



- (1) Reportable: No
(2) Of interest to other Judges: No


Signature

8 April 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no's: C506/2023 & C507/2023

In the matter between:

LISA LYN DANIELS

Applicant

and

ARGO ICARUS TRAVEL (PTY) LTD

Defendant

Heard: 20 October 2025

Delivered: 8 April 2026

Summary: An alleged claim of constructive dismissal, unfair discrimination, violation of constitutional rights, and a claim for unpaid salaries. The applicant testified as the sole witness, and after her evidence, the respondent applied for absolution from the case. Application dismissed as the applicant has made out a *prima facie* case.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The applicant, Lisa Daniels, filed two separate disputes against her former employer, Argo Icarus Travel (Pty) Ltd (the respondent), with this court in December 2023. By mutual agreement, an order was made consolidating the disputes, which were scheduled for hearing from 20 to 24 October 2025.
- [2] The applicant's four claims are for (i) constructive dismissal, or alternatively, automatically unfair dismissal, and in the further alternative, unfair dismissal for reasons that are not automatically unfair; (ii) an unfair discrimination dispute; (iii) a violation of the constitutional rights to bodily integrity; and (iv) a claim for outstanding salary.
- [3] At the commencement of the proceedings, Ms Ntsewa, for the applicant, delivered an opening statement in which she addressed the applicant's four claims. She also informed the court that the parties had agreed to separate the merits from the quantum.¹
- [4] In his opening statement, Mr Jonker, for the respondent, submitted that the respondent denied all of the applicant's claims, asserted that the applicant was exploiting the COVID-19 situation to claim money she was not entitled to, that she was on a fishing expedition, and that the claims were vexatious and frivolous.
- [5] On the first day of the trial, the applicant led evidence in support of her case. She was cross-examined and re-examined on the second day, after which the court was informed that her case was closed. At that point, Mr Jonker moved an application for absolution from the instance. Before addressing the facts and the applicant's evidence, I will outline the principles relevant to applications for absolution from the instance.

Absolution from the instance

¹ This is not reflected in the pre-trial minute, but Mr. Jonker, for the respondent, did not dispute Ms. Ntsewa's submission that an agreement had been reached to separate the merits from the quantum.

- [6] In *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*², the Court set out the test as follows:

[79] An order for absolution from the instance is an appropriate order to make at the end of the plaintiff's case where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff. The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances. A determination of what is in the interests of justice necessarily involves the exercise of a discretion.'

- [7] Therefore, a court exercises discretion whether to grant absolution from the instance after considering the evidence led, and whether, based on that evidence, it could or might find in favour of a plaintiff. In exercising the discretion, the court considers whether it is in the interests of justice to allow the matter to proceed or whether the litigation must be ended at that stage because the court, applying its mind to the material before it, could not or might not find in favour of the plaintiff.

- [8] In *Gordon Lloyd Page & Associates v Rivera and Another*³ (*Gordon Lloyd Page*), the Court stated this:

[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

' . . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for

² 2001 (4) SA 938 (CC) at para 26 and 79.

³ 2001 (1) SA 88 (SCA).

the plaintiff... The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly, but when the occasion arises, a court should order it in the interests of justice.

[9] Therefore, absolution from the instance is not granted because the evidence led by the plaintiff establishes what would ultimately be required. It is sufficient if a *prima facie* has been made, in which case the court could or might find for the plaintiff. Whether the plaintiff is in fact entitled to the relief they seek is an issue to be determined at the end of the trial.

[10] The additional principle is that absolution from the instance is granted sparingly.

Background facts

[11] These facts are derived from the pleadings, the applicant's evidence (including in chief, cross-examination, and re-examination), and the documents referred to during the applicant's testimony.

[12] Since 11 November 2019, the applicant had been employed by the respondent as a store manager at the respondent's Travel Experience store outlet in Cavendish Square Shopping Centre, Claremont, Cape Town (the store). The employment contract did not specify the store manager's duties, but it was understood that these would be those normally carried out by the store manager, the person responsible for the store.

[13] Working hours aligned with the shopping centre's business hours and did not exceed 45 hours per week.

[14] During the probation period, she earned R9,500 per month, which increased to R10, 000 per month after the probation period.

[15] The applicant reported to Mr Jaco Taylor (Taylor), the respondent's director based in Johannesburg. The two communicated via email or telephone.

- [16] It will be remembered that in March 2020, the world faced the COVID-19 pandemic, and most people and businesses were adversely affected in several ways. The respondent was not spared. To address the situation, in July 2020, the parties agreed to reduce the salaries of all employees, including the applicant's, by 25% until the ban on international travel is lifted and the respondent resumes normal business operations.
- [17] Although the arrangement was supposed to take effect from July 2020 onwards, the applicant states that the last month she received her full salary was February 2020, and that even after the July 2020 agreement, she did not receive 75% of her salary. Instead, she received amounts ranging from R4, 000 to R4, 700 per month. From May 2022, her monthly salary was increased to R8, 000, and from October 2022 until May 2023,⁴ she received R8, 500. It appears that the respondent paid the employees according to the actual hours worked.
- [18] The international travel ban was lifted on 1 October 2020.
- [19] The employees' salaries were not adjusted to their pre-COVID-19 levels, but they continued to be paid based on the hours worked.
- [20] While the applicant claims that in 2021/2022 the respondent's business operations grew to the point where pre-COVID-19 sales were surpassed, the respondent's case appears to be that it paid all its employees based on hours worked. It remains unclear what the respondent's position is regarding whether its operations ever returned to normal.
- [21] By the end of 2022, four employees, including her, were working at the store. The applicant claims that Taylor did not support her in managing the staff, especially Shahida Solomons (Solomons). In December 2022, Taylor visited the branch and reassigned tasks to the staff.
- [22] In January and again in February 2023, the applicant contracted COVID-19, which meant she could not attend work on all the days she was required to be

⁴ When she was placed on temporary incapacity leave until she was fit to resume all her duties as store manager.

present. The applicant alleges that she received several threats about her absence from work, returned to work despite being ill, was informed that her performance was being monitored, some of her managerial duties were reassigned to staff, her off days were removed from the roster, and at some point during one of his visits to the branch, Taylor informed the applicant that he would dismiss her.

