



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 175/23

In the matter between:

REYNOLDS MALEKA

Applicant

and

TIMOTHY BOYCE N.O.

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

ADT SECURITY (PTY) LIMITED

Third Respondent

Neutral citation: *Maleka v Boyce N.O. and Others* [2026] ZACC 7

Coram: Maya CJ, Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Rogers J, Seegobin AJ, Tolmay AJ and Tshiqi J

Judgments: Seegobin AJ (majority): [1] to [111]
Madlanga ADCJ (dissenting): [112] to [169]

Heard on: 12 September 2024

Decided on: 24 February 2026

Summary: Section 186(1)(e) of the Labour Relations Act 66 of 1995 — constructive dismissal — intolerability — grievance procedure — exhaustion of internal remedies

ORDER

On application for leave to appeal from the Labour Appeal Court (hearing an appeal from the Labour Court of South Africa, Johannesburg):

1. Condonation is refused.

JUDGMENT

SEEGOBIN AJ (Kollapen J, Majiedt J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] The concept of constructive dismissal—

“conveys a notion that there existed an implied term in a contract of employment that an employer would not conduct itself in a manner that is designed to destroy or materially damage the relationship of trust and confidence that sustains the employment relationship, which term, if breached, entitles the employee to cancel the contract.”¹

[2] In such an instance, when the employee cancels the contract through resignation, they bear the onus of proof before the courts to show that they did not resign voluntarily but that they were constructively dismissed. The standard of proof is an objective one. Therefore, the focus is not on the employee’s subjective feelings and perceptions but rather, on the actions, or lack thereof, of the employer that rendered the employee’s

¹ Okpaluba and Maloka “Intolerability of the Employment Relationship in the Context of Constructive Dismissal: An Analysis of Recent Judgments from South Africa, Namibia, Lesotho and Eswatini / Swaziland (Part 1)” (2023) 37 *Speculum Juris* 85 at 86.

continued employment intolerable. It is not enough that the employment relationship has become inconvenient or uncomfortable. While sometimes a single incident, sufficiently serious on its own, can render continued employment intolerable, more often it is a pattern of behaviour on the part of the employer that finally breaks the camel's back.

[3] This matter concerns an alleged constructive dismissal as envisaged in section 186(1)(e) of the Labour Relations Act² (LRA). It is an application for leave to appeal against the judgment and order of the Labour Appeal Court dismissing an appeal by the applicant in this matter, Mr Reynolds Mashogole Maleka, against the judgment and order of the Labour Court which dismissed Mr Maleka's application to review and set aside an arbitration award (award) in terms of section 145 of the LRA. The award was handed down by the first respondent, Mr Timothy Boyce N.O. (Commissioner) made under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) in favour of the third respondent, ADT Security (Pty) Limited (ADT).

[4] The primary issue for determination is whether a unilateral change to Mr Maleka's conditions of employment rendered his continued employment intolerable, such that it induced him to resign. In addition to this issue, the application also raises the question of whether an employee who claims that they have been constructively dismissed by the employer is always required to exhaust the employer's internal grievance procedures before resigning and the circumstances that would warrant not utilising such procedures. The judgment also addresses the issue whether an employee is entitled to invoke the provisions of section 186(1)(e) based on future or anticipated intolerability.

² 66 of 1995. Section 186(1)(e) of the LRA reads:

“Dismissal means that—

...

(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.”

Background

[5] Mr Maleka holds a Bachelor of Commerce (BCom) degree as well as a Masters of Business Administration (MBA) degree. Since 2014 and until the time of his resignation in 2017, he was employed as an Information Technology (IT) Director by Tyco International (Tyco), an Irish company and was placed to work at ADT, a South African subsidiary of Tyco. As a director, he was part of ADT's Executive Committee (Exco). On an international level, Mr Maleka reported directly to Mr Paul Birmingham who was the global Head of IT for Tyco. This reporting was referred to as a "solid reporting line". In South Africa, Mr Maleka reported to Mr Stuart Clarkson, who was the Managing Director (MD) of ADT. This reporting was referred to as a "dotted reporting line". Mr Clarkson was also a member of Exco.

[6] In late 2016, negotiations which had commenced in 2015 were pursued between Tyco and Fidelity Security Group (FSG) for FSG to acquire ADT from Tyco. According to Mr Maleka, ahead of this planned acquisition, at an Exco strategic planning meeting held at Muldersdrift on 13-14 December 2016, Mr Clarkson announced that ADT had appointed Mr Allan Quinn as its new Financial Director and that Mr Quinn would also oversee the IT portfolio (which Mr Maleka headed), as well as take over the responsibilities of logistics and procurement. It was also announced that Mr Quinn would be reporting to Mr Clarkson and that Mr Maleka would, in turn, report to Mr Quinn. This meant that Mr Maleka would no longer be reporting directly to Mr Clarkson. At the later arbitration, Mr Clarkson explained that this reporting line aligned with FSG's structure. This arrangement would only be effective from the period after the acquisition of ADT by FSG, as until then ADT would still be under Tyco's management.

[7] Mr Maleka was not happy about the change in his reporting line. To him, this meant that he would be reporting directly to a peer, who was on the same level of management as himself. Moreover, he was not consulted about this change. He immediately raised his concerns with Mr Clarkson, informing him that he would not

accept the change. Mr Maleka claimed that this change, which took place without any form of consultation with him, would negatively impact his status, authority, work and working conditions. After listening to his concerns, Mr Clarkson informed Mr Maleka that Mr Quinn's appointment was not meant to demote him; rather, it was meant to provide him with additional IT support, something that Mr Clarkson was unable to provide as Mr Quinn had extensive experience in the use of the SAP IT System (SAP) that FSG would be implementing after its acquisition of ADT.

[8] Mr Maleka's solid reporting line to Mr Birmingham did not change. He was to continue reporting to Mr Birmingham until transfer of the business to FSG was finalised on 15 March 2017. Mr Quinn was employed by ADT with effect from 17 January 2017. However, Mr Maleka did not report to Mr Quinn, nor did he report to Mr Clarkson directly. He avers that during January 2017 and March 2017, Mr Quinn made attempts to treat him as a subordinate but he refused to subordinate himself to Mr Quinn whilst still being employed by Tyco.

[9] FSG's acquisition of ADT was approved by the Competition Commission on 15 March 2017. On 20 March 2017, Mr Quinn sent an email to Mr Maleka inviting him to a "Fidelity-ADT Integration Kick-Off" meeting. Some colleagues who fell under Mr Maleka under the IT portfolio were, however, excluded from attending the meeting. Mr Maleka felt affronted by this. He expressed his dissatisfaction with what he believed was the assumption of his role and responsibilities by Mr Quinn. He again complained to Mr Clarkson, once more objecting to the change in his reporting line. On 22 March 2017, Mr Maleka requested a meeting with Mr Clarkson to discuss the change in his reporting line. According to Mr Maleka, Mr Clarkson emailed him to say that if Mr Maleka would like to see him "quickly on this", he should ask Mr Clarkson's personal assistant to set up 10 minutes to do so. At this meeting, Mr Clarkson heard his concerns but then informed him that the decision was final. However, he also reassured Mr Maleka that his duties, responsibilities, status and salary would remain unchanged. Despite this assurance, Mr Maleka resigned on 23 March 2017.

[10] In his letter of resignation, he stated, amongst other things, that the change in his reporting line was unacceptable as it amounted to a change in his conditions of employment. He also said that he had expected to be consulted first, before any changes were made and announced. He further said that he believed that the changes were tantamount to a demotion from an executive role to a managerial one. He concluded by saying that he was looking forward to discussing the terms and conditions of his exit.

Litigation history

The CCMA

[11] On 24 April 2017, Mr Maleka referred the dispute to the CCMA for conciliation. The dispute remained unresolved. It was thereafter referred to the CCMA for arbitration.

[12] At the arbitration hearing, which took place on 27–28 June and 3–4 September 2018, Mr Maleka testified that his responsibilities and status were affected by the change in his reporting line. He explained that he felt as though he was demoted from Exco because Mr Quinn treated him like a senior manager and seemingly deprived him of his executive responsibilities on Exco. He testified that Mr Clarkson made his working conditions intolerable when he made the decision to demote him. He further testified that it mattered not that his remuneration stayed the same – he was demoted because his responsibilities and status changed. When he was asked by the Commissioner how his working conditions would have become intolerable if he had not accepted the change in his reporting line, Mr Maleka said, “having refused to accept the change, the behaviour I had been dealing with from Clarkson and Quinn made life intolerable. . . . [T]heir emails on 20 March 2017 showed that Quinn was making IT decisions”. This seemed to form the basis of Mr Maleka’s resignation, namely, that he had been demoted by Mr Clarkson and that he had been relieved of his executive role and functions which were now vested in Mr Quinn.

[13] Before the Commissioner, Mr Maleka conceded that he was aware of ADT's grievance procedures. However, when he was asked why he did not lodge a formal grievance against Mr Clarkson, his response was:

“[W]ithin the South African business Mr Clarkson is the highest point of authority. A grievance process in my understanding would therefore be superseded by the fact that I was speaking to him and I made the point around being aggrieved by his decision.”

[14] He was later asked why he did not pursue an unfair labour practice dispute in terms of section 186(2) of the LRA if he believed that he had been demoted. His response was that he had not taken any legal advice on the matter but that, in any event, he was unaware that this was a remedy available to him.

[15] The Commissioner held that the test for determining whether a resignation amounts to a constructive dismissal is an objective one, the onus being on the employee to prove that the employer made continued employment intolerable. He found that Mr Maleka's contention that the change in his reporting line amounted to a demotion which made his continued employment intolerable was devoid of any substance. He found, further, that the change was intended to provide Mr Maleka with the necessary IT support and assistance and therefore it was inconceivable for a reasonable employee to conclude that the change was tantamount to a demotion or that it made continued employment intolerable. All this, said the Commissioner, was supported by the fact that Mr Maleka's title, position on Exco, salary, roles and responsibilities had not changed as a result of the change in his reporting line. The Commissioner further noted that Mr Maleka's refusal to accept the change was “an ego thing” and a far cry from a demotion. On this basis, the Commissioner concluded that, because Mr Maleka never accepted the change in his reporting line, his working conditions could not have been rendered intolerable because the proposed change had not materialised.

[16] Placing reliance on *Albany Bakeries*,³ the Commissioner also rejected Mr Maleka's explanation for failing to exhaust ADT's internal grievance procedures. He held that the grievance procedures provided distinct steps which an aggrieved employee was required to follow before referring a dispute to the CCMA or Bargaining Council in terms of the LRA. He concluded that Mr Maleka's failure to exhaust the internal grievance procedures suggested that his resignation had more to do with discussing the terms and conditions of his exit than having his displeasure or grievance resolved by ADT. The Commissioner held that Mr Maleka's resignation did not pass the test for constructive dismissal and that accordingly, he failed to establish the existence of a dismissal.

The Labour Court

[17] Mr Maleka thereafter applied to the Labour Court to review and set aside the award. Some months later ADT filed an application in terms of rule 11 of the Labour Court Rules.

[18] In terms of the rule 11 application, ADT sought an order declaring that the review application must be regarded as withdrawn in accordance with clause 11.2.3 of the Labour Court's Practice Manual (Practice Manual).⁴ ADT's complaint was that Mr Maleka had filed the record of the CCMA proceedings outside of the 60-day period

³ *Albany Bakeries Ltd v Van Wyk* (2005) 26 ILJ 2142 (LAC).

⁴ The relevant part of clause 11 of the Practice Manual of the Labour Court of South Africa, titled "Applications to review and to set aside arbitration awards and rulings", provides:

"11.2.2 For the purposes of rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received.

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties, and answering and replying affidavits may be filed within the time limits prescribed by rule 7. The Judge President will then allocate the file to a judge for a ruling, to be made in chambers, on any extension of time that the respondent should be afforded to file the record."

as prescribed by clause 11.2.2 of the Practice Manual. According to ADT, the period for filing commenced on 21 November 2018 when Mr Maleka was notified by the Registrar in terms of rule 7A(3) that the CCMA had delivered the record (though it turned out to be incomplete) in the form of a compact disc. ADT argued that Mr Maleka was late when he filed his notice in terms of rule 7A(8)(b)⁵ and the record only on 3 May 2019. Mr Maleka's contention was that "record" in the context of clause 11 meant a full and complete record. It was common cause that between 16 January 2019 and 27 March 2019 the parties were engaged in the reconstruction of the record, owing to its incomplete state. The reconstructed record only became available to Mr Maleka on 3 April 2019 when the Registrar notified him that the it had been filed by the CCMA.

[19] The Labour Court accepted that in terms of clause 11.2 of the Practice Manual the 60-day period commenced on the date upon which an applicant was notified by the Registrar that the record has been received, regardless of its condition. The Court held, however, that clause 11.2.3 provides for an extension of the 60-day period owing to a record that is lost, incomplete or inaudible. As a result, the Court held that the 60-day period in this matter only commenced from 4 April 2019, after the reconstructed record was filed with the Registrar and Mr Maleka was accordingly notified. The Court therefore dismissed the rule 11 application.

