *Sanlam Life Insurance Limited v Mogomatsi and Others* [2023] 11 BLLR 1166 (LAC) at paras 33–34.

Appropriate remedy

[157] In all the circumstances, I consider it appropriate to substitute the commissioner's decision with one declaring that the Applicant was constructively dismissed and that such dismissal was unfair.

[158] What remains to be determined is the Applicant's entitlement to compensation and if so, the quantum thereof.

[159] Section 193(1)(c) of the LRA provides that the court may order compensation where an unfair dismissal has been established. Section 194(1) in turn provides that any such compensation must, firstly, be just and equitable in all the circumstances, and is, secondly, limited to the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

[160] The Applicant seeks the maximum allowable amount of 12 (twelve) months' compensation.

[161] In my view, that amount is not just and equitable in all the circumstances on the facts of this matter. I say so for the following reasons.

161.1 First, on her own evidence, the Applicant would have been fit to resume work by 1 March 2024. That marks the point at which she regained full earning capacity. Any wage loss after that date is therefore no longer attributable to the dismissal, and compensation may extend only to the period of actual loss caused by it.

161.2 Second, as a senior executive, the Applicant possessed experience, autonomy, and marketability. There is no evidence she was rendered unemployable or that her professional reputation suffered lasting harm. Her distress was real, but not career-ending.

161.3 Third, the Applicant was not left unemployed, but secured alternative employment soon thereafter as an estate agent. That

demonstrates that while her distress was genuine, her financial and professional loss was limited.

[162] Accordingly, I consider that it is reasonable that the Applicant be awarded compensation in the total amount of R310 571.19 calculated (at R85 000.00 being the monthly rate prevailing at 30 November 2023) as follows:

162.1 the balance of (gross) remuneration owed to the Applicant for November 2023 in the sum of R55 571.19;

162.2 3 (three) months' gross remuneration for the months of December 2023, January 2024 and February 2024 amounting to R255 000.00.

Costs

[163] In this Court costs do not automatically follow the outcome.¹⁸ They are awarded only where considerations of law and fairness demand it. The court must weigh two competing concerns – the need not to deter employees from pursuing *bona fide* disputes, and the need to discourage frivolous or abusive litigation.¹⁹

[164] While the Applicant's claim was *bona fide* and not abusive, the unforeseen operational pressures on the Third Respondent precipitated the sequence of events that progressively eroded the employment relationship. That deterioration culminated in the dispute regarding the Applicant's sick note and the Third Respondent's reaction to it – the fulcrum of the matter, as discussed above.

[165] In my view, there is a sufficient degree of blame on both sides such that it would not be fair to visit costs on either party.

¹⁸ *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* [2021] 12 BLLR 1173 (CC) at para

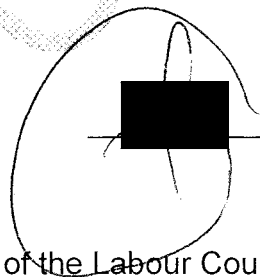
¹⁹ *MEC for Finance: KwaZulu-Natal and Another v Dorkin NO and Another* [2008] 6 BLLR 540 (LAC) at para 19.

[166] Accordingly, I consider it fair that each party should pay their own costs.

Order

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

1. The second respondent's award dated 24 June 2024 under CCMA case number WECT19442-23 is reviewed and set aside.
2. It is declared that the Applicant was constructively dismissed by the Third Respondent and that such dismissal was unfair.
3. The Third Respondent will pay the Applicant the sum of R310 571.19.
4. Each party will pay their own costs.



PS MacKenzie

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: CS Bosch

Instructed by: Carlo Swanepoel Attorneys Inc (Mr E Ramos)

For the Third Respondent: S Snyman of Snyman Attorneys

LABOUR COURT