(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR1629/21

In the matter between:

SIMON MAXWELL JACOBS **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION **First Respondent**

LUNGILE MATSHAKA N.O **Second Respondent**

BRAKPAN BUS SERVICES **Third Respondent**

Heard: 16 April 2026

Delivered: 05 May 2026

Summary: Opposed review application – claim of constructive dismissal – employee resigned after twenty years' service due to his new Line Manager not responding to his communication – threshold of intolerability not met

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JUDGMENT

MKWIBISO, AJ

Introduction

[1] In this matter, the applicant (the employee) seeks to have the award of the second respondent (the Commissioner), issued under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), reviewed and set aside. In terms of this award, the Commissioner found that the employee's resignation with notice on 04 January 2021 did not constitute a constructive dismissal of the employee by the third respondent (the employer).

[2] The issue is whether the Commissioner's decision, dismissing the employee's claim of constructive dismissal, was correct. The employer filed an answering affidavit opposing the relief sought by the employee but did not appear in Court when the matter was heard. The employee appeared in person and explained that he did not have the financial means to ensure that his legal representatives argued the matter on his behalf.

Relevant facts and evidence

[3] The employer is an entity of the City of Ekurhuleni Metropolitan Municipality (the City) and its business is to operate bus services in terms of which members of the public are transported by buses within a designated area under the jurisdiction of the City.

[4] As at the date of his resignation, the employee had been employed by the employer for twenty years. He occupied the position of Financial Manager and reported to the Managing Director of the employer.

[5] In October 2018, the employer suspended the employee in order to investigate allegations of misconduct against him. The suspension was uplifted in June 2020 and he was never charged for the allegations that led to his suspension. The employee took no steps to challenge the fairness of his suspension. During argument before me, he confirmed that he had been advised by his attorneys to not challenge his suspension.

[6] Upon his return from suspension, the employer did not have a Board, and a new Managing Director (Mr Teboho Jele) was appointed on an acting basis. There were significant operational issues that needed the attention of the Acting Managing Director. One of the issues concerned a cash leakage that the employee had identified, with a suspicion that Cashiers working under him were responsible for stealing the employer's money. A second issue concerned the payment of service providers. One of the service providers was supposed to be paid in order to repair the ticket software system that enabled the employee to track the issuing of tickets to passengers and the movement of money received from passengers who use employer's buses. Another service provider had to be paid in order to print the payslips of employees of the employer. A further service provider had to be paid after delivering goods (laptops) to the employer.

[7] The employee had reported these issues to the Acting Managing Director, who had failed to deal with the issues by approving the documents that were necessary for payment to be made. The employee faced complaints from colleagues who were paid their remuneration without payslips and he believed that he could not properly perform his duties without the Acting Managing Director's approval of the necessary payments to service providers.

[8] The Acting Managing Director went on annual leave on or about 14 December 2020. When the employee believed that the Acting Managing Director was not dealing with his concerns, he lodged a grievance with the Executive Mayor and City Manager of the City on or about 24 December 2020, based on the understanding that the Acting Managing Director reported to the Executive Mayor. This grievance was not attended to by the City's officials with the speed that the employee desired. As a result, the employee submitted a letter of resignation on 04 January 2021, indicating that his last day of work would be 04 February 2021.

[9] The letter of resignation read as follows:

> "To Mr Teboho Jele
>
> From Mr Maxwell Jacobs

Date 04 January 2021

LETTER OF RESIGNATION

It is with great disappointment to inform you that as from tomorrow, the 05th of January 2021, I will be serving notice until the 04 February 2021. I will always be grateful for having gotten the opportunity to work for Brakpan Bus Company (BBC) for the past twenty years.

There are many reasons behind my resignation and daily it became more unbearable to work for BBC under these circumstances.

1. For many years I have been saying that I am actually doing the job of three positions at BBC which are the CFO position, Financial Manager position and the Supply Chain Manager position. This was proved when the board approved the company organogram which has all three positions. Furthermore, when I returned to work from suspension on the 15th of June 2020, I discovered that there were three different people who were collectively doing my duties. Moses Mpjane was seconded to be the CFO, Hugh Skhalela was acting as Financial Manager and Gloria Hoffman was heading payroll. Upon my return to work, all the said duties were done by me only.

2. According to section 89 of the MFMA, the City must set the upper limit of the salaries of the CEO and senior managers who report to the CEO. All BBC managers are paid according to the upper limit set by the City excluding myself. As a result, all other managers are earning more than me despite the fact that they all have less than two years working at BBC and I have more than twenty years. We have signed the settlement agreement with the company at CCMA in July 2018, in trying to resolve this imbalance, but the company has disregarded it.