[20] In his application for a review and the setting aside of the award, Mr Maleka relied on the grounds of review set out in section 145(2)(a)(i) and (ii)⁶ of the LRA. His

⁵ Rule 7A(8)(b) reads:

"The applicant must within 10 days after the registrar has made the record available either—

...

(b) deliver a notice that the applicant stands by its notice of motion."

⁶ Section 145(2) of the LRA states:

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

(a) that the commissioner—

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

(ii) committed a gross irregularity in the conduct of the arbitration proceedings."

contentions were that the Commissioner had overlooked material facts in the matter and as a result, had reached an unreasonable and unjust conclusion. He argued that the Commissioner misconstrued the facts and the evidence when he deemed his complaint to be an “ego thing” and when he concluded that the resignation had more to do with Mr Maleka’s discussion of the terms and conditions of his exit rather than his genuine desire to voice his grievances.

[21] Mr Maleka also argued that the Commissioner’s conduct of the arbitration was grossly irregular in that he failed to consider the material facts and evidence available to him. He contended that this was due partly to the fact that the Commissioner failed to appreciate that Mr Maleka’s complaint was not about the “dotted line” reporting but that he had been instructed to “report to a peer, a level below the rank to which [he] was reporting up to 15 March 2017”. In this regard Mr Maleka relied on the reasonableness test for the review of an award as set out by this Court in *Sidumo*.⁷

[22] Before the Labour Court he asserted:

“[M]y grief⁸ was substantially that I would instead be reporting to a role within ADT that was previously in the same management level as mine. The nub of my dissatisfaction and forced resignation was that my reporting line, *after the acquisition*, would change from that of an executive (highest point of interface) within ADT to that where I was to report to a peer in the same level of management as I was.”
(Emphasis added.)

[23] Mr Maleka contended that his status would be drastically reduced if he were to report to “Quinn, [his] peer”, which, in the grand scheme of his role, constituted a demotion. He confirmed, however, that his salary had not been reduced leading up to the date when the acquisition was approved and that the terms and conditions of his

⁷ *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

⁸ The intended word is “grievance” rather than “grief”.

employment remained the same. Furthermore, he remained a member of Exco and was still responsible for ADT's IT portfolio.

[24] Mr Maleka again expressed the view that his dissatisfaction related mainly to what would happen after the acquisition. He averred that Mr Quinn was clearly going to assume his executive authority and decision-making powers concerning the IT aspect of the business. He explained that even though he would have remained on Exco, he would have been a mere "token". This would add to the reduction of his status in the business and would also negatively impact his career because—

“[his] status would be reduced, [his] authority whittled away and [his] powers would be seized. [He] would no longer be—
‘planning, organising, directing and controlling the activities and the staff involved in the operations of business systems.’”

[25] Thus, Mr Maleka's grounds for review were mainly an expression of his dissatisfaction with the Commissioner's assessment of the facts and the evidence that was led during the arbitration.

[26] The Labour Court held that in dealing with a case involving an alleged constructive dismissal, the Commissioner first had to establish the existence of such a dismissal. Once a dismissal was established, he was then required to establish the fairness of the dismissal. Whether there was a dismissal required the CCMA to determine whether it had jurisdiction to determine the dispute.⁹ The Labour Court held that the applicable test on review was whether the Commissioner's decision was, objectively speaking, correct, as held in *Asara Wine Estate*.¹⁰ It further held that the test was not one based on a threshold of reasonableness as relied upon by Mr Maleka, nor was the appropriate test the one set out by this Court in *Sidumo*.

⁹ *South African Rugby Players Association v SA Rugby (Pty) Ltd* [2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC) (SARPA) at paras 39-40.

¹⁰ *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* [2011] ZALCCT 21; (2012) 33 ILJ 363 (LC).

[27] The Labour Court set out the test for constructive dismissal in terms of section 186(1)(e) as being the following:

“In broad terms, the key elements of the test are that the contract of employment must have been terminated by the employee, the employee must not have terminated the contract voluntarily (in the sense that he or she would have continued in employment indefinitely but for the unbearable situation created by the employer), continued employment must, objectively, be intolerable, the intolerable circumstances must have been of the employer’s making, and the employer must be culpably responsible for the conduct that created the intolerable conditions.”¹¹

[28] The Labour Court also had regard to the matter of *Jordaan*¹² in which the Labour Appeal Court observed that considerable levels of irritation, frustration and tension are inherent in employment relationships, but that these in themselves are not sufficient to establish a level of intolerability to found a claim for constructive dismissal. More is required. The employer’s conduct as a whole was to be considered in order to determine whether, when judged “reasonably and sensibly”, the employee could not be expected to tolerate it. In other words, the conduct of the employer or the circumstances created by the employer must, objectively viewed, be intolerable.

[29] The Labour Court further held that the rule that an employee ought first to exhaust a grievance procedure prior to a resignation which is later alleged to be a constructive dismissal is a flexible one, particularly in cases where it would have been ineffective or futile for an employee to first exhaust such procedures. The Court found that Mr Maleka’s failure to provide compelling reasons for not having followed ADT’s grievance procedures was detrimental to his claim for constructive dismissal, providing grounds for a dismissal of his application altogether. It found that Mr Maleka’s conduct was impulsive and not a measure of last resort.

¹¹ *Maleka v Boyce N.O. and Others*, unreported judgment of the Labour Court, Johannesburg, Case No JR 2227/18 (2 December 2021) at para 14.

¹² *Jordaan v Commissioner for Conciliation, Mediation and Arbitration* [2010] ZALAC 10; [2010] 12 BLLR 1235 (LAC); (2010) 31 ILJ 2331 (LAC).

[30] The Labour Court reasoned that the change to Mr Maleka's reporting line, from the Chief Executive Officer to an executive on the same level of management as himself, did not render his continued employment intolerable. It found that the fact that there was a clear business rationale for the restructuring weighed against a finding of constructive dismissal. It echoed the Commissioner's finding that Mr Maleka's terms of resignation suggested that his resignation had more to do with negotiating an exit package and less to do with the intolerability of continued employment. On the strength of this reasoning, the Labour Court held that the Commissioner's decision was correct. The review application was dismissed, with the parties being ordered to bear their own costs.

The Labour Appeal Court

[31] The Labour Court granted Mr Maleka leave to appeal. Before the Labour Appeal Court, Mr Maleka contended that the Labour Court erred in its finding that he did not establish a dismissal on grounds that he did not exhaust ADT's grievance procedure. In this regard, he submitted that he complained on three occasions over a period of three months to Mr Clarkson, who on all such occasions informed him that his decision was final. He also argued that the grievance procedure did not anticipate a dispute with the MD, being Mr Clarkson. He said the Labour Court erred when it concluded that his resignation was an "ego thing". Finally, it was his case that the Labour Court was incorrect to find that there was a clear business rationale for the restructuring without him being consulted or being afforded an opportunity to consider the proposed changes to his conditions of employment.

[32] In its judgment, the Labour Appeal Court took issue with Mr Maleka's failure not to refer an unfair labour practice dispute to the CCMA on grounds of a demotion or unfair discrimination which, it held, could have averted his resignation and properly resolved the dispute. It held that Mr Maleka's "failure to pursue other feasible remedies, short of resigning, objectively speaking, was not justified at all, let alone reasonable". It thus held that the proposition that Mr Maleka had acted precipitately and prematurely was not without merit. It found that his situation had not become

unbearable or intolerable. Accordingly, it held that Mr Maleka had not discharged the onus of proving, on a balance of probabilities, that there was a constructive dismissal. For these reasons, the Labour Appeal Court concluded that the findings of the Labour Court and the Commissioner were correct. Mr Maleka's appeal was dismissed with no order as to costs.

This Court

Mr Maleka's submissions

[33] Before this Court, Mr Maleka contends that his appeal is based on the improper assessment by the Labour Court and Labour Appeal Court of the facts and their incorrect application of the test for constructive dismissal in terms of section 186(1)(e) of the LRA as laid down by this Court in *Strategic Liquor Services*.¹³ There, this Court held that the test for constructive dismissal was not whether the employee had other alternatives short of resignation, but whether the employer made continued employment intolerable. Mr Maleka argues that both the Labour Court and the Labour Appeal Court focused on the fact that he did not exhaust all the internal grievance procedures of ADT before resigning. This was in circumstances where it was clear to him that his employer had thwarted all his efforts to preserve the employment relationship. Moreover, his employer made it clear to him that all legitimate avenues to remove the intolerable conditions would be futile, thereby effectively exacerbating the oppressive conduct and making the continued employment relationship intolerable.

[34] Mr Maleka submits that he was effectively demoted and tokenised by ADT because his executive status and contract existed on paper only. He supports this statement by listing certain changes to his conditions of employment in the post-merger structure of the company. He asserts firstly that, although it was clear from his employment contract and offer of employment that as Director of IT he was "solely responsible for the execution of the thinking, the strategy and doing of all deliverables

¹³ *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; 2009 (10) BCLR 1046 (CC); (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC).

on IT within the ADT”, FSG’s acquisition of ADT on 15 March 2017 would affect the change in his reporting line. He would no longer be reporting to the highest executive in the company but to an executive on his own level. It was this change that aggrieved him the most. He contends that the Labour Court’s finding that this change was a fact of corporate life was incorrect. This is because a company cannot logically have two executives in one department. Secondly, he asserts that the post-merger structure of ADT-FSG excludes an IT Executive from Exco level, making it indisputable that his portfolio would be redundant in that structure.

[35] Mr Maleka submits that Mr Clarkson’s announcement at Muldersdrift had taken him by surprise. The changes announced by Mr Clarkson meant that Mr Quinn would become his line manager and Mr Maleka in turn would be his subordinate. He viewed this as a demotion which was announced in public without any prior consultation with him. Furthermore, the making of the announcement in the presence of numerous senior staff made him feel that he was not worthy of any respect. He contends that he felt humiliated and his dignity was impaired. In his founding affidavit in these proceedings, he states, amongst other things, that “[t]he scheme of things would result in my proverbial ‘demotion’” and that “[t]his was the gravamen of my complaint at the arbitration”.

[36] Lastly, Mr Maleka contends that his future in the new structure would be intolerable and that he was left with no option but to resign. He submits that his resignation letter shows that it was never his desire to terminate his employment with ADT.

ADT’s submissions

[37] ADT, on the other hand, contends that in order for Mr Maleka to succeed, it was incumbent upon him to have brought his review on the jurisdictional question of whether he was indeed dismissed, the test being whether the Commissioner was correct, and whether the dismissal was fair, on the reasonableness test. ADT submits that

Mr Maleka failed to make out a case before the Labour Court as to what was reviewable, other than to criticise the Commissioner's findings, reasoning and the failure to apply his mind.

[38] ADT submits that Mr Maleka's complaint has morphed in his application for leave to appeal into a claim that he was being "oppressed". It contends that, having failed with his previous arguments based on the evidence he presented, his case before this Court is now different from the one he presented before the Commissioner.

[39] ADT points out that before the CCMA, Labour Court and Labour Appeal Court, Mr Maleka submitted that his cause of action was premised squarely on section 186(1)(e) of the LRA. It submits that had Mr Maleka contended that such constructive dismissal related to a transfer as contemplated by section 197¹⁴ of the LRA,

¹⁴ Section 197 of the LRA deals with the transfer of contract of employment. The relevant provisions for purposes of this matter are subsections (1), (2) and (3)(a):

"Transfer of contract of employment"

- (1) In this section and in section 197A—
 - (a) **'business'** includes the whole or a part of any business, trade, undertaking or service; and
 - (b) **'transfer'** means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.
- (2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—
 - (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before date of transfer;
 - (b) all the rights and obligations between the old employer and an **employee** at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
 - (c) anything done before the transfer by or in relation to the old employer, including the **dismissal** of an employee or the commission of an unfair labour practice or act of discrimination, is considered to have been done by or in relation to the new employer; and
 - (d) the transfer does not interrupt an **employee's** continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.
- (3) (a) The new employer complies with subsection (2) if that employer employs transferred **employees** on terms and conditions that are on

he should have sought to adjudicate such dispute in terms of section 187(1)(g)¹⁵ of the LRA. However, this was not his case, so it was submitted. Had this been his case, the CCMA would not have been able to arbitrate the dispute and Mr Maleka would have been compelled to seek an adjudication by the Labour Court in terms of section 191(5)(b) of the LRA,¹⁶ as he would be alleging an automatically unfair dismissal.

[40] ADT submits further that it has never been Mr Maleka's case that he suffered any adverse effects surrounding a transfer of the business, as contemplated by section 197 of the LRA, or that his resignation resulted from the said transfer. Had this been the case, the CCMA, the Labour Court and the Labour Appeal Court would all have concluded that the CCMA was *functus officio* (discharged of its duties) to arbitrate a dispute when section 187(1)(g) of the LRA was applicable.

[41] Additionally, ADT argues that Mr Maleka based his case on an anticipated intolerability, that is, on a state of things he expected would happen. However, such a state of intolerability had not yet arisen when he resigned and no evidence existed to support his opinion that it may arise post-transfer. Similarly, Mr Maleka made no attempt to seek any recourse before the CCMA for an unfair labour practice or a

the whole not less favourable to the employees than those on which they were employed by the old employer.”

