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

_____ _____
Signature Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: A2025-076355

In the matter between:

ROYALE ENERGY (PTY) LTD **Appellant**

and

COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION **First Respondent**

COMMISSIONER DHELIWE MAVUMA N.O **Second Respondent**

ELAINE PHUMZA BAVUMA **Third Respondent**

Heard: **05 May 2026**

Delivered: **25 May 2026**

Coram: Djaje AJA; Masipa AJA and Moshoana AJA

Summary: The question whether a dismissal as defined in section 186(1) of the Labour Relations Act, 66 of 1995 (LRA) has or has not occurred is one that goes to jurisdiction. Where a dismissal as defined did not happen, the Commission for Conciliation, Mediation and Arbitration (CCMA) lacks jurisdiction to arbitrate a dispute. In order for a constructive dismissal to happen, the following requirements must be present; namely; (a) the employee terminates employment with or without notice; (b) the reason for the termination must be that the employer made continued employment

intolerable **for the employee. In terms of section 192 of the LRA, in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Should an employee fail to establish the existence of a dismissal, there is no onus on the employer to prove that the dismissal is fair.**

The requirement that the employer must have made continued employment for the employee to be intolerable, involves an application of an objective test. In other words, the question is whether any reasonable employee would have tolerated continued employment or not. In this matter, for a period spanning five years or so, the respondent employee alleged that the Group Chief Executive Officer (GCEO) of the appellant made her continued employment intolerable. Having endured the identified intolerability, on 3 September 2020, after the one incident of 27 August 2020, the respondent employee lodged a grievance against the GCEO with the chairperson of the Board of the appellant. The Board undertook to investigate the allegation that gave rise to the alleged intolerability and indeed appointed an external investigator. Following a consultative meeting – which was part of the investigative process – certain solutions were proposed.

The respondent employee opted for the mutual separation option and suggested payments to herself. The appellant rejected the suggested mutual separation and called upon the respondent employee to return to work and report to a different person. Instead, the respondent employee for her own reasons rejected the call to return and report to someone. She instead instructed her legal team to request a copy of the investigation report. Upon being informed that the investigation report does not exist because the investigations were incomplete, the respondent employee on 25 September 2020 terminated her employment. Whereafter, she referred a dispute to the CCMA and alleged unfair dismissal. The CCMA found that she was unfairly dismissed and ordered the appellant to compensate her. Displeased thereby, the appellant launched a review application, which application was dismissed by the Labour Court.

On the objective facts, the respondent employee was not dismissed. The respondent employee sought to rely on anticipated intolerability since in her subjective view, the GCEO will not change his ways, even if she were to report to someone else. This anticipated intolerability is speculative and a reasonable employee would not rely on such an intolerability for the purposes of terminating employment. The allegation that the respondent employee will continue to work with the GCEO on specific projects is also speculative in that the new person she was to report to could decide to not allocate her to the project at all. Most importantly, the GCEO could be removed from the project by the Board. On her own version, if she were allowed to work from home, the intolerability would not have continued. Accordingly, the requirement of intolerability, has not been established, as such the respondent employee was not dismissed within the meaning of section 186(1)(e) of the LRA. The CCMA lacked jurisdiction to arbitrate the dispute. The CCMA wrongly assumed jurisdiction over the dispute. The Labour Court erred by not reviewing and setting aside the arbitration award.

Held: (1) The appeal is upheld. Held: (2) The order of the Labour Court is set aside and it is replaced with an order that: (a) The arbitration award of the CCMA is reviewed and set aside; (b) The employee was not constructively dismissed; (c) The CCMA lacked jurisdiction to arbitrate the dispute. Held: (3) There is no order as to costs.

JUDGMENT

MOSHOANA, AJA

Introduction

[1] This Court in *Solid Door (Pty) Ltd v Theron N.O*[1]*,* expressly laid down the law in the following terms:

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

[2] The above legal statement remains trenchant to this day. Recently, the above statement of law received an imprimatur of the Constitutional Court in *Maleka v Boyce N.O and Others* (*Maleka*)[2]. That said, before us is an appeal that reached this Court after leave to appeal was granted by this Court on 13 February 2025. The present appeal is opposed by the third respondent, Ms Elaine Phumza Bavuma, the former employee of the appellant, Royale Energy (Pty) Ltd. The appeal is against the whole order of the Labour Court made on 20 August 2024, in terms of which, the review application launched by the appellant was dismissed. Additionally, the Labour Court ordered the appellant to pay the respondent employee an amount of R1 149 288.00 as compensation.