3. On the 30th of October 2018, a day before the due date of the settlement agreement implementation, I was suspended without any valid reasons. I have spent money paying lawyers for twenty (20) months, trying to get supporting documents for the allegations made against me. After 20 months the company withdrew the charges without any explanation and without considering any of my expenses incurred with regards to the unfounded allegations and legal costs.

4. The allegations made by the company in that charge sheet have brought my name into disrepute. Furthermore, they made more allegations against me at SARS.

5. All confidential reports of cash leakage sent to Mr Jele, in his capacity as the Acting Managing Director, were distributed to the junior staff in an attempt to create animosity between myself and the junior staff. As a result, the staff that reports to me who were also mentioned in the reports decided not to come to work without me signing their leave forms. This has made my work difficult since I am unable to finalise my mid-year reports without the information I am supposed to get from them.

6. Mr Jele has, once again, created animosity between me and other employees by refusing to authorise the purchase of payslips which resulted in employees getting salaries without payslips in the month of December 2020.

7. I am unable to review the reports on the ticket system due refusal to repair it. This makes it difficult to perform my duties.

8. Workers are exchanging their modules among themselves and are sharing passwords. This is making the revenue controls weaker. I have reported this many times before, but nothing has been done thus far.

9. Mr Jele seems to be creating wasteful expenditure and irregular expenditure unnecessarily and there is no apparent reason for him doing so. Afterwards, I am the one who is expected to explain these irregularities to all oversight committees as the head of finance".

[10] The employee indeed served his notice. He referred an unfair dismissal claim to the CCMA, claiming that his resignation constituted a constructive dismissal. This dispute was ultimately arbitrated by the Commissioner.

[11] At the arbitration, the employee testified on his behalf and the Acting Managing Director testified on behalf of the employer.

[12] The employee stated that he was not happy with the pace with which the Acting Managing Director was attending to the issues. He confirmed that he knew the City would replace the Acting Managing Director and he did not want to be charged for failing to do his work by the person who would replace the Acting Managing Director. He did not want a situation whereby he has to spend a lot of his own money trying to defend himself by proving that it was the Acting Managing Director who was making it difficult for him to do his work.

[13] The employee referred to emails that were sent to the Acting Managing Director requesting him to approve payments to service providers, which were ignored by the Acting Managing Director. One of the invoices that had to be paid related to the printing of payslips, which created animosity between him and his colleagues as employees were paid their remuneration without payslips that explained their benefits.

[14] The employee said he sent the first cash leakage report to the Acting Managing Director on 20 November 2020. He sent another cash leakage report to the Acting Managing Director on 13 December 2020. The Acting Managing Director failed to respond to his reports of employees stealing money from the employer.

[15] The employee referred to an email that the Acting Managing Director had sent circulating his confidential report to colleagues who were implicated in the report. He said this resulted in his juniors failing to report for duty in retaliation.

[16] The employee referred to an email that was sent by Mr William Magwele complaining about the non-payment of suppliers, which non-payment Mr Magwele said had become a huge risk to him and his family. The employee further referred to an email from a supplier who had delivered laptops but was not paid. He forwarded this email to the Acting Managing Director requesting payment due to the negative image that non-payment had on the employer.

[17] After referring to his resignation letter, the employee was asked whether he would have resigned had the Acting Managing Director responded, either

negatively or positively, to any of the emails he had sent to him. His response was that he would not have resigned:

> "APPLICANT REPRESENTATIVE: Thank you Sir. So if Mr Jele had responded, either in a negative or a positive way to any of the emails that you sent, highlighting the issues that you were experiencing. If he had responded, would you have resigned, Sir?
>
> MR. SIMON MAXWELL JACOBS: No, I wouldn't have resigned".

[18] It suffices to state that the Acting Managing Director testified and denied that the employee's resignation constituted a constructive dismissal.

[19] The Commissioner issued his award on 28 June 2021, dismissing the employee's referral on the ground that he was not dismissed but had resigned. The Commissioner found that the employee had not given the employer enough time to deal with his grievance. The employee had not approached the employer's Human Resources Department to exhaust his internal remedies in terms of the employer's internal policies but had instead approached the City, and had not waited for the City to respond before he resigned.

[20] The Commissioner further found that the employee's resignation was with a month's notice, which was inconsistent with a claim of intolerability. He referred to the Labour Court's judgment in *Volschenk v Pragma Africa (Pty) Ltd*[1] in support of this finding.

[21] The Commissioner furthermore found that the employee had sought the remedy of a transfer to another department of the employer, which was inconsistent with an official who was disillusioned with the employer. The Commissioner concluded that the employee had failed to prove on a balance of probabilities that the employer had made his employment so intolerable that the only option was to resign.