¹⁵ Section 187 on automatically unfair dismissals states as follows:

- “(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is
 - ...
 - (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A.”

¹⁶ The subsection provides:

- “(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved—
 - ...
 - (b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is—
 - (i) automatically unfair.”

discriminatory practice, nor did he invoke the protections afforded by sections 187 and 197 of the LRA. Instead, his case was that he would not be prepared, in a future management structure, to subordinate himself to a peer and chose to resign rather than work with Mr Quinn.

[42] Finally, ADT submits that Mr Maleka did not advance facts necessary to prove a constructive dismissal. It contends that the Commissioner arrived at a correct conclusion based on the evidence before him. There was accordingly no basis in law to review and set aside the award. ADT seeks a dismissal of the application for leave to appeal with costs on a punitive scale.

Condonation

[43] Mr Maleka failed to file his application for leave to appeal timeously. The application was filed 32 days late. The explanation proffered by him is that he could not secure the services of a lawyer as he has been unemployed since his alleged constructive dismissal in 2017 and, as a result, he was rendered indigent. Mr Maleka also seeks condonation for the late filing of his written submissions in this Court. His written submissions were 12 days late. He alleges that the delays were occasioned by matters beyond his control.

[44] ADT opposes both applications for condonation. The nub of ADT's opposition is that Mr Maleka misled the Court as far as his allegations of unemployment and inability to afford legal fees are concerned. ADT argues that Mr Maleka has not proffered a full explanation for the entire period of the delay, nor has he advanced any submissions regarding his prospects of success. ADT contends that it and this Court have suffered prejudice because of Mr Maleka's repeated non-compliance with this Court's directions. ADT accordingly submits that a costs order against Mr Maleka would be an appropriate sanction for his conduct.

[45] This Court has previously stated that the standard for considering an application for condonation is the interests of justice. This would of course depend on the facts and

circumstances of each case. There are a host of factors that are relevant to this enquiry including, but not limited to, the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.¹⁷ Indeed, what is required of a court when considering an application for condonation is a balancing act of these various factors depending on the facts before the court.¹⁸ The scale will, however, often tip against the granting of condonation upon consideration of the explanation furnished for the delay and the prospects of success.¹⁹

[46] As such, an applicant seeking condonation must give a full explanation for the delay.²⁰ The explanation must not only account for the entire period of delay but it must also be reasonable. The applicant must also enjoy reasonable prospects of success on consideration of the merits. This accords with what this Court said in *Grootboom*²¹ that condonation is not for the mere asking. While Mr Maleka's period of delay in filing the application for leave to appeal is considerable and the explanation offered is riddled with inconsistencies regarding his financial status and the challenges he faced in securing legal representation, I am of the view that the granting of condonation will depend on the prospects of success on consideration of the merits. I deal with this later in the judgment.

Jurisdiction and leave to appeal

[47] Mr Maleka argues that this Court's jurisdiction is engaged on three discernible grounds. In the first instance, he contends that this matter concerns the proper

¹⁷ *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at paras 20-2. See also *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (1) BCLR 65 (CC); 2014 (2) SA 68 (CC) at paras 20-4.

¹⁸ *S v Yusuf* 1968 (2) SA 52 (A) at para 54A.

¹⁹ *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC) at para 28.

²⁰ *Id.*

²¹ *Grootboom* above n 17 at para 23.

interpretation of section 186(1)(e) of the LRA insofar as it gives effect to section 23 of the Constitution. He argues that the impugned provision is unambiguous, in that the only factor relevant for consideration in a claim for constructive dismissal is that the “employer made the continued employment intolerable”.²² In support of this interpretative approach, Mr Maleka relies on *Strategic Liquor Services*,²³ a matter in which this Court confirmed that constructive dismissal only requires that the employer has made the employee’s continued employment intolerable.

[48] In addition to this, Mr Maleka argues that this Court’s jurisdiction is engaged on the basis that this matter concerns the interpretation of section 197 of the LRA insofar that the provision is to be interpreted as creating a legal obligation for employers to consult with their employees, if the latter’s conditions of employment are to change following a restructuring or transfer of the business. In the third instance, Mr Maleka argues that this Court’s jurisdiction is engaged on the ground that the constructive dismissal impaired his right to dignity, thereby giving rise to a constitutional matter.

[49] This Court has already stated that the LRA was enacted to give effect to the right to fair labour practices in terms of the Constitution. Thus, this Court’s jurisdiction will usually be engaged when the matter involves the interpretation and application of the LRA.²⁴ It follows that the proper interpretation of section 186(1)(e) of the LRA is a constitutional matter. I leave aside those cases where the only issues before the Court are factual and where no issues of general importance about the interpretation and the application of the LRA arise. This Court’s jurisdiction is also engaged as the matter concerns the protection of the constitutional right to fair labour practices as enshrined in section 23 of the Constitution.²⁵ Accordingly, I find that this Court has jurisdiction to hear this matter.

²² *Strategic Liquor Services* above n 13.

²³ *Id* at para 4.

²⁴ *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC) (*NEHAWU*) at para 14.

²⁵ Section 167(7) of the Constitution read together with *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at paras 11-14.

[50] In my view, the legal issues that arise in this matter are of paramount importance not only to the parties before this Court but to others as well. This is so because the matter does not only raise arguable points of law regarding the substance of the test for constructive dismissal, it also raises the need for employees to protect their right to dignity.²⁶ In the present instance Mr Maleka alleges that Mr Clarkson treated him with disdain by making a public announcement in front of his colleagues without any prior consultation with him. He further alleges that the change in his reporting line amounted to a “demotion” and that he was required to report to Mr Quinn, who he alleges is his peer. All this could conceivably have impaired his dignity.

[51] An employee who is allegedly unfairly demoted or has his or her status and responsibilities reduced and then resigns as a result of the unilateral changes to his or her conditions of employment because the employer has made continued employment intolerable, substantially suffers an impairment to his or her dignity. It is trite that recognising and protecting the right to one’s dignity is an “acknowledgement of the intrinsic worth of human beings [and their entitlement] to be treated as being worthy of respect and concern”.²⁷ Thus, the protection of the right to dignity is foundational to the right to fair labour practices. While Mr Maleka did not pertinently raise the issue of an infringement to his dignity either before the Commissioner or the Labour Courts, I nonetheless consider that given the nature of the complaints made by him as set out above, nothing precludes this Court from taking it into account in the overall assessment of his case, in the interests of justice.

²⁶ Section 10 of the Constitution.

²⁷ *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 328.

Analysis

The test on review – constructive dismissals

[52] The question that was before the Commissioner, the Labour Court and the Labour Appeal Court, and indeed before us, is whether Mr Maleka was constructively dismissed.

[53] The Labour Court and Labour Appeal Court have, with great consistency, held that whether there has been a dismissal speaks directly to the jurisdiction of the CCMA to entertain the dispute.²⁸ The CCMA, as a general rule, cannot determine its own jurisdiction. It can, however, make a determination for its convenience.²⁹ This position can be traced back to the old Labour Appeal Court in respect of the then Industrial Court.³⁰ It is only a court of law that can determine whether the CCMA has jurisdiction in a particular matter, the effect of which is that a decision by the CCMA which implicates its jurisdiction is subject to review by the Labour Court on objectively justifiable grounds.³¹

[54] What follows from the above is that if a commissioner, on the facts before them, objectively determines that there was no dismissal, the CCMA would lack the necessary jurisdiction to entertain the dispute in terms of section 191 of the LRA.³² This accords with the decision of the Labour Appeal Court in *Solid Doors*³³ where it was held that—

“the question whether the employee was constructively dismissed or not is a jurisdictional fact that – even on review – must be established objectively. That is so

²⁸ *Enforce Security Group v Fikile* [2017] ZALAC 9; 2017 (8) BLLR 745 (LAC); 2017 (38) ILJ 1041 (LAC) at para 43. See also *Transnet t/a Transnet Freight Rail v National Union of Metalworkers of SA obo Manku* [2021] ZALAC 17; 2021 (10) BLLR 1004 (LAC); 2021 (42) ILJ 1948 (LAC) at para 9.

²⁹ SARPA above n 9 at para 40.

³⁰ *Benicon Earthworks and Mining Services (Edms) Bpk v Jacobs N.O.* 1994 (9) BLLR 1 (LAC); 1994 (15) ILJ 801 (LAC) at 804C–D.

³¹ *De Milander v Member of the Executive Council for the Department of Finance, Eastern Cape* [2012] ZALAC 37; 2013 (34) ILJ 1427 (LAC) at para 40.

³² SARPA above n 9 at para 41.

³³ *Solid Doors (Pty) Ltd v Theron N.O.* [2004] ZALAC 14; (2004) 25 ILJ 2337 (LAC).

because if there was no constructive dismissal – the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner’s finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one – even on review – is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner’s award will stand to be reviewed and set aside.”³⁴ (Emphasis added.)

[55] The question on review therefore is whether, objectively speaking, the employee was constructively dismissed. A finding that an employee has been constructively dismissed is a matter of fact and the test to be applied, as correctly held by the Labour Court in this matter, is an objective one that is concerned with correctness and not reasonableness, because the question “whether an employee has been dismissed” rests on the jurisdiction of the CCMA.

[56] I pause to observe further that whether the correctness test or reasonableness test is to be used will depend on the nature of the dispute before the reviewing court. In *Jonsson*³⁵ the Labour Appeal Court held:

“The generally accepted view is that we have a bifurcated review standard, viz reasonableness and correctness. The test for the reasonableness of a decision was stated. . . as follows: ‘is the decision reached by the commissioner one that a reasonable decision-maker could not reach?’

In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute.

³⁴ Id at para 29.

³⁵ *Jonsson Uniform Solutions (Pty) Ltd v Brown* [2014] ZALCJHB 32 (LAC).

The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. *There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.*³⁶ (Emphasis added.) (Footnotes omitted.)

[57] As I have stated above, the test that is to be applied will be determined by the nature of the dispute. In other words, is it a dispute about the factual findings or a dispute about the legal or jurisdictional findings of the Commissioner. I am of the view that the dispute in the present matter is about the Commissioner's jurisdictional findings, that is, whether Mr Maleka was constructively dismissed. If he was not dismissed, the CCMA would not have had jurisdiction to hear the dispute and the award would stand to be reviewed and set aside on the grounds that the CCMA lacked jurisdiction.

[58] Notwithstanding the fact that the correct test on review in this matter is correctness, this is not the end of the enquiry. The usual *Sidumo* reasonableness test must apply once a court is satisfied that an employee was dismissed, that is, when it moves to the enquiry on whether the dismissal was unfair. This two-staged approach is consistent with what the Labour Appeal Court said in *Jonsson* that there will be cases "where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied".³⁷

[59] In *Westcor*³⁸ the Labour Court said:

³⁶ Id at paras 33-5.

³⁷ Id at para 35.

³⁸ *Westcor SA (Pty) Ltd v Mey* (2023) 44 ILJ 397 (LC). See also *Aquarian Lifestyle Trading (Pty) Ltd t/a Vespa South Africa v CCMA* [2024] ZALCJHB 73 (LC) at para 9 and *Ukweza Holdings (Pty) Ltd v Nyondo N.O.* [2020] ZALAC 7; [2020] 6 BLLR 544 (LAC); (2020) 41 ILJ 1354 (LAC) at para 12.

“It is firmly established (despite some criticism) that the review test on the first question – whether a resignation amounted to a constructive dismissal – is correctness, not reasonableness.

If the court is satisfied that the employee was dismissed, it must apply the usual *Sidumo* reasonableness test on review of the decision as to fairness. This test focuses on the outcome: is the arbitrator’s decision capable of reasonable justification on all the material that was before the arbitrator (including for reasons not considered by her)?”³⁹

[60] It must be emphasised that the purpose of applying the test in *Sidumo* is to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.⁴⁰ The test does not concern itself with whether the award is right or wrong. What is of importance is whether that decision, objectively viewed, falls within the spectrum of reasonable decisions that one would make based on the evidence before the decision-maker.⁴¹ The enquiry therefore is focused on the outcome and an assessment of whether the decision is capable of reasonable justification. That the decision is unsatisfactory in one or more respects is not enough to deem it unreasonable.⁴² It will, however, stand to be reviewable and set aside if it is one that a reasonable decision-maker could not reach.⁴³

[61] Therefore, when the Labour Court was confronted with Mr Maleka’s application for review, the two questions that Court had to ask itself were, firstly, whether Mr Maleka was constructively dismissed (a jurisdictional issue) and second, if he was, whether the constructive dismissal was unfair (a merits issue). On the first question, the test is for all purposes, objective correctness. On the second question, the test is whether the commissioner’s decision was one which a reasonable commissioner could

³⁹ *Westcor* id at paras 27-8.

⁴⁰ *Sidumo* above n 7 at para 105.

⁴¹ *National Union of Mineworkers v Rustenburg Platinum Mine (Mogalakwena Section)* [2014] ZALAC 62; [2015] 1 BLLR 77 (LAC) at para 26.

⁴² *Id.*

⁴³ *Sidumo* above n 7 at para 107.

reach. In other words, whether the decision is capable of reasonable justification on all the material that was before the commissioner at the time.