- [23] In early March 2023, the applicant informed the respondent that she was pregnant, and her pregnancy was classified as high-risk. At the same time, another colleague was also pregnant. The applicant claims that the two were unable to carry stacked boxes, resulting in unopened boxes accumulating in the storeroom. The applicant states that, despite being pregnant, they were still required to handle, carry, and move stock boxes, even though the other two employees could have done this task.
- [24] In March 2023, Taylor visited the store, and according to the applicant, he showed no compassion for her situation. He called her mentally unstable, threatened to dismiss her for sharing his emails with her medical professionals, and claimed that if she took him to the Commission for Conciliation, Mediation and Arbitration (CCMA), he knew people there.
- [25] The applicant lodged a grievance against Taylor, which the respondent did not process. Instead, Taylor sent the applicant an email denying the allegations in the grievance document and stating that the respondent would not assume responsibility should any health or pregnancy complications arise, because the applicant had refused the offer of unpaid leave for the rest of her pregnancy and the four months afterwards.
- [26] On 28 March 2023, the applicant referred two disputes to the CCMA. In the first, she alleged unfavourable treatment,⁵ and in the second dispute, she claimed full salary from 1 October 2020, when the ban on international travel was lifted and, according to the applicant, the respondent's business returned to normal.

⁵ It is submitted that the applicant, who was unrepresented at the time, in fact meant to allege unfair discrimination.

- [27] The applicant alleges irregularities at the CCMA involving the commissioner who conciliated the disputes and the respondent's representative,⁶ whom she alleges met in her absence. She states that the respondent's representative mockingly asked, '*How can anyone work with her when she can't even open any boxes?*' The applicant states that nothing came out of the CCMA referrals and that she returned to work the following day. She also states that the day she attended the CCMA was deemed unpaid leave, despite her request for it to be treated as annual leave.
- [28] During March and April 2023, the applicant continued to communicate with the respondent regarding her duties, in light of her medical reports issued by her treating medical practitioners, stating that she suffered from acute anxiety due to being forced to lift and move heavy objects, that she should not lift heavy objects, that she should be on light duty and not stand for prolonged periods, and that she needed to see a cardiologist.⁷
- [29] On or about 23 April 2023, the applicant provided the respondent with a list of tasks she could perform. She excluded tasks involving lifting or moving heavy objects, climbing, and bending.
- [30] On 25 April 2023, the applicant was asked to resume her duties, excluding strenuous activities, and she responded that she would set aside all ill feelings if the respondent was willing to cooperate with her.
- [31] On 2 May 2023, the applicant was issued with a Notice to attend an incapacity hearing on 4 May 2023.
- [32] On 4 May 2023, the applicant reported for work. That day, Shahida Solomons (Solomons) allegedly pushed a chair into the applicant's stomach, and she reported the incident. She also stated that similar incidents had occurred in March and April 2023 and that she had reported them to the Head Office without any repercussions for Solomons.

⁶ The respondent disputes that Mr Venter is/was a legal representative.

⁷ Dr Lagardien report dated 19 April 2023.

- [33] The applicant challenged the fairness of the incapacity hearing on the grounds that the legal representative who represented the respondent in the CCMA proceedings was the chairperson.
- [34] The outcome of the hearing held in the applicant's absence was communicated via an email sent later that day, which stated, inter alia, that '*due to the high risk factors uncovered which are out of the company's control to adapt, and as there are no suitable alternative positions available*', the applicant was placed on unpaid leave for the remainder of her pregnancy, and four months later, and was informed that she would be provided with a UI-19 form and a service certificate.
- [35] The applicant responded on the same day, stating that the only hazard in the workplace was Solomons, denying that there was no work for her, given that the majority of her work was administrative in nature, and that in the past, pregnant employees were treated differently than she was being treated.
- [36] In a follow-up email sent later the same day, the applicant was informed that she had not been dismissed and that she needed to give the respondent one month's notice before returning to work. The UI-19 form provided to the applicant records the termination date as 4 May 2023, and the reason for termination as Code 10: illness/medically boarded. The applicant was also given a 'salary schedule' showing the salary she had earned since starting work for the respondent.
- [37] On 3 July 2023, the applicant sent an email to the respondent, stating that she was willing and able to work, and that, as an alternative, an incapacity hearing should be reconvened to allow her to make representations. The respondent acknowledged receipt of the applicant's email and informed her that the matter had been referred to the labour consultant.
- [38] The applicant never heard from the respondent again, and on 21 July 2023, she sent an email stating she was resigning from her employment because the respondent had made continued employment intolerable. She referred to being forced into unpaid leave despite not being declared unfit to work and noted that

her pleas to be deemed fit to work were ignored, culminating in no response to her email of 3 July 2023.

[39] The applicant also alleges that shortly after she was placed on unpaid leave, the respondent appointed a former employee as the store manager of the Cavendish branch.

[40] She referred two separate disputes to the CCMA, which were not resolved during the conciliation stage, and therefore, the referrals were made to this Court.

[41] Her baby was born in October 2023.

The applicant's pleaded claims

[42] The applicant pleaded that during her employment with the respondent, she was pressured to undertake tasks that were unsafe for her unborn baby, the respondent ignored medical advice indicating she could perform her duties with reasonable accommodation as required by section 26(2) of the BCEA, and instead placed her on forced, unpaid leave. She remained on unpaid leave until her resignation in July 2023.

[43] Therefore, the first contention is that she was constructively dismissed as contemplated in section 186(1)(e)⁸ of the Labour Relations Act⁹ (LRA), in that, *inter alia*, the respondent not paying her full salary, failing to reasonably accommodate her pregnancy, pressuring her to perform tasks that risked her unborn baby's safety, failed to support her in managing staff, reallocated her managerial duties, failed to take disciplinary action against Solomons, threatened to dismiss her while pregnant, failed to process the grievance against Taylor, held an unfair incapacity hearing against her due to her

⁸ Which provides as follows:

186 Meaning of dismissal and unfair labour practice

(1) '**Dismissal**' means that-

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

⁹ Act 66 of 1995, as amended.

pregnancy, placed her on unpaid incapacity leave without medical reports indicating she was unfit to work, and failed to engage with her on returning to work or in reconvening the incapacity hearing.

[44] Cumulatively and/or alternatively, she claims that the dismissal was automatically unfair in terms of (i) section 187(1)(e) of the LRA, because the reason for dismissal relates to pregnancy or related to pregnancy, (ii) section 187(1)(f) of the LRA, as she was unfairly discriminated against on the grounds of sex, gender, and pregnancy, and (iii) section 5 of the LRA, because the applicant referred disputes against the respondent to the CCMA. In the further alternative, it is contended that the dismissal was both procedurally and substantively unfair for reasons that do not constitute automatically unfair grounds.