[22] Unsatisfied by the outcome of the CCMA, the employee approached this Court with a review application seeking to have the award against him set

[1] *Volschenk v Pragma Africa (Pty) Ltd* (2015) 36 ILJ 494 (LC).

aside. The employee only filed one founding affidavit and did not file a supplementary founding affidavit making reference to the record once he had secured the transcript of the arbitration proceedings. His grounds of review are stated in the following vague terms:

> "32.1 The Second Respondent did not properly, rationally, and justifiably apply his mind to the facts and/or law in this instance;
>
> 32.2 The award rendered by the Second Respondent is not justifiable in relation to the reasons given for such award and such award is also not rational or justifiable in its merits or outcome;
>
> 32.3 The Second Respondent failed to properly, justifiably and reasonably determine and assess the evidence properly before him;
>
> 32.4 The Second Respondent had not considered relevant considerations and/or had taken irrelevant considerations into account;
>
> 32.5 The decision reached by the Second Respondent is not a decision that a reasonable decision-maker would reach in the circumstances of this case".

[23] In a further attempt to set out grounds of review, the employee stated the following in his founding affidavit:

> "33. It is my respectful submission that the Second Respondent gave preference to the Third Respondent's version and did not even attempt to establish the Applicant's version fully
>
> 34. Be that as it may, the Second Respondent did not attempt to establish the true state of affairs from the Applicant himself or ignored what was presented during the proceedings
>
> 35. It is my humble submission that the Second Respondent did not give due consideration to the fact that Applicant discharged the onus placed on him.
>
> 36. Therefore, in the circumstances, it is submitted that the award by the Second Respondent, in this instance, constitutes a defect as contemplated by section 145 of the LRA and/or constitutes a ground

> for review as contemplated in section 158(1)(g) of the LRA and should accordingly be reviewed and/or set aside".

[24] The employer opposed the review application on the basis that the Commissioner was correct in finding that the employee was not dismissed.

Analysis

[25] The employee approached the CCMA with a complaint that he was dismissed by the employer and that his dismissal was unfair. His averment that he was dismissed was based on the definition of "dismissal" in section 186(1)(e) of the Labour Relations Act[2] (the LRA).

[26] Section 186(1)(e) of the LRA defines "dismissal" in the following terms:

> "(1) "Dismissal" means that –
>
> …
>
> (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee".

[27] When the CCMA dismissed his claim, he approached this Court with a review application seeking to have the arbitration award against him set aside. As can be seen from his grounds of review, he made no reference to the arbitration record, which is inappropriate and incompetent when one is challenging a decision-maker on the ground of a failure to apply one's mind to the evidence that served before him. Surely such a challenge should be mounted with reference to the actual evidence that it is alleged was misconstrued instead of making vague allegations of a failure to apply the mind.

[28] The test for review is trite. The issue is whether the Commissioner's decision that the employee's resignation did not constitute a dismissal was correct, based on an objective assessment of the evidence. The review test of reasonableness as enunciated in *Sidumo and Another v Rustenburg Platinum*

[2] Act 66 of 1995.

Mines Ltd and Others[3] does not apply to a Commissioner's findings on jurisdiction or lack thereof.

[29] The requirements or elements of a constructive dismissal claim were set out by the Labour Appeal Court in *Solid Doors (Pty) Ltd v Commissioner Theron and Others*, in the following terms:

> "[28] … there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established".[4]

[30] In *Gold One Limited v Madalani and Others*, the Labour Court dealt with the requirement of intolerability by stating that "*intolerability entails an unendurable or agonising circumstance marked by the conduct of the employer that must have brought the employee's tolerance to a breaking point*".[5]

[31] This approach has been confirmed recently by the Constitutional Court in *Maleka v Boyce NO and Others*.[6] The apex court defined "intolerability" in the following terms:

> "[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

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.
[4] *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 (LAC), para 28.
[5] *Gold One Limited v Madalani and Others* (2020) 41 ILJ 2832 (LC), para 46.
[6] *Maleka v Boyce NO and Others* (CCT 175/23) [2026] ZACC 7 (24 February 2026) at para 73.

actions would not per se establish intolerability". 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 brought the employee's tolerance to a breaking point".

[32] The Constitutional Court confirmed that resignation should be a measure of last resort:

"[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".

[33] The Constitutional Court considered the duration between the act that allegedly caused intolerability and the act of resignation, as a relevant factor in determining the existence of intolerability:

"[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".