[62] Before considering the decision of the commissioner, I deal firstly with the concept of “constructive dismissal” and its intricacies in our law. I do so for the reason that this Court has not had an opportunity to give content to the test for constructive dismissal, apart from confirming that the test requires that the “employer made continued employment intolerable for the employee”.⁴⁴

The concept of constructive dismissal

[63] The concept of “constructive dismissal” emanates from English law. It was imported into our law in the late 1980s.⁴⁵ As a result, contracts of employment were deemed to contain an implied general clause which prohibited an employer from conducting itself in a manner that was “calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee”, without reasonable and proper cause.⁴⁶ A breach of this term would result in the repudiation of the contract thereby justifying the employee’s resignation and subsequent claim for compensation.⁴⁷

[64] The concept has been codified in the LRA and appears in section 186(1)(e) as follows:

“‘Dismissal’ means that—

...

(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.”

⁴⁴ *Strategic Liquor Services* above n 13 at para 3.

⁴⁵ *Murray v Minister of Defence* [2008] ZASCA 44; 2008 (11) BCLR 1175 (SCA); 2009 (3) SA 130 (SCA).

⁴⁶ *Id* at para 8.

⁴⁷ *Id*.

[65] The Labour Appeal Court in *Solid Doors*⁴⁸ set out three requirements for establishing that an employee has been constructively dismissed. It 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 the 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 made continued employment intolerable. All 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.”

[66] The first requirement is hardly contentious. It merely requires that an employee, either by words or by conduct, evidences a clear and unambiguous intention not to continue with her or his employment contract.⁴⁹ The second and third requirements are, however, contentious because they require the employee to show that the conduct of the employer or the conditions of their employment were so intolerable, to the extent that the employee could not have been reasonably expected to continue with their contract of employment. It suffices to state that there must be a causal connection between the intolerability and the termination.

[67] The Labour Appeal Court in *Mogomatsi*⁵⁰ held:

“In constructive dismissal disputes, a two stage approach is normally followed. First, the employee must prove that the employer effectively dismissed him or her by making her or his continued employment intolerable. It is an objective test. The employee need not prove that he had no choice but to resign, all that is required is to prove that the employer made continued employment intolerable. The conduct of the employer

⁴⁸ *Solid Doors* above n 33 at para 28.

⁴⁹ *Fijen v Council for Scientific and Industrial Research* (1994) 15 ILJ 759 (LAC).

⁵⁰ *Sanlam Life Insurance Ltd v Mogomatsi* [2023] ZALAC 15; [2023] 11 BLLR 1166 (LAC); (2023) 44 ILJ 2516 (LAC). See also *Centre for Autism Research and Education CC v Commission for Conciliation, Mediation and Arbitration* [2020] 11 BLLR 1123 (LC) at para 28 and *Westcor* above n 38 at para 30.

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.”⁵¹

[68] It is clear from the above that the inquiry into intolerability is an objective one, which requires a fine-tooth comb approach to determine the presence of intolerable conduct or working conditions. Grogan⁵² states:

“To discharge the onus of proving that they were constructively dismissed, employees must prove that it would have been ‘intolerable’ to remain in employment. The employer need not be shown to repudiate the contract in the formal sense; all that is needed is that the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign.”⁵³

[69] In *Pretoria Society*⁵⁴ the Labour Appeal Court held:

“When an employee resigns or terminates the contract as a result of constructive dismissal *such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely, to work.* The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. *She does so on the basis that she does not believe that the employer will ever reform or abandon 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.*

...

The enquiry then becomes 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 employers conduct as a whole and to determine

⁵¹ Id at para 32.

⁵² Grogan *Workplace Law* 13 ed (Juta & Co Ltd, Cape Town 2014).

⁵³ Id at 138.

⁵⁴ *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 986. See also *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILT 629 (LAC) (*Jooste*) at 638A-639B and *Quince Products CC v Pillay* (1997) 12 BLLR 1547 (LAC).

whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.” (Emphasis added.)

[70] The question that arises is what type of conduct on the part of the employer would be deemed to be intolerable? In other words, what constitutes intolerability? The Labour Appeal Court in *Solidarity*⁵⁵ held that the word “intolerable” means a situation which is beyond that which can be tolerated or endured; or insufferable.⁵⁶ The Court went further to say that it is “something which is simply too great to bear, not to be put up with or beyond the limits of tolerance”.⁵⁷ This means that the threshold test to establish intolerability is high.⁵⁸

[71] This Court in *Booi*⁵⁹ held that “the term ‘intolerable’ implies a level of unbearability, and must surely require more than the suggestion that the relationship is difficult, fraught or even sour”.⁶⁰ Although this was held in the context of section 193(2)(b) of the LRA, which is aimed inter alia (among others) at protecting the rights of individual workers and to achieve industrial peace in conformity with fair labour practices, in my view it can also be understood in the context of constructive dismissals where the allegation is that the employer made the employee’s continued employment intolerable resulting in the employee’s dismissal.

[72] Much of what I have quoted above also accords with the approach to constructive dismissals by courts and tribunals in foreign jurisdictions, which have recognised that the threshold for establishing constructive dismissal is high.⁶¹ When one borrows from

⁵⁵ *Solidarity on behalf of Van Tonder v Armaments Corporations of South Africa (SOC) Ltd* [2019] ZALAC 55; [2019] 8 BLLR 782 (LAC); (2019) 40 ILJ 1539 (LAC).

⁵⁶ Id at para 39.

⁵⁷ Id.

⁵⁸ *Gold One Ltd v Madalani* (2020) 41 ILJ 2832 (LC) at para 46.

⁵⁹ *Booi v Amathole District Municipality* [2021] ZACC 36 (CC); 2022 (3) BCLR 265 (CC); (2022) 43 ILJ 91 (CC).

⁶⁰ Id at para 40.

⁶¹ See decision of the British Columbia Supreme Court in *Danielisz v Hercules Forwarding Incorporated* 2012 BCSC 1155 at para 78 where Arnold-Bailey J held:

these jurisdictions, what is evident is that a claim for constructive dismissal must be objectively scrutinised in order to ascertain, from the facts, whether the conduct or series of acts by the employer have “poisoned the environment”⁶² or is such that it constitutes the “last straw” which broke the employment relationship, thereby justifying the employee’s resignation.⁶³

[73] In my view, intolerability means something more than just conduct (on the part of the employer) or working conditions, which simply result in difficult, unpleasant or stressful situations for the employee. It would not be enough that the employer’s conduct is merely rude, uncompromising or unbecoming. Likewise, “even a breach of the employment contract, deductions from salary, or unfair disciplinary actions would not per se establish intolerability”.⁶⁴ The employee would need to show that such conduct is characterised by what can objectively be construed as unendurable or agonising and he or she must show that the perpetrator is their employer. In other words, it must be clear that the employer’s conduct was the cause for complaint and that it

“It is clear that for negative behaviour towards an employee by an employer to constitute a constructive dismissal it must be such as to render continued employment beyond what an employee may reasonably be expected to bear. *The threshold must be high enough to permit an employer to legitimately express frustration to an employee, make very direct comments about performance, or require the employee to work in a workplace with a degree of discord or conflict.*” (Emphasis added.)

⁶² *General Motors of Canada Ltd v Yohann Johnson* 2013 ONCA 502 (*General Motors*) at paras 4-5 where Cronk J said:

“An allegation of discriminatory treatment in the workplace due to racism is a serious claim that implicates the reputation and employment interests of the claimant, as well as those of the alleged perpetrators. It can also affect the dignity, self-worth and health of both the alleged victim and those accused of racist conduct. An allegation of this type can reverberate for many years after the incident or incidents in question, with potentially long-term consequences for all concerned.

No less serious are judicial findings of racially-motivated conduct in the workplace and a poisoned work environment due to racism. Judicial consideration of an allegation of constructive dismissal based on alleged racism in the workplace requires careful scrutiny of and balanced attention to all the evidence relating to the allegation in order to determine whether it is more likely than not that the alleged racism occurred.”

⁶³ Although jurisdictions like Canada and the United Kingdom speak of a unilateral breach of an expressed or implied contractual term caused by the employer’s conduct or series of acts, which a reasonable person would conclude that the employer no longer wished to be bound by that contract. See *Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10; [2015] 1 SCR 500; *Farber v Royal Trust Co* [1997] 1 SCR 846; *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35; and *Marshall v McPherson Ltd* [2025] EAT 100.

⁶⁴ *HC Heat Exchangers (Pty) Ltd v Araujo* [2020] 3 BLLR 280 (LC) (*HC Heat Exchangers*).

brought the employee's tolerance to a breaking point.⁶⁵ This position is consistent with what has been followed by the labour courts since *Solidarity*.⁶⁶

[74] It follows that termination in these circumstances must be a measure of last resort. As I pointed out already, and as the authorities show, the threshold for establishing intolerability under section 186(1)(e) of the LRA is high. And so it should be. This is to avoid an unhealthy situation in a workplace where employees, who have become disgruntled and dissatisfied for flimsy reasons, would simply walk out and thereafter claim a constructive dismissal. Such a situation would be at odds with the prescripts of fairness in labour practices, which requires that “an employee who is dissatisfied with his employer's conduct, at first, offers the employer an opportunity to redress the dissatisfaction. Employees should refrain from hastily resigning and then arguing that the employment relationship had become unbearable”.⁶⁷

[75] Having set out the applicable principles in respect of the second and third requirements of the test for constructive dismissal as laid down in *Solid Doors*, I turn to consider the material facts that were before the Commissioner which led to his finding that Mr Maleka was not constructively dismissed.

[76] Before the CCMA, Mr Maleka based his cause of action exclusively on the provisions of section 186(1)(e) of the LRA. The Commissioner correctly identified the issue for determination to be whether “the employer made continued employment intolerable for the employee” as contemplated in the section. The Commissioner further correctly stated that in terms of section 192(1) of the LRA, Mr Maleka, as the employee, bore the onus to establish the existence of the dismissal. Furthermore, the Commissioner correctly held that the test for determining whether a resignation

⁶⁵ Id at para 46.

⁶⁶ Id at para 49. See also *Foschini Group v Commission for Conciliation, Mediation and Arbitration* (2008) 29 ILJ 1515 (LC) at para 22.

⁶⁷ *Old Mutual Group Schemes v Dreyer* [1999] ZALAC 32; (1999) 20 ILJ 2030 (LAC).

amounts to a constructive dismissal was an objective one that requires an assessment of the employer's conduct.

[77] It was common cause before the Commissioner that the change in Mr Maleka's dotted reporting line would not have resulted in any change to his title, position, salary, roles and responsibilities, or to his position on Exco. His contention throughout the arbitration was that the proposed change in his dotted reporting line from Mr Clarkson (as MD) to Mr Quinn (the Chief Financial Officer) amounted to a demotion and this made continued employment intolerable for him. On the evidence, the Commissioner accepted that Mr Quinn was an expert in the SAP IT system, that he had previously owned his own IT company and that he had implemented the system at another company where he was previously employed. In these circumstances, the Commissioner considered that it was understandable why Mr Clarkson felt that Mr Quinn was better equipped to provide Mr Maleka with additional IT support. In the Commissioner's view, Mr Clarkson was accordingly fully entitled to make this change to Mr Maleka's dotted reporting line.

[78] There is nothing in the evidence to suggest that Mr Maleka was not aware of the impending acquisition of ADT by FSG. The negotiations for the acquisition commenced as early as 2015 between Tyco and FSG and gained momentum towards the latter part of 2016. Mr Maleka himself had been involved in the take-over process. He had in fact also delivered presentations on this as the employer's IT director. It was, however, the announcement by Mr Clarkson at the strategic planning meeting at Muldersdrift on 13-14 December 2016 that took him by surprise. It was there that Mr Clarkson announced that ADT had appointed Mr Quinn as its financial director and that Mr Quinn would also head the IT portfolio which Mr Maleka was already heading. The effect of this change, as far as Mr Maleka was concerned, was that he would now be reporting locally to Mr Quinn and not to Mr Clarkson.

[79] Before the Commissioner, Mr Maleka testified that he viewed this change in his reporting line as a demotion as it differed from what he was hired for. He also felt that

Mr Clarkson was seeking to remove him from Exco. His attempts thereafter to discuss the matter with Mr Clarkson proved futile as Mr Clarkson was dismissive and went so far as to indicate that the decision would not be revisited. Whilst Mr Maleka was prepared to, and did in fact, interact with Mr Quinn as a colleague, the event that triggered his resignation was when he received an email on 20 March 2017 from Mr Clarkson, on behalf of Mr Quinn and him, requesting that he join the “ADT-Fidelity Integration Kick-Off” event. Mr Maleka immediately turned down the invitation as he felt that he was being treated as a subordinate by Mr Quinn. Mr Maleka recorded his objection in writing to Mr Clarkson on 22 March 2017. Mr Clarkson responded on the same day saying that he had considered the objection but that Mr Maleka could arrange a 10-minute meeting with him through the former’s personal assistant. At this meeting, Mr Maleka informed Mr Clarkson that he felt that he was being pushed out of the organisation and that he was left with no choice but to resign. Mr Clarkson informed Mr Maleka that the decision announced in December 2016 would stand. However, he also told Mr Maleka that he should go home and think about his position. Mr Maleka resigned a day later.