[45] The applicant seeks 24 months' compensation for the unfair dismissal claim.

[46] The second claim is that she was unfairly discriminated against on the grounds of sex and/or gender, and pregnancy, as contemplated in section 6(1), and sections 51(1)¹⁰ and 51(2)(b)(ii)¹¹ of the Employment Equity Act¹² (EEA), *inter alia*, in that the respondent failed to accommodate her as a pregnant woman, held an incapacity hearing whilst she was fit to work, and placed her on unpaid leave due to her pregnancy and discriminated against her for taking action against the respondent (referring disputes to the CCMA).

[47] She also contends that Taylor and Solomons harassed her on the grounds of sex, gender, and/or pregnancy, and/or for reasons related to pregnancy as contemplated in section 6(3) of the EEA. This occurred in circumstances where

¹⁰ Which states the following:

51 Protection of employee rights

(1) No person may discriminate against an employee who exercises any right conferred by this Act.

¹¹ Which states as follows:

(2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:

(b) prejudice an employee because of past, present or anticipated-

(ii) exercise of any right conferred by this Act; or

¹² Act 55 of 1998, as amended.

she has the right to equality as provided for in section 9 of the Constitution of the Republic of South Africa, 1996 (Constitution), and the right to fair labour practices as provided for in section 23 of the Constitution.

- [48] In respect of the discrimination claim, the applicant seeks R500, 000 in general damages, R206, 692¹³ in patrimonial damages, an unconditional written apology to be published on the respondent's website, an order for the respondent to take specified reasonable measures to prevent future unfair discrimination and harassment on the grounds of pregnancy, sex and/or gender, and to report to the Court on measures taken.
- [49] The third claim concerns an alleged violation of the applicant's constitutional rights to human dignity and bodily and psychological integrity, which are protected by sections 10 and 12(2), respectively, of the Constitution. It is alleged that the respondent knowingly and unlawfully subjected her to a hostile work environment created, among others, by Taylor and Solomons, by placing her on forced, unpaid leave, thereby depriving her of income without justification, and by failing to provide her with documents that would have enabled her to claim UI-maternity benefits. All of these actions are alleged to have had a negative impact on her, both physically and psychologically, as a pregnant woman. The relief sought is R500,000 in general damages.
- [50] The fourth claim is for R153, 857.90, plus interest from the date each amount became due, in terms of section 73A(3),¹⁴ 77(3),¹⁵ and 77A(e)¹⁶ of the Basic

¹³ Costs in respect of psychological counselling and therapy, psychiatrist visits and psychiatric medication.

¹⁴ Which deals with claims for failure to pay any amount owed to an employee, and where such disputes should be referred.

¹⁵ Which states as follows:

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

¹⁶ Which provides as follows:

77A Powers of Labour Court

Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order-

(e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation;

Conditions of Employment Act¹⁷ (BCEA), representing the difference between the salary paid and the R10, 000 monthly salary that should have been paid to her from March 2020 until 21 July 2023.

The respondent's defences

[51] The respondent's defences to the applicant's claims are as follows:

51.1 Save for admitting what is contained in the email correspondence, the disputes declared at the CCMA, and the birth of the child, it denies that the applicant was constructively dismissed and alleges that the resignation was premeditated, opportunistic, and vexatious.

51.2 It also denies that the dismissal was automatically unfair.

51.3 It denies the allegations of unfair treatment, victimisation, and discrimination, and denies violating any of the applicant's constitutional rights, and puts the applicant to the proof.

51.4 It alleges the following:

51.4.1 That a risk assessment was conducted in terms of the Code of Good Practice on the Protection of Employees During Pregnancy and after the Birth of a Child¹⁸, after which the applicant was placed on light duty during the first three months of her pregnancy.

51.4.2 The applicant refused to attend the incapacity hearing on 4 May 2023.

51.4.3 The applicant was laid off and was provided with the UI19 form.

51.4.4 It held a grievance hearing, after which the applicant declared a dispute.¹⁹

51.4.5 It denies owing the applicant any money and submits that, in any case, this dispute was never handled by the CCMA under section 73A of the BCEA.

¹⁷ Act 75 of 1997, as amended.

¹⁸ GoN R1441, G. 19453.

¹⁹ It is unclear what this relates to.

The applicant's evidence

- [52] She lives in Mitchells Plain, and at the time of the trial, she was employed by Fitness Fusion Lifestyle, which is also located at Cavendish Square. She applied for the job with the respondent on Gumtree and was invited for an interview. During the interview, Taylor asked if she was single and whether she planned to get a boyfriend. She found the question confusing but chose to overlook it. She was appointed and started work on 11 November 2019. It was agreed that her initial monthly salary would be R9,500 for the first three months of probation, after which it would increase to R10,000.
- [53] She reported to Taylor and commuted to work by bus. She was flown to Johannesburg for training, and once she started, the store's losses decreased from R2900 to R600. Her duties included administrative work, managing staff, the store, customers, and compiling reports. When she began at the store, she was warned that the staff were problematic, did not last, and that Solomons was an issue.
- [54] Before COVID-19, she had four colleagues, all of whom were sales consultants. In her absence, Solomons acted as the store manager. As a new employee, she found Solomons particularly difficult to manage, but she coped. She learnt that Solomons wanted her job. She got along well with the other two colleagues. She always attended work every day and was never late. On weekdays, she worked from 9 am to 7 pm, and on weekends, until 5 pm. She communicated with Taylor by phone and email. The most challenging part of her job was making Taylor happy, but management was very responsive.
- [55] In July 2020, it was agreed that staff salaries would be reduced by 25% until the travel ban was lifted. Despite this agreement, she received R4,000 instead of the agreed R7,500. The travel ban was lifted effective 1 October 2020, but salaries were not restored to their pre-COVID-19 levels.
- [56] During the COVID-19 period, only two colleagues were in the store at any given time. They worked one day on and one day off. Eventually, their hours returned to 180 per week, but they finished work at 6 pm instead of 7 pm, and on weekends, they worked until 5 pm. Over time, they resumed pre-COVID-19

hours and inquired about their salaries, which had not been adjusted. She was told she would be retrenched if she kept asking. Until she left the respondent in July 2023, her salaries were never readjusted to pre-COVID-19 levels. She wanted to leave, but jobs were scarce. Her responsibilities remained unchanged. In 2022, the store performed exceptionally well, and stock losses dropped to zero. She raised the issue of salary adjustments, as the store was very busy and staff couldn't take breaks. She received an email confirming the store's strong sales.