Preliminary issue

[3] The appellant delayed in delivering the record. As such, it was prompted to seek condonation for the delay. The application seeking condonation was not

---

[1] (2004) 25 ILJ 2337 (LAC) at para 29.
[2] (2026) 47 ILJ 839 (CC) at para 54 and 55.

opposed. At the commencement of the hearing of the appeal, this Court condoned the delay and proceeded to hear the appeal on its merits.

Background factual matrix pertinent to the present appeal

[4] Royale Energy (Pty) Ltd (hereafter the appellant) is the largest privately owned, licensed petroleum wholesalers and distributors in South Africa. Ms Elaine Phumza Bavuma (hereafter Bavuma) commenced employment with the appellant on 03 January 2013 as a General Manager: Mpumalanga South Cluster. She reported to the Group Chief Executive Officer of the appellant, Mr Stephan Nothnagel. The difficult relationship between Bavuma and Mr Nothnagel emerged for the first time on 14 June 2015, when Bavuma addressed an email to him following his rude, derogatory, contemptuous and appalling behaviour towards her. Regarding this difficulty, Bavuma adopted an attitude of moving on and thought Mr Nothnagel as a seasoned professional would take cognisance of her displeasure and self-correct.

[5] I interpose, to mention that Bavuma did not bring this difficulty to the attention of the powers that be at the appellant. It follows axiomatically that the rude, derogatory, contemptuous and appalling behaviour did not render continued employment intolerable for her. Almost two years went pass, when around December 2017, Mr Nothnagel had a one-on-one session with one of the direct reportees of Bavuma. She was unhappy with this conduct. The direct reportee believed that Mr Nothnagel stepped out of his boundaries and he resigned as an employee of the appellant. Bavuma somewhat took up the cudgels for the direct reportee. I interpose again to mention that Bavuma only approached Mr Nothnagel, who did not think there was anything wrong in his conduct, and did not bring that to the attention of the powers that be.

[6] Almost two years later another incident happened. An emotional outburst took place at the Management meeting held on 21 October 2019. The meeting related to the Leandro Caltex Service Station incident of the installation of the new operator. The emotional outburst involved Mr Nothnagel being rowdy and rude and asked Bavuma to leave the appellant. This after Bavuma raised issues relating to one Mr Johan Becker about the process of the new retailer

installation. In response to this rowdy and rude behaviour Bavuma was resolute and threw down the gauntlet on Mr Nothnagel. Resultantly, on 6 November 2019, the new process of the new retailer installation took place without any hindrance from Mr Nothnagel. I again interlude and mention that this incident was not brought to the attention of the powers that be.

[7] Some few months later, on 26 June 2020, another incident emerged involving Astron, dealing with the unclear WhatsApp communication between Astron and the appellant., Mr Nothnagel in a rough tone reminded Bavuma that she was employed by the appellant and if she thought otherwise, she must leave the appellant. Yet again, Bavuma stood her ground and reminded Mr Nothnagel that it was her responsibility to manage the commercial agreement to avoid any breach from the Branded Market agreement with Astron. I again interlude, this skirmish was not brought to the attention of the powers that be.

[8] The last incident that apparently became the straw that broke the camel's back happened on 27 August 2020. At this incident, Mr Nothnagel, without being provoked, blew up in a confused and furious outburst and undermined Bavuma in front of her colleagues. When she was attempting to explain the issue being discussed, Mr Nothnagel stood up and charged towards her and frantically wiggled his finger in a violent and aggressive manner in close proximity to her face. Again, Nothnagel dared her to leave the appellant.

[9] Few days after the incident, Bavuma lodged a grievance on 3 September 2020 and requested a way forward before close of business on 4 September 2020. She also called for the Board's immediate intervention, to work from home to avoid further confrontation with Mr Nothnagel until the Board has *remedied* the situation. She stated that she was amenable to return to the office and ready to subject herself to '*any process that seeks to resolve the issue at hand'*. I interpose to mention that, at this point, there is no indication that continued employment will be intolerable. Instead, she was actively looking for a solution to the issue at hand.