[80] It is perhaps useful at this juncture to have regard to the full contents of Mr Maleka’s letter of resignation and the precise reasons he advanced for resigning. It reads:

“Hi Stuart

As discussed in your office yesterday, this mail is to confirm that I will not be accepting the change in reporting line. I fully accept that you have the responsibility to make this decision. Equally I have to make decisions that advances my career hence I emphasized the point on ‘Levels of Work’.

Herewith more context:

- 1) I joined ADT for career advancement – to have ‘end-to-end’ executive responsibility for an IT function. This was my agreement with Tyco and ADT.
- 2) Changing my reporting line will thus change my condition of employment.

- 3) The change will effectively demote me to a manager / senior manager level. That takes me back 15 / 16 years back in career. The last time I had a title senior manager. This will come with change in organisational responsibilities removed from the executive team. The career implications are clearly negative. Which I cannot accept.

Fidelity context:

- 1) As you noted your decision is informed by the Fidelity structure. I am aware and understand that FSG will have to make integration decisions, but this one was made in December already. I had hoped changes in reporting lines would be deferred to the integration process. *If the decision is a Fidelity directive, then I would have expected a consultation process where alternatives would be offered. I would expect to be treated as an 'affected employee'.*⁶⁸ This is the fair HR process. I fully expected that from FSG side depending how they intend to integrate ADT going forward, would follow similar. It is unfortunate that, in this case, I was also not afforded a 1 on 1 opportunity to discuss before you announced my change in reporting line at the 'break-way' / strategy session in December [2016].
- 2) Given our experiences with Tyco, you and I talked about the need to support the sale transaction through. In spite of the risks and concerns that one had we agreed to give this sale process a fair chance. In my mind, this was not only to ensure continuity and 'going concern' status of the business but also for the potential opportunities that FSG could offer. I was truly looking forward to that and as noted above, would have hoped you would defer restructure decisions. *To ask me to take a lower role under this circumstance does not auger well for potential future opportunities in FSG, let alone my point (3) above.*

It is unfortunate that I have to tender this resignation. I consider it as a 'forced' or 'no alternative' situation. I look forward to discussions on termination conditions.”
(Emphasis added.)

[81] It is apparent from his letter of resignation that Mr Maleka's dissatisfaction and unhappiness did not stem from a state of intolerability in the workplace. Rather, it arose mainly from the fact that his reporting line had suddenly changed. This, in his view, resulted in a material change to his conditions of employment. He now found himself

⁶⁸ Emphasis added.

under less favourable working conditions and that too without any consultations. If this was his case from the outset, this change to the terms of his conditions of employment stood to be challenged in terms of section 187 read with section 197 of the LRA. However, this was not the case he put before the CCMA – before the CCMA his case had changed to one exclusively in terms of section 186(1)(e).

[82] I have set out the events immediately preceding Mr Maleka's decision to resign in some detail as they support the Commissioner's finding that Mr Maleka failed to discharge the onus resting on him in terms of section 186(1)(e) of the LRA. Clearly, Mr Maleka felt aggrieved by the change in his reporting line. He felt that he was being demoted and side-lined, and that the change was designed to force him off Exco. That he was entitled to entertain such feelings is perhaps justifiable. He was, after all, in his own right, a highly qualified individual with a vast and varied experience in IT. He was also the Director and Head of IT in ADT and had no less than 15 years of IT experience. On the other hand, however, ADT was embarking on restructuring and Mr Maleka was integrally involved in this process.

[83] It must be accepted that the business world is a fluid environment with businesses and companies constantly restructuring and rebranding themselves in order to remain competitive so as to meet the demands of a changing world. Whilst such changes may result in many positive effects, there could equally be negative ones, especially where some employees become redundant and lose their employment. This, however, is not what happened to Mr Maleka. By his own admission, he did not lose anything as a result of the acquisition – his position on Exco, his title, status, remuneration and terms of his employment contract remained unchanged. Additionally, the evidence was that Mr Quinn was an expert when it came to the SAP IT system and Mr Maleka would have benefitted greatly from such support in his portfolio.

[84] Given the relatively short duration of the period between December 2016, when Mr Clarkson made the announcement, and 23 March 2017, when Mr Maleka submitted his letter of resignation, it is difficult to conceive that the employer would have

embarked on a deliberate and concerted effort to make continued employment for Mr Maleka so intolerable so as to force him to resign. It seems more likely that his resignation had more to do with an anticipated intolerability rather than an existing one, namely the new reporting lines that would come into operation upon the implementation of the FSG takeover.

[85] I do not believe that section 186(1)(e) envisages a future or anticipated set of circumstances that might result in intolerability entitling an employee to resign. This would be stretching the bounds of intolerability too far. In his resignation letter, Mr Maleka stated that he was concerned about something that would only happen in the future. Interestingly, in his evidence before the Commissioner, he conceded that he never accepted the change in his reporting line. In light of this, the Commissioner made a crucial finding in paragraph 28 of his award when he said:

“In addition to the foregoing, the absence of intolerable working conditions is patently obvious if one bears in mind that the proposed change in the employee’s dotted reporting line never materialised. The employee made it abundantly clear throughout the arbitration that he refused to accept the proposed change, and it is axiomatic that a proposed change which does not materialise can never render continued employment intolerable for a reasonable employee. As stated above, the employee’s refusal to accept the proposed change in his dotted reporting line was, in my view, ‘an ego thing’, and it is significant that the employee concluded his resignation letter by stating that he looked forward to ‘discussions on termination conditions’.”

[86] In all the circumstances, I am unable to conclude that the Labour Court, based on all the evidence before it, came to an incorrect finding that no constructive dismissal had been established. It follows then that the Commissioner’s findings cannot be faulted. In the absence of a finding that Mr Maleka was constructively dismissed, there was no need for the Labour Court and the Labour Appeal Court for that matter to embark upon the second leg of the enquiry as set out in *Sidumo*.

Alternative remedies

[87] Although I have already found that the Commissioner was correct in his finding that Mr Maleka was not constructively dismissed, I do, however, consider it important to address whether an employee in Mr Maleka's position should first explore other suitably available alternative remedies to resolve the dispute before resigning. I do so because whether an employee has exhausted internal procedures to resolve their grievance is important in determining whether the situation was such that it can be regarded as intolerable. The labour courts have adopted an approach that supports the Commissioner's finding that an employee who fails to exhaust the internal grievance remedies that were available to him would be hard-pressed to prove that continued employment was intolerable.⁶⁹ I agree with this approach for the reasons set out below.

[88] From its inception in 1995, the LRA was designed to create a framework that promotes fair treatment in the workplace, protects workers' rights and encourages collective bargaining. At its most fundamental level, however, it also provides a mechanism for resolving disputes, which in turn helps to maintain harmonious employment relations. In instances where a grievance process is available to an employee by the employer, and which would, if applied, resolve the cause of complaint, the employee would ordinarily be required to follow it.

[89] In circumstances where an employee elects not to follow such internal procedures, the employee cannot, as a matter of principle, claim a constructive dismissal, unless of course the employee is able to prove circumstances that make it appropriate for him to be absolved from this obligation. For an employee to merely assert that they have no confidence in the grievance procedure and its outcome or that the employer would not reform, cannot suffice as a sufficient circumstance. In *Solidarity*,⁷⁰ the Court held that—

⁶⁹ See *Albany Bakeries* above n 3 at paras 28-30; *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre* (2013) 34 ILJ 3184 (LC) (*Motor Industry Bargaining Council*) at para 131; *Johnson v Rajah N.O.* [2017] ZALCJHB 25 at para 74-6; and *HC Heat Exchangers* above n 64 at para 55.

⁷⁰ *Solidarity* above n 55 at para 44.

“[i]t may be that the appellant had a legitimate complaint about the performance outputs and appointments to his division. But such matters occur often and are run of the mill points of difference or tension in any workplace. *Grievance procedures exist for that very purpose. They are the compulsory means of resolving conflict over run of the mill disagreements between subordinates and their superiors. A proper application of the grievance procedure aims at testing the legitimacy of any difference of opinion and through conciliation hopes to find workable remedial solutions.*” (Emphasis added.)

[90] In his testimony before the Commissioner, Mr Maleka admitted that he was aware of the employer’s grievance procedure. This is indeed true because the following clause is contained in Mr Maleka’s employment contract:

“COMPANY DISCIPLINARY PROCEDURES

- 34.1. You undertake to abide by the Company’s policies, rules and procedures and acknowledge that you have read and are aware of such policies, rules and procedures. Copies of the Company’s policies, rules and procedures are available from the Company’s Human Resources Department.
- 34.2. It is recorded that the Company’s policies, rules and procedures constitute guidelines only.”

[91] It was held before the Commissioner that the grievance procedure contained in ADT’s policy sets out a clear procedure to be followed by an aggrieved employee. In terms of the procedure, the employee is expected to communicate their grievance relating to their work, verbally and directly, to their immediate supervisor, noting that they are lodging a formal grievance. The supervisor has to then settle the grievance as soon as possible and also furnish the employee with an answer within three working days after becoming aware of the grievance. The policy also makes provision for the manager to establish an investigating committee, upon receiving the grievance form, to investigate and make a finding on the merits of the grievance. This committee consists of employees, witnesses, the supervisor, manager and Human Resources manager. Where an employee is dissatisfied with the outcome of the investigations, the procedure entitles the employee to escalate the grievance to the general manager together with a

copy of the committee's findings and a complete explanation of the facts relating to the matter and the relief sought. If the grievance remains unresolved it is then open to the employee to turn to the dispute resolution mechanisms prescribed by the LRA.

[92] In spite of this, Mr Maleka did not lodge a formal grievance, nor did he follow the prescribed steps of the grievance procedure. His explanation before the Commissioner for this omission was that Mr Birmingham had told him that he was not aware of the decision to change his reporting line and that it would have been superfluous to lodge a grievance as Mr Clarkson was the highest person of authority in the South African business. Mr Maleka further stated that he did not lodge an unfair labour practice dispute relating to his "demotion" because he was unaware of that remedy.

[93] I am unable to agree with Mr Maleka's assertion that lodging a grievance procedure would have been a futile attempt to resolve his grievance. If a grievance had been lodged against Mr Clarkson, the ethical choice for Mr Clarkson, in my view, would have been to exclude himself from those processes and to nominate someone of similar status to oversee the finalisation of the issues. If Mr Maleka was, at that point, still concerned that he would not be given a fair opportunity to be heard, a reasonable expectation of an executive in his position would have been to propose the appointment of an independent person to oversee the finalisation of the grievance or to seek legal advice. Therefore, to render the outcome of a grievance process in this context as a *fait accompli* (an accomplished fact) without any attempt to utilise those internal dispute mechanisms provided for is, in my view, an incorrect understanding of the purpose of workplace policies.

[94] It follows that I agree with the Commissioner's finding that Mr Maleka's failure to lodge a grievance worked against him. This determination must be informed by an understanding that the LRA is an innovative piece of legislation which has been carefully crafted to enable employees who have been unfairly treated to first seek recourse at the workplace in terms of internal procedures and mechanisms and, only

thereafter, to pursue other recourses through specialised tribunals such as the CCMA and the labour courts. It cannot be that every time an employee's feelings are hurt or they are undermined or unfairly treated, they are entitled to resign and claim a constructive dismissal, without having attempted to resolve the grievance with the employer. This would not only have a devastating effect on the employee, but it would also adversely affect employers and the economy as a whole.

Conclusion

[95] There can be no doubt that the sudden and unexpected announcement by Mr Clarkson at Muldersdrift in December 2016 of a change in Mr Maleka's reporting line must have caused Mr Maleka to suffer considerable anxiety and embarrassment, particularly in circumstances where no prior consultations had taken place with him at all. Mr Maleka was, after all, a highly qualified and skilled individual who was employed by Tyco as an IT director and was part of ADT's Executive Committee. Despite being assured by Mr Clarkson that he would retain his title, status, salary and authority, the reporting change from Mr Clarkson to Mr Quinn (who was also an executive on the same level as Mr Maleka) could reasonably have been perceived as a demotion which was hurtful and insulting, leading to him resigning. As a black executive, Mr Maleka was perhaps justified in feeling that tokenism was at play, particularly as there is nothing in the evidence to suggest that any other executive had to undergo this change in reporting.

[96] It is also noteworthy that in his letter of resignation, Mr Maleka stated that Mr Clarkson's conduct took him back 15 / 16 years to when he was a senior manager, and not an executive. However, as the facts show, Mr Maleka did not accept the change in his reporting line and as such, he never reported to Mr Quinn. It is assumed that he continued to report to Mr Birmingham until the take-over was finalised on 15 March 2017. A day after his meeting with Mr Clarkson on 22 March 2017, he resigned. He did not wait to see whether the change in his reporting line would result in a situation that would indeed become unbearable to tolerate. He merely anticipated that it would.