- [57] Solomons frequently caused problems, especially with banking summaries, and she refused the training offer. She would shout and swear at the applicant. In June 2022, Taylor authorised her to issue a warning to Solomons. When she asked for guidance on issuing the warning, Taylor told her to speak to Solomons instead. Helga, one of the colleagues, used to borrow money from the applicant, and at some point, the applicant decided she would no longer lend her money. From that moment, their relationship deteriorated.
- [58] In October 2022, she injured her neck while installing printers at work. She took sick leave and reported the incident to the head of HR, who told her it was not a workplace concern. In November 2022, Taylor sent her an email about banking issues, which left her feeling hopeless. Management ignored her emails regarding staff problems. The environment became extremely toxic, with staff giving her orders, despite holding the title.
- [59] Taylor promised to visit the store in December 2022. When he arrived, he threatened to retrench all the employees and claimed he knew people at the CCMA. He also dismissed the issues as petty problems. She could not understand why she was being called petty when Solomons was behaving as she was.
- [60] In the same month, Taylor sent an email reallocating tasks to everyone. By the end of December 2022, she no longer wanted to be there but decided to endure the unfair treatment because she needed the money until she found another job.

- [61] Explaining what happened in 2023, the applicant stated that the respondent's main business is selling luggage, but that it also offers assistance with international driver's licences, travel bookings, and other services. The head office is based in Boksburg, and it has between seven and nine branches. Phillip Christofides is in charge of the businesses, followed by Taylor, the director.
- [62] They began work on 1 January 2023. The working environment became more toxic than in 2022. Taylor informed the applicant that he wanted to dismiss her and reinstate Helga, who had resigned due to personal issues with the applicant after the applicant stopped lending Helga money.
- [63] On 29 January 2023, she collapsed at home. The doctor said she had a throat infection. Later that day, she was informed that she tested positive for COVID-19. She sent an email to management, and Taylor insinuated that she was faking it. On 31 January 2023, Taylor told her that her Thursday day off had been cancelled due to her absence from work. She was advised not to return to work until she was feeling better.
- [64] Her stress levels in February 2023 were very high. Taylor kept accusing her of pretending to be ill and refused to answer his calls. She struggled to be at home or at work. She returned to her job in the second week of February 2023. When Taylor called her, she told him she was still unwell, and he told her to go home.
- [65] When she visited the doctor for a check-up on 1 March 2023, she found out she was five weeks pregnant and informed management. In 2012, she had also become pregnant but lost the baby because she was working in a store at the time, lifting suitcases. She had been pregnant three times. When she told management about her pregnancy and its high risk, she was advised to undertake light duties. However, the staff were unsupportive of her doing only light duties, which led to her getting into trouble for unopened boxes. She couldn't open the boxes because they were stacked, each weighing between 12 and 15 kilograms. Taylor instructed her to carry the boxes regardless of the risk to her pregnancy. Her stress levels were very high, but she was unable to take medication. She wanted to leave but needed the money.

- [66] At the time, another employee, Chelsea Du Plessis (Du Plessis), was also pregnant. Du Plessis's pregnancy was further advanced than hers. As store manager, she assigned Du Plessis light duties. Taylor was kind to Du Plessis. When she informed Taylor about the light duties given to Du Plessis, Taylor disagreed and said she should have opened the boxes and that it did not matter if she lost the baby.
- [67] On 12 March 2023, Dr. Lagardien wrote a letter to the respondent to assign her to light duties. He also warned her that she might lose the baby if she did not resign from her job. She obtained another letter from Mitchells Plein Hospital - Antenatal Unit, addressed to the respondent, indicating that the unborn baby was at risk. She sent this letter to Jarod Jantjes (Jantjes) because Taylor no longer wished to deal with her. Jantjes advised her to do light duties but also told her over the phone to open boxes with her colleagues' help. However, the colleagues refused to assist.
- [68] On 16 March 2023, she was asked to provide a statement regarding unopened boxes. At that time, only she and Du Plessis were present at work, as the temporary employee was absent. Jantjes accused her of dishonesty.
- [69] The store exclusively employed female staff. Taylor explained that he preferred female employees because he enjoyed looking at them. He claimed women are much more visually appealing. He would tell them to tuck in their shirts so he could see their figures. During interviews, he hired women with their blouses unbuttoned. He also mentioned being accused of sexual harassment after touching a woman's neck.
- [70] On 28 March 2023, she referred a dispute to the CCMA, alleging discrimination on the grounds of pregnancy and claiming that her salary was being short-paid. The CCMA ruled that it lacked jurisdiction to determine the salary claim. Life turned into hell after the CCMA referral, as they had been specifically told not to approach the CCMA.
- [71] At Taylor's request, Dr Lagardien wrote a letter explaining what 'light duty' meant. In April 2023, several emails were exchanged between the applicant and the respondent's representatives regarding the applicant's duties. On 25

April 2023, in an email to all employees, Taylor attached a final, non-negotiable list of allocated tasks. According to the applicant, the list did not match the duties Dr Lagardien had recommended as light duty. For example, she was still required to climb ladders.

[72] She was sidelined. For instance, 'reps' visited the store, and she was unaware of the visits, while all staff were aware of them. She felt embarrassed.

[73] On 2 May 2023, she received a letter summoning her to an incapacity hearing. She immediately declined the invitation upon seeing that Venter, who had represented the respondent at the CCMA, would chair the hearing. He had remarked, '*How can a store manager not open boxes,*' and she felt he would not be impartial.

[74] After the hearing, she received the UI-19 form and a salary schedule, but there was no outcome. She was told to return the keys and leave the store. She saw the 'Risk Assessment' document for the first time while giving evidence. She was unable to claim Unemployment Insurance (UI) maternity benefits as the respondent refused to sign the corrected UI19 form.²⁰

[75] On 3 July 2023, she emailed the respondent requesting permission to return to work or to reconvene the incapacity hearing. She was informed that the matter had been referred to a labour consultant for advice. She did not hear from the respondent again, and on 21 July 2023, when she was six months pregnant, she decided to resign. She believed she had been discriminated against on the grounds of pregnancy and noted that the respondent had not contacted her since 3 July 2023. After resigning, she felt a sense of relief but was concerned about unemployment. She believed she had protected her baby by resigning.