[34] On the facts of the current matter, it is my view that the employee may have felt aggrieved by work conditions that caused difficult, unpleasant and stressful situations for him in the workplace. He needed service providers to be paid in order for services to be rendered to the employer, which services were related to his line of work. The conduct of the Acting Managing Director may have been unbecoming to the extent that he did not respond to emails or speedily approve payments to service providers. The employee's colleagues may have put pressure on him by constantly inquiring about matters that were beyond his control, due to the Acting Managing Director's failure to act speedily on matters that required his approval.

[35] In my view, the conduct that caused the employee to be aggrieved was not sufficient to break the camel's back, as it were. In other words, it was not sufficient to render his resignation an act of last resort. Importantly, just as the reasons for dismissal are to be gleaned from a letter of dismissal, the reasons for resignation must be gleaned from the resignation letter where such a letter ventures into providing reasons for resignation.

[36] The employee had other alternative methods available to him of dealing with the issues he set out in his resignation letter.

[37] If he had a complaint about doing work that fell outside his job description without being remunerated adequately, then he could have requested a job evaluation and grading of his position or referred an unfair labour practice dispute relating to the provision of benefits. It seems he did refer a dispute to the CCMA and a settlement agreement was concluded, which means he could have enforced the terms of the settlement agreement as permitted by sections 142A and 158(1)(c) of the LRA.

[38] If he believed his suspension from work was unfair, he could have challenged the suspension at the CCMA and sought an order of compensation for the unfairness.

[39] If junior officials had retaliated against the employee by being absent from work without authorisation, then the employee could charge them for misconduct as their superior, in the same way he had charged an official

whom he suspected of stealing money prior to his suspension. In argument before me, the employee complained that the disciplinary process was too slow.

[40] In relation to the employee's inability to do his work due to service providers not rendering services to the employer as a result of not being paid, then the employee could have raised his concerns against the Acting Managing Director in a formal grievance, following the employer's policies and procedures.

[41] In *Maleka v Boyce NO and Others* (supra), the Constitutional Court dealt with a situation involving the lodging of a grievance against an official who was the highest person of authority in the business. The Court held the following:

> "[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".

[42] If the employee had evidence of the Acting Managing Director being responsible for fruitless and wasteful expenditure, then he could have reported this to the City and oversight committees and this would have been sufficient. He could also have lodged a grievance internally, following the employer's grievance procedure, in which case the Acting Managing Director

would have had to exclude himself from the administrative and oversight processes relating to that grievance.

[43] Ultimately, the employee made it clear that had the Acting Managing Director responded to any of his emails, meaning even a single email, then he would not have resigned. This demonstrates that the difficult, unpleasant and stressful situations that the employee experienced as a result of the conduct of the Acting Managing Director were not enough to trigger his resignation, as all he needed was a speedy response or reaction (whether negative or positive) from his Line Manager. When the employee's issues were not addressed at the speed he desired, he decided to hastily resign. In his testimony at the arbitration hearing, he mentioned that the Acting Managing Director made his work difficult (as opposed to impossible). Perhaps this is why the employee was prepared to work through his notice period after he had resigned.

[44] The time factor must also be considered. The employee seems to have had issues with the Acting Managing Director from September 2020 and he resigned on 04 January 2021, which is a period of four months. It is difficult to conclude that the employer deliberately sought to make his employment intolerable in such a short period.

[45] It is probable that the employee resigned as a result of anticipated intolerability of the possibility of being charged in the future for problems that he believed were caused by his Line Manager, which anticipation was unreasonable because he had done all he could by following-up on requisitions that required approvals and reporting the conduct of the Acting Managing Director to the City. He could not reasonably be expected to act without authorisation or approve requisitions that fell outside of the scope of his powers if his Line Manager was failing to act. The employee's fear of having to spend his hard-earned money on legal fees in the event of having to defend himself against unfounded allegations against him is unfounded, as he did not have to approach legal practitioners every time he faced challenges in the workplace and legal practitioners are generally not allowed in internal

workplace disciplinary processes. After all, he was able to appear in Court unrepresented in this matter.

[46] The Commissioner's decision was correct. The employee's resignation was not caused by the working environment being made intolerable by the employer. There was simply no intolerability. As a result, the employee's resignation did not constitute a constructive dismissal, and his referral of an unfair dismissal claim was correctly dismissed on the ground that there was no dismissal.

[47] In light of the above, the employee's review application stands to be dismissed.

<u>Costs</u>

[48] The general rule is that costs do not follow the result in this court and there are no valid reasons why I should deviate from this rule.

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

<u>Order</u>

1. The applicant's review application is dismissed.
2. There is no order as to costs.

VG Mkwibiso

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For Applicant	:	In Person
For Third Respondent	:	No Appearance
		(Mdzikwa Attorneys on record)