[97] The fundamental difficulties with Mr Maleka's pleaded case are these: before the CCMA, Labour Court and Labour Appeal Court, he based his cause of action exclusively on section 186(1)(e) of the LRA. Had he contended that the constructive dismissal related to a transfer of employment as contemplated by section 197 of the LRA, he ought to have sought the adjudication of such a dispute in terms of section 187(1)(g) of the LRA. However, this was not his case. If it was, the CCMA would not have been able to arbitrate the dispute and he would have been compelled to seek adjudication by the Labour Court in terms of section 191(5)(b)(i) of the LRA, as he would be alleging an automatically unfair dismissal.

[98] Additionally, it has never been his case that he suffered any adverse effects surrounding a transfer of business as contemplated by section 197 of the LRA or that his resignation resulted from such transfer. Had this been his case, the CCMA would have taken the view that it lacked the necessary jurisdiction to arbitrate a dispute where section 187(1)(g) of the LRA was applicable. Lastly, if his dignity was impaired (as he seems to suggest by the fact that he was demoted) or if he was being unfairly discriminated against, for example, on racial grounds, both the CCMA and the Labour Court would have had the necessary jurisdiction to entertain such a complaint in terms of the Employment Equity Act.⁷¹ In the final analysis however, the main problem facing Mr Maleka is the fact that his case is predicated on an anticipated or future state of intolerability which had not arisen by the time he made the decision to resign. There is in fact no evidence to support his opinion that such a state would have arisen post-transfer of the business to FSG.

[99] In all the circumstances, I consider that Mr Maleka has failed to prove that the employer made his working conditions intolerable to the extent that it would have been unreasonable to expect him to remain in such employment. I accordingly conclude that

⁷¹ 55 of 1998.

Mr Maleka enjoys no prospect of success on the merits and as such, his application for condonation must fail.

Dissenting judgment

[100] I have read the well-crafted dissenting judgment penned by my Colleague, Acting Deputy Chief Justice Madlanga, which does not support my finding that Mr Maleka failed to discharge the test for constructive dismissal. The fundamental difference between this judgment and the dissent is not on substance, but rather on the application of sound legal principles as they relate to constructive dismissals. The dissent takes the view that the tokenistic conduct which Mr Maleka was subjected to, created circumstances that were intolerable, as it was a blatant attack on his dignity – owing to the embarrassing, insulting and degrading treatment arising from the decision to change his reporting line. It concludes that Mr Maleka’s resignation was therefore justified as it was a measure of last resort.

[101] I agree with the dissent’s characterisation of tokenism, which by its very nature constitutes deplorable conduct that continues to permeate through the halls of corporate South Africa. It is racist treatment that insults one’s dignity and renders their existence within a workspace worthless. In fact, I would go further and say that discrimination on any of the grounds protected by the Constitution and other human rights legislation is serious. The negative consequences that flow from an allegation of discrimination is something that employers should be concerned about as it has a tendency to poison the working environment.

[102] By “poison the working environment” I refer to what the Ontario Court of Appeal said in *General Motors* when it considered the alleged racial discrimination in the context of constructive dismissals.⁷² The Court set aside the trial judgment and dismissed an action against the company, saying that the former employee (Mr Johnson) who brought the claim based on alleged racial discrimination, had

⁷² See *General Motors* above n 62 at para 5.

suffered from stress and mental anguish arising out of perception.⁷³ It found that the evidence did not support the trial judge’s findings of racism and a work environment poisoned by racism. The Court held that the employee bore the onus of establishing a claim of a “poisoned workplace” and the test was an objective one. In this regard it said:

“[S]ubjective feelings or even genuinely-held beliefs are insufficient to discharge the *onus*. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment has been created.”⁷⁴

[103] The Court further held that in constructive dismissal claims, a poisoned workplace is created when there is an egregious stand-alone incident, or persistent or repeated serious behaviour that creates a hostile or intolerable work environment.⁷⁵ It follows that, while racist conduct and indeed conduct which promotes racism like tokenism is seriously harmful, the high threshold test necessitated by a claim for constructive dismissal, will still need to be applied in order to objectively determine whether the conduct complained of has, in fact, “poisoned the workplace”. This is not to trivialise complaints of this nature in the workplace, as is suggested in the dissent, but to ensure that where the allegations against the employer are found to be true, a fair and proportionate sanction is imposed.

[104] While the dissent attempts to show that Mr Maleka’s environment had become intolerable, the evidence presented before this Court suggests otherwise. In other words, from the period between Mr Clarkson’s announcement at Muldersdrift on 13-14 December 2016 and his later meeting with Mr Clarkson on 22 March 2017, the

⁷³ Id at para 103.

⁷⁴ Id at para 66.

⁷⁵ Id at paras 67 and 71, where the Court went further and said:

“Johnson’s racism complaint arose from a single employee’s failure to attend a single training session. Such conduct falls short of the type of egregious behaviour manifested in those cases involving poisoned work environments. Johnson did not establish a systemic or institutional racist behaviour . . . a single incident of this kind, with a single employee, over the course of an eight-year working relationship cannot objectively ground a finding of a work environment poisoned by racism.”

evidence does not support an objective finding that the working environment had become poisoned nor was the conduct of Mr Clarkson and Mr Quinn such that it would constitute the “last straw”, so much so that Mr Maleka had no alternative but to resign. It is unfortunate that the dissent relies on circumstances which Mr Maleka, unfortunately, did not remain around long enough to see materialise and become unbearable. The working relationship between Mr Maleka, Mr Quinn and Mr Clarkson continued to exist without any hostility or reprehensible behaviour. At least, there is no evidence to the contrary of this. What seems to have unsettled Mr Maleka was Mr Clarkson’s assertion that his change in reporting line was final. However, objectively speaking, in the period leading up to his resignation there is nothing before us to show that he was stripped of who he was, what he had achieved and what he meant to the company before the acquisition. These, in my view, are all important factors that one would have to consider when determining the issue of intolerability.

[105] The dissent, in my view, seems to ignore the body of case law already affirmed by this Court, the Supreme Court of Appeal and our labour fora in dealing with the issue of constructive dismissals grounded in section 186(1)(e) of the LRA.⁷⁶ To find for Mr Maleka on the basis of tokenism giving rise to racial discrimination (as the dissent seems to do), would mean watering down the test for intolerability drastically. This will undoubtedly lead to confusion and inconsistency in the application of well-established and well-settled legal principles on the issue. Such an approach would, in my view, offend the principle of *stare decisis* (to stand by things decided). This is a situation that should be avoided altogether.

[106] As this judgment finds, Mr Maleka’s decision to resign had more to do with what he feared or perceived would happen in the future rather than one based on his present circumstances. The dissent does not address this. To decide the issue of intolerability on this scenario, would require one to look into a crystal ball. This is not what the test envisages.

⁷⁶ As the authorities tell us, the test for intolerability is high and must be assessed objectively.

[107] This judgment is at pains to point out that Mr Maleka does not make out a proper case for the relief he seeks. Simply put, he fails to satisfy the threshold test for intolerability. Additionally, his decision to resign and thereafter claim a constructive dismissal, without seriously exploring and exhausting other suitable means to resolve the impasse was, in my view, unduly rash, unreasonable and precipitous.

[108] Whilst I am not without a measure of sympathy for Mr Maleka's cause, adjudicating the matter on some maudlin sympathy would, in my respectful view, simply ignore decades of sound jurisprudence on the threshold test for intolerability and constructive dismissal. Not only this, reducing the test for intolerability would, in my view, open up the floodgates to untold and unnecessary litigation. This too is a situation that should be avoided altogether.

[109] All in all, and for the reasons set out herein, I disagree with the dissent and the reasoning that underpins it.

Costs

[110] This Court has recently reiterated the long-standing rule that in labour disputes costs do not automatically follow the result.⁷⁷ Whether or not costs should be awarded is dependent on considerations of justice and fairness. Mr Maleka has pursued this litigation vigorously over a number of years despite being unsuccessful in all fora. This, however, does not mean that he should be mulcted in costs.

Order

[111] The following order is made:

1. Condonation is refused

⁷⁷ *Motor Industry Staff Association v Great South Autobody CC t/a Great South Panelbeaters; Solidarity on behalf of Strydom v State Information Technology Agency SOC Ltd* [2024] ZACC 29; 2025 (3) BCLR 312 (CC); (2025) 46 ILJ 481 (CC) at paras 77-8.

MADLANGA ADCJ (Maya CJ, Mathopo J and Rogers J concurring):

Introduction

[112] I have read the skilfully reasoned judgment of my colleague Seegobin AJ (first judgment). I am of the firm view that Mr Maleka was constructively dismissed. I am also of the equally firm view that the constructive dismissal was unfair. For those reasons, I disagree with the first judgment's reasoning and outcome.

[113] The first judgment takes the view that there was no intolerability. In what I consider to be a narrow view of what actually happened, it goes so far as to say that Mr Maleka anticipated intolerability which, if it were to happen at all, was to materialise in future. It says that Mr Maleka should rather have waited to see how matters would unfold and whether, upon the FSG takeover, there would be any intolerability. The first judgment concludes that there was no constructive dismissal. Secondly, despite this holding, the first judgment goes on and also concludes that, in any event, Mr Maleka's bid must fail because he did not explore other suitable remedies before resigning. The basis for this conclusion is that Mr Maleka failed to exhaust ADT's grievance procedure. The relevance of this, according to the first judgment, is that this issue "is important in determining whether the situation was such that it can be regarded as intolerable".⁷⁸

Background facts

[114] Although the facts have been usefully canvassed in the first judgment, I deal with them only to the extent necessary for purposes of advancing my reasoning.

⁷⁸ First judgment at [87].

[115] Mr Maleka has relatively high academic qualifications. When he instituted these proceedings, he held BCom and MBA degrees. Also, he was highly experienced in IT. About three years before the events that gave rise to the present dispute, he was employed by an Irish company, Tyco, as an IT Director. Tyco was the holding company of ADT, a South African company. Although employed by Tyco, Mr Maleka was placed with ADT. He reported directly (the so-called solid reporting line) to Mr Paul Birmingham, the global Head of Tyco's IT. In South Africa, he reported to Mr Stuart Clarkson (the dotted reporting line), ADT's Managing Director. Mr Maleka was on the Exco of ADT. This, as a result of being a director.

[116] This dispute started with an announcement by Mr Clarkson at an Exco strategic planning meeting. Mr Clarkson had called the meeting to discuss the realignment of the business as a result of the takeover of ADT by FSG. The takeover was in the context of Tyco divesting from ADT. Mr Clarkson invited senior managers and executives to Muldersdrift to the strategic planning meeting.

[117] In that meeting, Mr Clarkson made an announcement that he had employed a new Finance Director, Mr Allan Quinn, who – as a director – would automatically become a member of Exco. Mr Quinn was to report to Mr Clarkson. Mr Clarkson also said that IT would fall under Mr Quinn and that Mr Maleka was now to report to Mr Quinn. So, a director was to report to another director. For me, that is where the intolerability arises. As at the time, that was happening in the present; nothing anticipated, nothing about the future. All the other detail serves to obfuscate that reality. That situation endured until Mr Maleka resigned. I say more on this later.

Constructive dismissal

[118] Even though constructive dismissal consists in the employee leaving employment, it is dismissal nonetheless. I say so because section 186(1)(e) of the LRA defines “dismissal” to mean “an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”. In *Jooste*, it was held that “it needs to be emphasised that a ‘constructive

dismissal' is merely one form of dismissal".⁷⁹ Constructive dismissal may manifest in any number of ways. In this regard, *Jooste* quotes the English case of *Woods*⁸⁰ where it was held that "[t]he circumstances [of constructive dismissal] are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact".⁸¹

[119] This Court has held that the test for constructive dismissal "does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable".⁸² The first judgment usefully quotes the Labour Appeal Court's judgment in *Solid Doors* where that Court held:

"[T]here 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 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."⁸³

[120] The test on whether continued employment had been made to be intolerable is objective:⁸⁴ viewing everything that happened, would a reasonable person be satisfied that continued employment had become intolerable? The onus of proving intolerability rests on the employee.⁸⁵

[121] Proof of intolerability is not the end of the matter. It is still open to the employer to prove that the dismissal was fair. Section 188(1) of the LRA provides:

⁷⁹ *Jooste* above n 54 at 638.

⁸⁰ *Woods v WM Car Services (Peterborough) Ltd* (1982) IRLR 413 (CA).

⁸¹ *Id* at 415.

⁸² *Strategic Liquor Services* above n 13 at para 4.

⁸³ *Solid Doors* above n 33 at para 28.

⁸⁴ *Id* at para 29.

⁸⁵ *Jooste* above n 54 at 638 and *Pretoria Society for the Care of the Retarded* above n 54 at 983.

“A dismissal that is not automatically unfair, is unfair if the employer fails to prove—

- (a) that the reason for dismissal is a fair reason—
 - (i) related to the employee’s conduct or capacity; or
 - (ii) based on the employer’s operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.”

[122] So, in this second stage, the onus rests squarely on the employer.

[123] I proceed to consider whether ADT rendered Mr Maleka’s continued employment intolerable.