[76] An attorney assisted her in describing the nature of the disputes in the CCMA referral forms.

Cross examination

²⁰ The UI19 form she had received recorded that she was terminated for ill health/medically boarded.

- [77] She was asked about her employment history before joining the respondent. She confirmed that her salary was R10,000 per month and that she was not paid by the hour. She denied ever depleting her sick leave whilst employed by the respondent. She was referred to her claim for outstanding salary, and it was put to her that she had been placed on unpaid leave; therefore, her claim for unpaid salary did not make sense. She explained that the claim was for underpaid salaries. She was asked whether she received TERS money, and she confirmed that she received R750 per month and that the respondent had informed her it was a loan to be repaid. She had no knowledge of the UIF Covid TERS Audit Employer Sign-Off Certificate signed by the respondent in October 2023.
- [78] She confirmed that she had referred three disputes to the CCMA. She attended the initial hearing alone, and by the September 2023 hearing, she had legal representation. At that time, her baby had not yet been born. She did not consult a labour attorney before the CCMA referrals because she could not afford it.
- [79] During her pregnancy, she consulted a psychologist and a psychiatrist. She gave birth in October 2023 and had been prescribed anxiety medication for life. She took anxiety medication from late 2022 to early 2023 due to work-related stress. When asked for proof that she had consulted a psychiatrist and a psychologist, he stated that the evidence was in the folder. When asked for proof of the medication she had purchased, she replied that she had some in her bag, and the rest she could bring to court the following day. She also stated that she had handed all the documents to her legal representatives.
- [80] It was put to her that the law requires an employee to take maternity leave four weeks before the birth and three months afterwards. It was also put to her that she was not medically boarded or dismissed because of her pregnancy, but that she expressed her desire to return to work, which she confirmed. She confirmed that after she was placed on incapacity leave, she visited the Department of Labour, was informed she could claim maternity benefits, and was given the correct forms that the respondent was required to sign. The respondent refused to sign the documents.

- [81] It was put to her that she could not claim UI benefits because she resigned, and she responded that she resigned after the Department informed her that she could not claim UI benefits unless the correct UI19 forms were signed by her employer.
- [82] The decision to resign was hers, as the respondent was ignoring her, and she did not know what else to do. Christofides cared about the staff, but not Taylor.
- [83] Thereafter, the applicant was asked to read emails exchanged with Taylor on 18 March 2020 regarding Symptoms and Prevention of COVID-19. These emails indicated that she could work from home if unwell and included a March 2020 letter from the respondent to all employees stating that they were being temporarily laid off due to the lockdown. She stated that after the lockdown, the business improved, and from 2021 to 2022 she sent the respondent an email stating that the business was making more money than before COVID-19. She was referred to the March 2020 email about leave not being credited while employees were on lockdown. She was also referred to Taylor's March 2020 email about salary adjustments, which had been overlooked and would be rectified. She responded that she had never received the promised R500 increase. She was further referred to an email to employees stating they would receive a R750 weekly allowance for 15 weeks, over and above the TERS money. She confirmed that employees received TERS from the government. She stated that both the TERS and the R750 weekly allowance were discontinued in July 2020, when it was agreed that employees' salaries would be reduced by 25% until the travel ban was lifted and business returned to normal.
- [84] Regarding tension in the workplace, she was referred to Taylor's September 2020 email, in which he instructed staff to cease hostile behaviour. She was also directed to the email Taylor sent to Solomons in May 2022, which stated that if she did not know how to prepare banking summaries, then she should resign. This was after the applicant complained that Solomons was not preparing banking summaries correctly. She was also referred to her April 2022 email requesting that salaries be returned to pre-COVID-19 levels, as well as

Taylor's email to Christofides requesting that the matter be treated as a priority. She stated that the issue was never resolved.

- [85] She referred to an email she sent in June 2022 regarding Solomons falling behind with her work, and was asked whether she had disciplined him. She responded that she was instructed to escalate staff matters to Taylor. She then referred to an email from January 2023 concerning Solomons and Taylor's response to Solomons, indicating she should respond to the allegations. It was suggested to her that this shows Taylor intervened when issues about Solomons were raised with him, to which she replied that this was done solely for administrative reasons.
- [86] She was referred to an email she sent to Taylor on 26 October 2022 about being booked off sick for the rest of the month, which demonstrates that she communicated openly with Taylor and was not ignored.
- [87] She was referred to Taylor's December 2022 email regarding tensions at the store, and she responded that it concerned another store, not Cavendish Square. She was also referred to another email from Taylor, sent in December 2022, which advised her to discipline staff and issue warnings as necessary; she replied that, until then, she was not authorised to do so. Additionally, she was directed to Taylor's January 2023 email, in which he stated he would visit the store because the staff were unhappy and unfriendly to customers. She was also referred to her December 2022 email to HR about meal intervals and Taylor's October 2022 email. No questions were asked about these emails.
- [88] She was referred to the work attendance register from July 2022 to October 2022, and the fact that she was paid R30 per hour. She responded that this was her contracted salary.
- [89] She was referred to her email to Taylor dated 14 February 2023, in which she stated that the doctor said he was partly responsible for her slow recovery. Taylor responded that her accusations were false and that her emails were causing her stress. She replied, acknowledging that Taylor had shown ongoing concern for her health.

- [90] She was referred to the emails from March 2023 regarding the Interbrand invoices, and the fact that she stated Taylor's emails were offensive because he accused her of being mentally unstable, a claim which Taylor denied.
- [91] She was also referred to the email from April 2023, in which she reported a workplace incident, among other matters. She confirmed that Solomons had swung a chair out, knowing the applicant was behind her, hitting her stomach, and had done so a second time, with a grimace on her face. Solomons told the applicant that she should not have been behind her.
- [92] She stated that her pregnancy was high-risk from the outset. It was put to her that Dr Largadien's note dated 2 March 2023 indicated she should be on light duties for the first three months, and that she would be able to return to normal duties on 3 March 2023. There was no response.
- [93] She confirmed that the respondent accepted all the sick notes she submitted and paid her. Regarding the diagnosis of acute anxiety, she stated that this was due to work pressures and confirmed that she had started taking anxiety medication towards the end of 2022.
- [94] She was referred to the medical notes from Mitchells Plein dated 12, 14, and 19 April 2023, which stated that she should be placed on light duty. She confirmed this but stated that it was not implemented.
- [95] She was unaware of the risk assessment conducted before the incapacity hearing. She did not attend the hearing because Venter, the chairperson, mocked her at the CCMA, claiming she could not open boxes. At that time, she did not have a lawyer. She feared Venter would be biased. When she requested another incapacity hearing, she never received a response from the respondent. When asked about the delay in requesting the reconvening of the incapacity hearing, she said she could not recall the dates.
- [96] The risk assessment report noted that they sat in traffic because of load shedding, but they remained in the store all day.

- [97] It was put to her that she staged the case to illegally claim money from the respondent, and she disputed this. When asked why she resigned, she replied that she received no assistance because the respondent refused to sign the correct UI-19 form. It was also put to her that if her complaint was about a lack of money during COVID-19, everyone suffered, as there was no money during COVID-19.
- [98] She stated that after she was placed on incapacity leave, her health worsened. There was no income coming in, she lost her appetite, and she felt stressed. Her father advised her to visit the Department of Labour. The Department of Labour did not tell her to resign but to claim maternity benefits. The UI19 form she received from the respondent recorded the reason for termination as Code 10, but the Department of Labour said it should be Code 9 (maternity leave, not termination of employment).
- [99] It was put to her that altering the previously issued UI19 form would have constituted fraud because she was not dismissed, and she responded that the Department advised her to obtain a UI19 form, which indicated that she was on maternity leave. It was also put to her that neither a layoff nor medically boarded status applied. Furthermore, she was asked why, if she was not satisfied with the Department's responses, she did not lodge a formal complaint against them, to which she replied that she was happy with the Department's response but not with the respondent, who refused to sign the correct UI19 form.
- [100] She reiterated that she had no choice but to resign, refused to participate in the incapacity hearing because of Venter, and stated that no lawyer had advised her to resign, as she could not afford one. When asked if she had taken a shortcut by resigning and claiming what she was not entitled to, she responded that she had resigned because the situation was intolerable.

Re-examination

- [101] She testified that the respondent did not explain the purpose of the incapacity hearing and felt she was being targeted. She did not receive the email explaining why the respondent would not sign the UI-19 form she received from the Department of Labour because an incorrect email address was used. The

table in the statement of case reflects the amounts she received from the respondent during that period, which are not the R10 000 she was contractually entitled to. According to the report, the risk assessment was completed before the incapacity hearing. Dr Lagardien listed the light duties she could perform. Colleagues did not assist her much, and management accepted their version over her own. She was placed on incapacity leave during the first trimester of her pregnancy.

Respondent's submissions in the application for absolution from the instance

- [102] In respect of the constructive dismissal claim, it was submitted that the applicant had alternatives to resigning. It was argued that she should have waited until she was fully recovered and then indicated when she was able to return to work, supported by a medical certificate. She was considered high risk and suffered from anxiety, and she did not testify that she was ready to return to work, supported by a medical certificate. The submission was that she instead wanted the respondent to medically board her so that she could claim UI maternity benefits, and that this was what was agreed in the pre-trial minute. Therefore, it was submitted that a dismissal had not been established.
- [103] Regarding the discrimination claim, the submission was that COVID-19 affected everyone, not just the applicant, so she was not subjected to discrimination, so the submission went.
- [104] Regarding the alleged violation of constitutional rights, it was argued that no evidence had been presented to substantiate the claims. The purported hostile environment was caused by other staff members, whom she was responsible for managing. Consequently, the submission was that the claim could not get off the ground. Reliance was placed on *Solidarity obo Kellerman v Western Cape Education Department and Others*²¹ (*Solidarity obo Kellerman*), which, according to the submission, held that workplace disputes and strained relationships do not constitute grounds for discrimination claims.

²¹ (C70/22) [2024] ZALCCT 59 (22 November 2024).

[105] Regarding the claim for the alleged outstanding salary, it was submitted that in her evidence, the applicant did not refer to her payslips or attendance register. It was also argued that she sought payment for hours she did not work and that only she wanted to receive her full salary, but not the other employees. It was further submitted that the applicant had been referred to documents she did not deny.

[106] Reliance was placed on the decision in *Lagadien v Minister of the Department of Science and Technology and Another*²², (*Lagadien*) and it was submitted that, like the employee in that matter, the applicant had not established a *prima facie* case, and therefore, absolution from the instance was appropriate.

Evaluation

Alleged constructive dismissal

[107] The first claim concerns an alleged constructive dismissal, founded on reasons that automatically make the dismissal unfair on the grounds of gender, sex, and pregnancy.

[108] An employee is considered constructively dismissed when they resign because an employer has made continued employment unbearable. In this case, the resignation is not contested. Whether continued employment was made intolerable is assessed objectively, not based on the employee's personal opinion. If employment was made intolerable, the next question is whether the employer is responsible for that situation. Finally, even if these conditions for constructive dismissal are met, it only proves that a dismissal occurred. A further question then arises as to whether the dismissal was fair, both in substance and in procedure.

[109] The respondent's only submission in the application for absolution from the instance is that the applicant had other options besides resigning. However, in *Lagadien*, which Mr Jonker quoted extensively in oral argument, the court referred to *Sanlam Life Insurance Limited v Mogomatsi and Others*²³, which

²² (JS1042/17) [2023] ZALCJHB 261 (27 September 2023).

²³ (2023) 44 ILJ 2516 (LAC).

found that an employee who claims constructive dismissal need not prove that they had no choice but to resign. All that an employee is required to demonstrate is that an employer made continued employment intolerable. Having relied on an incorrect test in constructive dismissal cases, it follows that absolution from the instance cannot be granted.

[110] In stating the above, it must be remembered that to succeed in a constructive dismissal case, an employee must meet all the criteria. If those criteria are satisfied, the employee must still demonstrate that the dismissal was both substantively and procedurally unfair. The applicant has claimed that the respondent created intolerable conditions and is responsible for them. Prima facie, she has established a case that this Court, considering the facts, could or might find in her favour. However, the Court can only make a final decision after hearing the respondent's version of the case presented by the applicant. All questions concerning whether the applicant was constructively dismissed can only be properly addressed if the matter is allowed to proceed to completion, including hearing the respondent's side.