[124] Making Mr Maleka to be overseen by, and requiring him to report to, Mr Quinn immediately raises the question: why must a director of one portfolio (Finance) oversee a director of a different portfolio (IT)? It must be remembered that Mr Quinn was introduced to be at exactly the level at which Mr Maleka was before this introduction. Mr Clarkson simply decided that Mr Maleka’s portfolio would be subjected to Mr Quinn’s supervision. Why? As I demonstrate later, Mr Clarkson’s reasons do not make sense.

[125] Much as corporations, or any other entities for that matter, may structure or restructure themselves the way they want, that does not mean restructuring may not affect some employees so grievously that continued employment may be rendered intolerable. This may, for example, be the case if the restructuring *outrightly* demotes or, *in essence*, demotes an employee or in any other way lowers the status of their position in a non-trivial way.

[126] It is no small matter that the announcement was made at an ADT strategic planning meeting with no prior notice to Mr Maleka. Downright, just the manner of the announcement, was an appalling insult. This being done to a warm-bodied person with feelings who, against all odds in white corporate South Africa, had risen to hold the executive position of director. In a most callous manner, he was being caused to report

to another director, and no longer to report to the Managing Director. That, on its own, is intolerable. One cannot make light of it, which, unfortunately, seems to be what the first judgment does. This is especially so because the first judgment takes the view that intolerability, if any, could only have arisen in the future.

[127] One would have to ignore South African reality, where the vast majority of senior corporate leadership positions continue to be held by white people, something of which I can comfortably take judicial notice,⁸⁶ if one were nitpickingly to look at details like whether Mr Maleka continued to hold a senior position (a directorship, so-called) and earn the same salary. For obvious reasons, I use “so-called” advisedly. In fact, it is an insult to say that Mr Maleka continued to be at the same level. Mr Clarkson rendered him a director in name only; his directorship had since become a hollow title. That is plainly demonstrated by the fact that he now had to report to another director. The fact that he continued to have duties to perform at a senior level does not alter that.

[128] In a corporation and, indeed, other entities, even the question of who reports to whom is quite crucial. That explains why Mr Clarkson’s letter of 20 March 2017, which clearly demonstrated that Mr Quinn was, indeed, Mr Maleka’s boss, precipitated Mr Maleka’s final steps at resolving the issue. At this point, Mr Clarkson’s letter made it clear that Mr Quinn was to exercise the power of seniority over Mr Maleka. Mr Maleka did not act on impulse. He took his time to observe how things would pan out. After the letter, he attempted to engage Mr Clarkson on the matter. He was disdainfully rebuffed. It was after all this that Mr Maleka felt that he could no longer remain in ADT’s employ. The intolerability had reached its peak and been sealed.

[129] Here is a context that is very important regarding Mr Maleka’s reaction to the treatment that was meted out to him. It is quite a feat for black people in corporate

⁸⁶ I must say, though, that there are statistics in support of what I have said. A recent report on the disproportionate representation of white men in top management jobs in South Africa clearly evidences the persistent lack of transformation in the corporate world. See 24th Commission for Employment Equity Annual Report (2023-2024), available at <http://labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2024/24th%20Commission%20for%20Employment%20Equity%20Annual%20Report.pdf>.

South Africa genuinely to rise to senior management positions, let alone executive positions. I use “genuinely” purposely because, unfortunately, tokenism or window dressing is a reality in our country. Mr Maleka rose to the position of director, an executive position, only to have another executive – a white executive – imposed to supervise him. That, after an admirable triumph in the South African context. It was as if he was being shown that the rise of a black person in corporate South Africa – whether attained genuinely or tokenistically – counted for nothing.

[130] We need to be alive to these realities. We are not in a homogeneous society that has always enjoyed racial tranquillity. We are in a society with a history of which we are all aware, a significant part of whose negative legacies continue to engulf us. That is what happened and we cannot skirt around it. With the exception of executives reporting to the Managing Director, what executive reports to another? If such a phenomenon, which appears to be quite a kink insofar as Mr Maleka was concerned, was, in fact, commonplace, surely ADT would have told us so. It should be borne in mind that ADT claimed that Mr Maleka’s position was on the same level as Mr Quinn’s. If that were truly so, why is it that Mr Maleka had to report to Mr Quinn? This on its own is a substantially crucial consideration.

[131] The first judgment says:

“It must be accepted that the business world is a fluid environment with businesses and companies constantly restructuring and rebranding themselves in order to remain competitive so as to meet the demands of a changing world. Whilst such changes may result in many positive effects, there could equally be negative ones, especially where some employees become redundant and lose their employment. This, however, is not what happened to Mr Maleka.”⁸⁷

[132] This ignores South African reality. It sounds as if it is addressing a situation in some homogenous society that has never experienced the racial history that we have

⁸⁷ First judgment at [83].

experienced. It ignores the blood, sweat and tears it must have taken Mr Maleka to scale white South Africa's corporate ladder and reach the heights he did. What happened here had nothing to do with the innocuous restructuring the first judgment is describing. It had everything to do with treating Mr Maleka in an appreciably disrespectful, belittling and hurtful manner for no cogent reason; a manner that grievously impugned his dignity. I explain presently that there was no cogent reason.

[133] The reasons given by Mr Clarkson for having Mr Quinn oversee Mr Maleka were manifestly untenable. He said the following. Mr Quinn had experience with the FSG and the SAP IT systems. As a result, Mr Quinn would be better able to support Mr Maleka. Why did Mr Maleka need this support? What other director needed to be supported by another director? None. If there was, that would have been one of the first things ADT would have said to demonstrate that there was nothing odd in subjecting Mr Maleka to supervision by Mr Quinn. Mr Clarkson went on to say that Mr Quinn would not be taking over the day-to-day running of the portfolio or making any strategic decisions relating to it or controlling the staff working within the IT division. These would remain Mr Maleka's responsibilities.

[134] Mr Quinn may have had the FSG and SAP IT experience referred to. Importantly, though, there was no suggestion that Mr Maleka was not able to perform the job of IT director without being supervised by Mr Quinn. That is what was crucial; that was the real question. It was highly insensitive and insulting, especially in the context of South Africa's race relations and what it took Mr Maleka to get to where he was, for the Managing Director not to foreground that question. What made it worse is that this supervisor, who, in my book, was not shown to have been necessary, was a white person. That is not insignificant in the South African context. Like Mr Maleka, he was at the level of a director, to boot.⁸⁸ In essence, this said to Mr Maleka: "You cannot stand on your own as a director; you need a white person to prop you up and

⁸⁸ In fairness to Mr Quinn, I must record that he was not responsible for the decision, and there was no evidence that in his relations with Mr Maleka there was bad blood or high-handedness. And Mr Maleka was not critical of Mr Quinn.

supervise you.” It does not take rocket science to realise that this must have been grievously and deeply hurtful to Mr Maleka who, as I said, rose against all odds to reach the extremely senior position of an executive within white corporate South Africa.

[135] To further show that Mr Clarkson’s reasons were untenable, if not fallacious, the first judgment itself says that Mr Maleka “was, after all, in his own right, *a highly qualified individual with a vast and varied experience in IT. He was also the Director and head of IT in ADT and had no less than 15 years of IT experience.*”⁸⁹ At Barclays Africa, which took over Absa for a while, he headed IT. Add to this the two and a half years during which he headed IT within Tyco in South Africa. With this much IT experience, how could he suddenly be so much at sea that he would require to be supervised by another director?

[136] As the first judgment says, Mr Maleka was vastly and variedly experienced in matters IT. And there has not been a single suggestion that, in all the years he applied his experience within ADT, he was ever found wanting. If that be so, just what was so magical with the experience Mr Quinn is said to have possessed to warrant the displacement of Mr Maleka? We have not been told. Mr Quinn may have risen through a certain path within the IT environment and Mr Maleka may have risen through another. That did not make Mr Maleka not suitably qualified to continue holding the position of director unsupervised.

[137] Have we been told the real reason why Mr Quinn was imposed as Mr Maleka’s boss? During argument, ADT’s counsel first tried to make light of what had been done to Mr Maleka. He suggested that not much had changed. When asked who – between Mr Quinn and Mr Maleka – made *executive* decisions on IT matters, he had to concede that it was Mr Quinn. And he accepted that Mr Maleka had been subordinated to Mr Quinn. When he was pressed to give the real reason for the imposition of Mr Quinn over Mr Maleka, he said that “Mr Clarkson could add no value, whereas Mr Quinn

⁸⁹ First judgment at [82] (emphasis added). The first judgment makes a similar point at [95].

knew [IT] and he wanted Mr Maleka to speak to him. Mr Clarkson does not know any of this.”

[138] I understand this to mean that – because of Mr Clarkson’s lack of knowledge in IT matters – he felt that he could not have been able to engage Mr Maleka meaningfully. On the other hand, Mr Quinn – who was well versed in IT – would be in a position to engage Mr Maleka meaningfully on that subject. Mr Quinn would then be the one who made whatever report found to be necessary to Mr Clarkson. Rather than give us an answer to the question why Mr Quinn was interposed between Mr Clarkson and Mr Maleka, this raises more questions. Why is it that – despite his lack of knowledge in IT – Mr Clarkson would be in a position to receive (and possibly understand) reports on IT matters from Mr Quinn? Why is it that – as seems to have been the case – there would have been difficulties if Mr Clarkson had received the reports directly from Mr Maleka?

[139] Crucially, there has been no suggestion that there was anything the matter with Mr Maleka’s ability to convey what needed to be conveyed. If anything, it seems to be accepted that he could “speak” to Mr Quinn about IT matters. I cannot but infer that – for whatever reason – Mr Clarkson was more comfortable with Mr Quinn than with Mr Maleka. For that reason, Mr Quinn had to be the one reporting to him. Actually, it gets worse. Later during the engagement with the Bench, ADT’s counsel said that “[i]t was Mr Quinn who had the knowledge and the expertise in this that Mr Clarkson trusted to delegate his responsibility to. The case does not get better or worse than that.” The first judgment and mine are agreed that Mr Maleka had vast experience in IT. Therefore, he was undeniably an expert in the IT field. Why is it, then, that Mr Clarkson trusted only the knowledge and expertise of Mr Quinn? We have not been told.

[140] And that is not where this terrible picture ends. ADT’s counsel later said that – because of his lack of IT skills – Mr Clarkson would not have been able to supervise Mr Maleka. When asked how he would have been able to supervise

Mr Quinn, counsel said that “it was an act of faith”. Unexplained, if not inexplicable, faith, if you ask me. The real reason is not far to seek. Mr Clarkson “trusted” and had “faith” in Mr Quinn because – like him – he was white. That is the inarticulate premise.

[141] In those circumstances, I find it disturbing for it readily to be accepted that nothing much had changed and that, as the first judgment unfortunately says, Mr Maleka “did not lose anything as a result of the acquisition [of ADT by FSG] – his position on Exco, his title, status, remuneration and terms of his employment contract remained unchanged”,⁹⁰ and that, therefore, there was no intolerability. In fact, in the light of this statement, there is an internal contradiction in the first judgment insofar as it appears to accept – under what is headed “conclusion” – that Mr Maleka was subjected to tokenism. If nothing had changed, then Mr Maleka remained the executive that he had always been and, therefore, there was no tokenism. That must be the first judgment’s conclusion.

[142] To say that Mr Maleka lost nothing is a rather narrow view of what happened; a narrow view informed by this apparent idea that all that is important in a job setting is a title, even if hollow (which Mr Maleka’s had become), some tasks to perform, and an unchanged salary. In the circumstances of this case, the fact of being caused to report to another director for the flimsiest of reasons and to be supervised by him, and no longer to report to the Managing Director, in and of itself, gave rise to grievous intolerability. This is especially so in the case of Mr Maleka who was not only highly qualified and experienced to head the IT division, but had never been found wanting whilst actually heading it. In any event, it is inaccurate to say that Mr Maleka had retained his position on Exco, title, status and conditions of employment. As I have said, his position, title and status had been rendered hollow. He was a director in name only. As a director, he used to report directly to Mr Clarkson, the Managing Director. He was not overseen by another director. That changed overnight. I do not understand how it can be said that his conditions of employment had not changed.

⁹⁰ First judgment at [83].

[143] It does not end there. Even at a practical level, Mr Maleka said that this disadvantaged him in terms of professional progression. It took him back many years (15 or 16, to be exact), he said. That was so because, in the corporate world, it matters – for upward mobility – where you fall within reporting lines. Suddenly, someone was placed above Mr Maleka in the reporting line. Mr Maleka’s assertion that this change in the reporting line took him back many years and disadvantaged him in his upward mobility makes sense. This much is accepted by the first judgment, which means that this cannot only be about the retention of some of his conditions of employment. I deliberately capture what was retained in this manner because the first judgment errs in essentially saying that nothing had changed. I have explained why, in fact, a lot had changed.

[144] The Commissioner said that Mr Maleka’s complaint was an “ego thing”. The first judgment quotes this with apparent approval.⁹¹ I disagree. This was about a director who wanted to be treated like a true director. In fact, what the Commissioner said was a deeply hurtful insult. It completely disregards facts and supports the idea that all that matters in the workplace is a title, even if hollow, salary and, perhaps, some responsibilities. This is placing form over substance. Painfully, being tokenised and marginalised counts for nothing in the words of the Commissioner. Holding a hollow position of director was no small matter. In fact, it was an insult to even continue saying that Mr Maleka had not been stripped of his position of director. As I say, the title had become hollow.