[111] It must also be remembered that the applicant's case is that she was fit for light duty and could have continued working until she needed to go on maternity leave. The respondent's version of whether it was not possible for the applicant to be placed on light duty must be heard and considered. In this regard, I noted Mr Jonker's submission that the applicant wanted to be medically boarded so that she could claim UI maternity benefits. The court was unable to find the substantiation for the submission.

[112] The respondent also promised to reply to the applicant's letter of 3 July 2023 but never did. She further alleges that the respondent failed or refused to complete the correct UI19 form, which would have indicated she was on maternity leave, but provided her with an incorrect UI19 form stating she was terminated due to ill health and/or was medically boarded. Her case is essentially that she was left in limbo. If these claims are accurate, the key issue is whether the respondent's conduct, viewed objectively, could have created intolerable conditions. The respondent must be given a chance to present its

side of the story, including its view that completing a leave form stating the applicant was on maternity leave would have amounted to fraud.

[113] The applicant's additional contentions were that her difficult relationship with Solomons made continued employment intolerable because the respondent failed to intervene. The evidence before the court thus far suggests that the respondent did not discipline Solomons but also indicates that the applicant was authorised to do so, though she did not. The court cannot make a determination on the issue with the limited information before it, which is why absolution would not be an appropriate order to grant.

[114] Regarding the alleged difficult relationship with Taylor, the respondent has not provided a competing version apart from referencing emails between the applicant and Taylor to demonstrate communication. At this stage of the proceedings, the court might rule in favour of the applicant but may also decide against them after considering Taylor's account of the issues raised.

Alleged automatic unfair dismissal

[115] The applicant alleges that she resigned due to reasons related to her sex, gender, pregnancy and reasons related to pregnancy. In *Kroukam v SA Airlink (Pty) Ltd*²⁴, the Court stated that section 187 of the LRA imposes an evidential burden on an employee to present evidence that raises a credible possibility of an automatically unfair dismissal, after which it is incumbent upon the employer to prove otherwise by demonstrating that the reason for the dismissal did not fall within the circumstances outlined in section 187.

[116] The respondent's sole submission, in support of an application for absolution from the instance, is that COVID-19 affected all employees, not just the applicant. The Court finds this submission difficult to understand, as the applicant is not relying on COVID-19 to support her case. In the interests of

²⁴ (2005) 26 ILJ 2153 (LAC).

justice, the respondent must be given an opportunity to respond to the applicant's claim that her dismissal was automatically unfair.

[117] *Prima facie*, the applicant has presented evidence that raises a credible possibility that her dismissal falls within the scope of section 187(1)(f) of the LRA. She was placed on light duty for the first three months after she disclosed her pregnancy. If that arrangement worked during those three months, it prompts the question of what changed and why she could no longer remain on light duty. Mr Jonker suggested to the applicant that a medical note indicated she would be fit to return to normal duty after the initial three months. How should the Court interpret the medical notes issued as recently as April 2023, which state that the applicant must be placed on light duty? If there were difficulties in maintaining the applicant on light duty for the remainder of her pregnancy, only the respondent can explain them. The applicant claims that the final, non-negotiable light-duty task allocation sent by Jantjes did not align with Dr Lagadien's recommendations, as she was still required to bend. Only the respondent can address this allegation.

[118] An additional matter needing an answer is what happened to the other pregnant employee, including whether her pregnancy was also high risk and if she was similarly placed on incapacity leave. The applicant's evidence was that Taylor was sympathetic to the employee's situation but also criticised the applicant for the light duties assigned to the employee. What is the respondent's account of these issues?

[119] I have also considered the applicant's undisputed evidence that she was neither involved in nor made aware of the risk assessment conducted by the respondent prior to the incapacity hearing. The risk assessment also mentioned sitting in traffic, whereas the applicant's pregnancy was in 2023. The respondent should be given the opportunity to clarify these matters.

[120] Having considered the decision in *Lagadien*, which Mr Jonker quoted extensively from during oral argument, I believe that the outcome in that case was fact specific. The employee involved, who had a disability, failed to provide credible evidence that the employer created intolerable working conditions due

to her disability, which led to her resignation, and that she claimed was automatically unfair. In my view, the facts of the present case are distinguishable. The applicant in this matter has, *prima facie*, established, among other things, that the respondent placed her on incapacity leave despite her ability to perform light duties and failed to respond to her request to return to work or to reconvene an incapacity hearing. In oral argument, Mr Jonker did no more than read paragraphs of the judgment, without making any submissions as to the relevance of what he read into the record.

- [121] The respondent did not make any submissions on the applicant's claim that her life became a nightmare after she referred the two disputes to the CCMA. *Prima facie*, she has established that the employer acted in breach of section 5 of the LRA, rendering her dismissal automatically unfair. It is only fair that the respondent be given a chance to respond to that case.

Discrimination claim

- [122] The second claim concerns unfair discrimination as outlined in section 6 of the EEA. This provision prohibits unfair discrimination, whether direct or indirect, against any employee through employment policies or practices based on listed or arbitrary grounds. These grounds include, but are not limited to, sex, gender, and pregnancy. However, section 6(2) states that it is not regarded as unfair discrimination to differentiate someone based on the inherent requirements of a specific job.
- [123] The applicant asserts she was placed on temporary incapacity leave due to her sex, gender, pregnancy, and pregnancy-related reasons. Since the alleged discrimination is based on these grounds, section 11 of the EEA requires the employer to prove that the discrimination did not occur or that it was justified. Unless the respondent submits its version before the Court, it cannot demonstrate that no discrimination took place or that it was justified. Therefore, its version must be heard, in the interests of justice.
- [124] The applicant also alleges harassment, which, under section 6(3) of the EEA, constitutes a form of discrimination that is prohibited on any of the listed or arbitrary grounds.

[125] The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace²⁵, provides as follows:

"4.1 The term 'harassment' is not defined in the EEA. Harassment is generally understood to be-

4.1.1 unwanted conduct which impairs dignity;

4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and

4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA."

[126] As the applicant has relied on listed grounds in her claim that she was harassed by Taylor, who allegedly treated her unfairly on several occasions, and by Solomons, who allegedly pushed the chair into her pregnant stomach on at least three occasions, the respondent bears the burden of proving that the applicant was not harassed or that the harassment was justified.