[145] Resignation was a measure of last resort. I say this not to suggest that constructive dismissal is justified only in circumstances where the employee has no option but to leave their employment. It is enough if – looking at the circumstances brought about by the employer’s conduct objectively – the employee was justified in terminating their employment. About the last resort in the present matter, more than

⁹¹ First judgment at [85].

once, Mr Maleka attempted to engage Mr Clarkson. Mr Clarkson was not receptive to these attempts at engagement. In fact, he was impatient with him; so impatient that on the last occasion he said he was giving him only ten minutes to say whatever he had to say.

[146] In short, there was never any meaningful engagement. Bear in mind that Mr Maleka was attempting to engage *ex post facto* (after the event). I cannot but make the observation that it passes more than strange that Mr Clarkson did not have the decency to take Mr Maleka into his confidence before the fact and tell him what he was proposing doing and why, and even invite him to comment on it. I am not saying this as a legal proposition. I am stating it as a matter of common decency: executive to executive. Imagine how gravely hurtful this must have been for Mr Maleka to learn of this for the first time with everybody else in attendance at the strategic planning meeting, possibly with the exception of Mr Quinn who, presumably, would have been told what his portfolio entailed. Of course, a legal proposition does become relevant. That is, does this *ex post facto* maltreatment – together with other facts and circumstances – lead to the type of intolerability envisaged in constructive dismissal?

[147] In addition to the imposition of an overseeing director – which was callous in and of itself – the manner of announcing the change was grievously insulting, inconsiderate, insensitive and degrading; a clear assault on Mr Maleka's dignity.⁹² *Makwanyane* tells us this about the importance of dignity in the South African context:

“Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.”⁹³

⁹² Section 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

⁹³ *Makwanyane* above n 27 at para 329.

[148] What Mr Clarkson did to Mr Maleka displayed a total disregard of the shift from treating black people as if they enjoyed no dignity. This, despite the transformative promise of our constitutional dispensation. Today it is imperative to assess all conduct through the lens of the Constitution, in particular – for the present purposes – the right to dignity. Surely, treating Mr Maleka in a manner that displayed a total disregard for his self-worth and an uncaring attitude about his dignity was the fundament of the intolerability.

[149] Mr Clarkson was not in the least concerned about Mr Maleka's feelings. They counted for nothing. What mattered to him was the comfort he sought to enjoy by interposing Mr Quinn as the person that would report to him, and not Mr Maleka. I emphasise the issue of mere comfort because the asserted issue that Mr Quinn had experience in the SAP IT system was, in my view, a mere subterfuge. If this experience was the real reason, why was Mr Maleka not engaged on it and asked specifically if he could work effectively as a director upon the introduction of the SAP IT system by FSG? As I said earlier, the growth of people professionally may take any number of forms. What counts in the end is the ability to do the job. I am yet to hear a suggestion that Mr Maleka could not perform as a *true* IT director.

[150] In fact, what gives the lie to the notion that Mr Quinn had the edge over Mr Maleka because of his knowledge of the SAP IT system is that ADT itself is emphatic that Mr Maleka was not being divested of his functions and responsibilities of running the IT division and supervising all staff within it. Mr Quinn was not to interfere in that. This could only have been because ADT trusted Mr Maleka to be capable of effectively running the division even after the introduction of the SAP IT system. At the risk of being repetitive, here is a question that then arises. If that be so, what was *the real reason* for interposing Mr Quinn as Mr Maleka's supervisor and as the director that would report to Mr Clarkson on IT matters? It can only be some inarticulate premise. If Mr Maleka – hitherto a senior executive – could run the division to ADT's

satisfaction, what was the problem with him performing the next logical step, that is, to report to Mr Clarkson? None has been *cogently* suggested.

[151] You have a senior executive. He is performing well. He has a number of years of experience in the very area of expertise at issue. It is atrocious to impose on him a person he must suddenly report to without anything having gone wrong on his watch. A person at his level, to boot. That must be grievously hurtful. In my book – especially bearing in mind the question of race that was at the centre of this – there must be very few worse examples of situations that would give rise to intolerability. Mr Maleka, a black professional, had admirably worked himself up the corporate ladder against all odds in South Africa’s white dominated corporate environment only to be displaced by a white executive who held a position at the same level as he did for incomprehensible reasons; on an inarticulate premise, as I say.

[152] I should not be misunderstood. I am not suggesting that a white Managing Director or CEO should never displace a black executive and replace them with a white executive. Far from it. If there are cogent reasons for doing it, by all means, it may be done. What I am saying is this. It gives rise to grievous intolerability to displace a highly qualified and experienced black executive who has risen against all odds in South Africa’s white dominated corporate landscape and against whom there is not a single blemish and to replace them with a white executive who has not cogently been shown to be more qualified or experienced than the black executive.

[153] Earlier I referred to the objective test on whether, viewed through the lens of a reasonable person, it can be said that – in a given set of circumstances – an employee was justified in leaving employment on the basis that continued employment had become intolerable.⁹⁴ I am led to the conclusion that, in this matter, this test is satisfied. Mr Maleka’s conduct was reasonably justified in the circumstances detailed above.

⁹⁴ Murray above n 45 at para 12.

[154] At the centre of the first judgment's conclusion that there was no intolerability are two bases. The first is the notion that Mr Maleka's "position on Exco, his title, status, remuneration and terms of his employment contract remained unchanged".⁹⁵ The second is that Mr Maleka's complaint related to future or anticipated intolerability.⁹⁶ I disagree with both bases. Subjecting Mr Maleka to the deeply hurtful insult of divesting him of the position of a *true* director and impugning his dignity amply demonstrate that it cannot be said that he retained his title and status.

[155] Likewise, the hurtful insult and assault on Mr Maleka's dignity had an immediate effect. And those gave rise to the intolerability immediately. I do not understand why the first judgment says that whatever intolerability there could be could only have been in the future. This intolerability existed at the time Mr Maleka resigned. Mr Clarkson had made the decision. Just before Mr Maleka's resignation, Mr Clarkson made it clear that he was not going to change his mind. That being the case, what future – and with what possible consequences – are we talking about? Of course, I do not accept this idea that intolerability, if any, would have arisen in the future. The intolerability existed from the time of the announcement at the strategic planning meeting.

[156] Based on the above, the requirements for constructive dismissal were satisfied. On the second question, which is whether this dismissal was unfair and on which the onus is on the employer to establish fairness,⁹⁷ my conclusion is that fairness has not been established. I say so because of the lack of a cogent reason for interposing Mr Quinn, which I have dealt with fully above.

[157] I should be ending here on this aspect. But I must address the first judgment's conclusion that Mr Maleka ought to have explored other suitable remedies before resigning and that he failed to do so. On this conclusion, the real question remains

⁹⁵ First judgment at [83].

⁹⁶ First judgment at [84] and [85].

⁹⁷ *Bakker v Commission for Conciliation, Mediation and Arbitration* [2018] ZALCJHB 13; [2018] 6 BLLR 597 (LC); (2018) 39 ILJ 1568 (LC) at para 10.

whether continued employment had been rendered so intolerable that the employee was reasonably justified to leave it. As I said above, this Court has held that the test for constructive dismissal “does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable”.⁹⁸

[158] The existence or otherwise of other options or suitable remedies does not change that question. The existence of such remedies or options must be considered as part of the real question. Carving out the question of existence of other options as if it is a separate consideration misses the point. So, what one must consider is the upshot of everything put together, including the remedies or options. In looking at remedies available at the employee’s workplace, one must also weigh up the egregious nature and effect of the conduct that gave rise to the intolerability. The more the conduct is egregious, demeaning and violative of the employee’s dignity, which the conduct in issue here was, the less nitpicking one should be with what the employee did in trying to have the offending conduct corrected.

[159] Yes, Mr Maleka did not pursue ADT’s grievance procedure before resigning. But he did not just up and leave. He tried to resolve the situation. He made a couple of approaches to Mr Clarkson. He was rebuffed and thus did not succeed. The fact that he chose this route and not ADT’s grievance procedure does not automatically make this route unreasonable. In any event, he does explain why he did not pursue the matter any further. Mr Clarkson was the most senior employee within ADT and he thought pursuing the grievance process would have been futile. Whatever other reasonable option there might have been, that does not, of necessity, mean Mr Maleka’s option and view were unreasonable. Interestingly, ADT’s counsel was asked who – beyond Mr Clarkson – could have entertained the grievance. He said that it could have been entertained by the board. Upon further engagement, it became clear that this was the opinion of counsel, and not necessarily what was, in fact, available within ADT. In any

⁹⁸ *Strategic Liquor Services* above n 13 at para 4.

event, it is doubtful that the board would be available for such a managerial issue. So, this idea of the availability of a grievance procedure is questionable.

[160] What ADT's counsel submitted in argument upon being engaged by the Bench is significant. He submitted that one could not expect an employee who was a victim of a physical assault to exhaust an employer's grievance procedure before resigning. The employee would be entitled to consider this act of violence to constitute constructive dismissal. Counsel was asked why it is that intolerability is not equally triggered when an employee is subjected to tokenism that seriously impairs their dignity. He submitted that intolerability would be triggered "where the conduct of an employer towards an employee is so egregious that the dignity of the employee is so horrendously attacked that they would have no other alternative". I agree. But then the argument continued that the present case was not such a case. For all the reasons I have given, I disagree. As I have explained, Mr Clarkson's conduct was definitely so egregious as horrendously to demean Mr Maleka's dignity.

[161] A horrendous assault on a person's dignity grievously hurts the person's inner core, their very being, their sense of who they are, and may engender feelings of self-doubt. It is unsurprising that this Court has said that human dignity "must be jealously guarded and protected".⁹⁹ That is so because "[r]ecognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern".¹⁰⁰ By holding on to the notion that Mr Maleka's position on Exco, his title, status, remuneration and terms of his employment contract remained unchanged, ADT makes light of the outrageous indignity Mr Maleka was caused to suffer. That is at variance with the constitutional imperative that human dignity "must be jealously guarded and protected". What seat Mr Maleka continued to hold on Exco was significantly weakened. His title was

⁹⁹ *NM v Smith* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at para 50.

¹⁰⁰ *Makwanyane* above n 93 at para 328. See also *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

hollow. His status was downgraded. His terms of employment had most certainly been changed.

[162] My conclusion stands. Therefore, I would grant leave and uphold the appeal.

Remedy

[163] Having found that Mr Maleka was constructively dismissed and that the dismissal was unfair, what is the appropriate remedy? As with all dismissals, remedies for constructive dismissal are to be found in section 193(1) of the LRA. This section provides:

- “(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
 - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
 - (c) order the employer to pay compensation to the employee.”

[164] Two possibilities that have been placed before us by the parties are reinstatement and compensation. I see no reason why re-employment should feature. So, I will not consider it. Reinstatement should be considered primarily in order to restore the status quo ante. Compensation should be considered as an alternative. In *Adams*,¹⁰¹ Zondo J said that “the norm should be to order reinstatement and the denial of . . . primary relief should occur only as an exception”.¹⁰² That this must be so is plain from a conjoined reading of subsections (1) and (2) of section 193. The introductory part of subsection (2) provides that the “Labour Court or arbitrator *must require the employer*

¹⁰¹ *Adams v Coin Security Group (Pty) Ltd* [1998] 12 BLLR 1238 (LC); (1999) 20 ILJ 1192 (LC).

¹⁰² *Id* at para 88.

to reinstate or re-employ the employee".¹⁰³ It then proceeds to itemise exceptions, which are that—

- “(a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[165] Mr Maleka seeks reinstatement as his primary relief. In the alternative, he asks for compensation. He contends that the intolerable circumstances that caused him to leave his employment were attributable to the cumulative effect of Mr Clarkson’s conduct, namely: the decision that changed the reporting lines; the fact that this change had the effect of tokenising and demoting Mr Maleka; the fact that the decision was taken without consulting him; and the utter disdain with which he was treated by Mr Clarkson when he sought meetings. In support of reinstatement, Mr Maleka submits that these no longer exist as Mr Clarkson had since left ADT.

[166] ADT was silent in its papers on what the remedy should be. It was only in response to engagement by this Court in argument that a submission was made that reinstatement would not be an appropriate remedy. The reason given was that there was no evidence on the basis of which it could be concluded that, if Mr Maleka were reinstated to his position, he would be able to report directly to Mr Clarkson’s successor.

[167] As should be gleaned from my reasoning, I am quite sympathetic to Mr Maleka who was treated with utter disdain by ADT. But in the circumstances of this case, it seems to me that reinstatement would be punitive, and disproportionately so. Compensation in the form of remuneration for a year seems just and reasonable.

¹⁰³ Emphasis added.

Costs

[168] Although this is a labour dispute, I am of the view that the default rule that there should be no order of costs must not apply. That is so because of the horrendous, disdainful manner in which Mr Maleka was treated and the fact that, after all that, compensation will be consumed by costs payable to his legal representatives.

Conclusion

[169] Had I commanded the majority, I would have granted leave, upheld the appeal, awarded compensation in the form of a year's remuneration and ordered ADT to pay costs in all the Courts.

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