[127] Section 60 of the EEA states that an employer is liable for the conduct of an employee who breaches any provision of the EEA if the employer fails to take the steps outlined in that provision. The applicant alleges that the respondent is responsible for the conduct of Solomons and Taylor because it did not undertake the steps specified in the provision. Only the respondent can challenge this *prima facie* case by answering whether Solomons and Taylor breached the EEA, and if so, whether the respondent took the steps outlined in section 60 to evade liability.

[128] In the *Solidarity obo Kellerman* judgment relied upon by Mr. Jonker, the applicant alleged discrimination on an unspecified arbitrary ground and was unable to specify what that ground was. Furthermore, in that case, it was not pleaded, and no evidence was presented that the employee was being treated in that way because of his race. Consequently, the case could not proceed further. In this instance, the applicant relies on sections 6(1) and (2) of the EEA

²⁵ As published in GN R1890 contained in GG No 46056 dated 18 March 2022.

and explicitly states the listed grounds of pregnancy, gender, and sex. This is the main factor that distinguishes the two cases.

[129] But more importantly, in *Solidarity obo Kellerman*, a key consideration was that the two employees had a difficult relationship and had lodged grievances against each other. In the present case, the applicant, who lodged complaints against Solomons and sought to raise a grievance against Taylor, alleges that no action was taken against either Solomons or Taylor. This appears to be a further distinguishing factor.

[130] Also in *Solidarity obo Kellerman*, the employee accused of harassment was disciplined and dismissed, while in the present case, nothing was done to Solomons or Taylor. Therefore, the employer in *Solidarity obo Kellerman* could not be held liable under section 60 of the EEA for the conduct of an employee whom it had dismissed for their behaviour towards a fellow employee. This is very different from what happened in this case.

[131] *Prima facie*, the applicant established a nexus between the ill treatment and the pregnancy. The interests of justice are best served by giving the respondent an opportunity to demonstrate that there was no discrimination or that it was justified.

Violation of constitutional rights

[132] The third claim concerns the alleged violation of the applicant's dignity and bodily and psychological integrity. The respondent seeks absolution on the grounds that no evidence was provided to support the claim. The question that arises is whether evidence can be presented to support such a claim, or whether the applicant failed to present it. Unless the court has the benefit of the parties' arguments on the legal point, it cannot rule that the applicant cannot succeed with her claim.

[133] The respondent also argued that the applicant could have but failed to discipline Solomons. This issue was addressed above. What was not addressed was what the applicant could have done about Taylor, whom she reported to, and the fact that the respondent did not process the applicant's grievance against

Taylor. Perhaps the respondent can explain itself and should be given the opportunity to do so.

[134] Insofar as *Solidarity of Kellerman* was relied upon, the employee had a difficult relationship with a colleague, who was ultimately dismissed for his behaviour towards a fellow employee, and then resigned after being informed that his contract would not be renewed. In that regard, there may well be some similarities between the present case and that of *Solidarity obo Kellerman*, but the final decision can only be made once both sides of the story have been heard. However, in this case, the difficult relationship between the applicant and Taylor, a director, cannot be explained by referencing the *Solidarity obo Kellerman* decision.

[135] The court stays uninformed unless given all necessary information to make a proper decision.

Salary claims

[136] The final claim relates to the salary, which the applicant asserts was not readjusted after the ban on international travel was lifted. At this stage of the proceedings, the dispute between the parties is whether employees could, at some point, claim salary only for hours actually worked. While the applicant relies on the contractual arrangement of R10,000 per month, the respondent's case is that the applicant was claiming for more hours than she had worked. Whether the applicant was requesting something different from what other employees were claiming, if that was the case, is irrelevant. The court needs to hear the respondent's version in relation to the applicant's version. Therefore, absolution from the instance cannot be considered.

[137] The respondent's argument that the applicant's claim for outstanding salaries cannot be considered because she did not refer the dispute for conciliation is a matter the court requires legal submissions on before reaching a decision. This further emphasises why absolution from the instance would not serve justice.

[138] The fact that the applicant read emails into the record, which she did not deny, does not strengthen the respondent's case. She was asked to read the emails,

but in most cases, no questions followed. The court remained uninformed about the point intended to be emphasised.

- [139] On the facts, it could not properly be said that no court, reasonably considering the matter, could or might find that the applicant was not short paid, given that her salary was not readjusted after the ban on international travel was lifted.

Concluding remarks

- [140] The court is satisfied that the applicant has met the threshold of establishing a *prima facie* case against the respondent on all claims, with some being stronger than others. The statement of response mainly consists of bare denials. The applicant's cross-examination primarily involved asking her to read, one after another, very lengthy emails. When the Court sought to guide Mr Jonker, as he is not a legal representative and might have needed the Court's assistance, he took offence at the Court's offer. The consequence was that the Court held back but was also unable to determine which inferences or deductions to draw from the several emails the applicant was asked to read under cross-examination.
- [141] In argument, Mr Jonker also read extensively from the two judgments referred to above, without drawing any parallels between the facts of the case before the court and those of the two judgments he relied upon. Unfortunately, this did not assist the court, which also considered the fact that he is not a legal representative.
- [142] When all is considered, the interests of justice require that the respondent should be given an opportunity, if advised to do so, to present its version on all of the applicant's claims, beyond the bare denials in the statement of response and the few illuminating questions posed during cross-examination. Whether the applicant will succeed with any or all her claims can be determined in due course.²⁶

²⁶ *Commercial Stevedoring Agricultural & Allied Workers Union on behalf of Dube & Others v Robertson Abattoir* (2017) 38 ILJ 121 (LAC) at para 25.

[143] Having regard to the pleaded case, the response thereto, the applicant's evidence, the documentary material referred to, the respondent's submissions, whether the applicant has established a *prima facie* case for the relief she seeks, the overall interests of justice, and the fact that absolution from the action should very rarely be granted, the court is satisfied that the applicant has established a *prima facie* case, which the respondent must answer to.

[144] A costs order, in accordance with the requirements of law and fairness, as stipulated by section 162 of the LRA, can only be properly determined after all the evidence has been presented.

[145] As a result, the following order is made:

Order

1. Absolution from the instance is denied.
2. The costs of the application are costs in the cause.



T. Gandidze

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv T Ntsewa
Instructed by: Malcolm Lyons & Brivik Inc

For the Respondent: Mr George Jonker
Instructed by: South African United Employers' Association