[10] Given the view I take at the end of this matter, it is apposite to record in full, the response of the appellant to the grievance. The Chairperson of the Board responded as follows[3]:

> 'We take note of your communique dated 03 September 2020 and wish to advise as follows:
>
> 1. Our staff contingent is of utmost importance to the board. The wellbeing: fair treatment and alike is of utmost importance as without our brilliant people we cannot sustain our business. We are dependent on our staff, as they are on us.
>
> 2. We do not wish for any person to be mistreated, victimized or other; but also understand that every situation, argument or disagreement between our staffing compliment holds its own merits.
>
> 3. To this end a decision was made to appoint an external agent to assist in the resolution of the matter. The person appointed and tasked with resolving the process is R. Jansen van Rensburg appointed as Director by Law Emporium (Pty) Ltd.
>
> 4. A request was made for you to meet with Mr Jansen van Rensburg on Tuesday, 08 September 2020 at the office of Royale at 13:00 for discussion on the matter.
>
> We trust you find the mentioned in order.
>
> Yours Faithfully
>
> Mr Makhaza ZE
>
> Chairperson

[11] It is common cause that on 8 September 2020, as arranged, Bavuma met with Mr van Rensburg. The only record of the discussion between the two is the letter penned by her on 9 September 2020. It may not be necessary to regurgitate the contents of the recordal. It suffices to mention that Bavuma

[3] The letter appears to have been mistakenly dated 7 August 2020. However, the letter was despatched to the respondent employee on 7 September 2020.

dealt with all the three proposals made at the consultation meeting. She, for her own reasons rejected two of the proposals. I pause to mention that the question whether her reasons for rejection are valid or not is of no moment. Regarding the mutual separation, she proposed to be paid an amount of over R4 million which would include a bonus payment as well as outstanding leave pay out.

[12] Again, it is of some needful significance to record the response of the appellant to the proposal:

> ‘1 The organisation has considered your proposal to part ways and does not accept this proposal.
>
> 2 The board has considered other avenues to see what best would address your perceived grievance and prevent your exit from the organisation. As such a decision is made that you would report to Johan Ferreira in the interim.
>
>
>
> 3 It is of essence that you report to the office of the Employer and for duty effective 16 September 2020 at 8:00 for a handover meeting and to resume normal duties.
>
> We trust you find the mentioned in order.
>
> Yours sincerely
>
> Mr Makhaza ZE
>
> Chairperson

[13] Instead of considering and or accepting the interim suggestion, Bavuma enlisted the services of a Labour Relations Consultant. The consultant demanded an investigation report of Mr van Rensburg. I pause to mention that this posture is at odds with the one stated in the penultimate paragraphs of the grievance letter of 03 September 2020 – to subject herself to any process that seeks to resolve the matter at hand. The letter from the consultant does not advance any basis that will account for this *volte face* or chameleonic posture.

[14] That notwithstanding, the consultant was advised that the proceedings were not finalised, the outcome would be presented to the Board and alternative reporting arrangements are in place until the matter is resolved. This advice was repeated to the consultant twice. That notwithstanding, on 25 September 2020, Bavuma terminated her employment with the appellant. It is significant for the purposes of this judgment to extract some portions of the resignation letter. Bavuma stated the following:

> '2 It should not be a surprise that I am resigning, as the process that has been followed by the office of the chairperson in dealing with my grievance has been impulsive, flawed and arbitrary resulting in further gross injustice on the part of the Board…
>
> 3 In that regard, both the conduct of Mr Nothnagel and the Board have been instrumental in creating a continuous intolerable environment, which has rendered the continuation of my employment relationship at Royale Energy untenable and my working conditions intolerable, leaving me with no option but to resign in response to your breach of my employment contract. The working conditions, intimidation, victimisation, harassment, and abuse of power are intolerable. This leaves me with no option but to resign because of being forced to work in a threatening environment.'

[15] I pause to reflect that it is apparent from the contents of the resignation letter that the resignation was propelled by (a) the impulsive conduct of the chairperson; (b) conduct of Mr Nothnagel. Clearly, there is a visible embellishment suggesting victimisation and harassment, which was not detailed in the grievance of 3 September 2020. I comment in passing that I observe a sleight of hand in the contents of the resignation letter. Nevertheless, nothing turns on this. It is interesting to note that Bavuma alleges that she was forced to work in a threatening environment. On the objective facts, since June 2015, she, on her own volition, continued to work despite the happenings of the incidents complained of. From 3 September 2020, she stopped working from the offices of the appellant and failed to return to the offices despite an offer to report to someone else. Since she

never returned, the alleged threatening environment is a matter of anticipation and or speculation.

[16] On 3 October 2020, Bavuma referred a dispute alleging unfair dismissal to the CCMA. As indicated at the dawn of this judgment, the dispute was resolved in Bavuma's favour.

Arbitration award

[17] The commissioner concluded that there was a reasonable period within which the appellant could have attended to the serious complaints raised by a senior employee implicating another senior employee. Based on that conclusion, the commissioner reached a finding that the appellant dismally failed to deal with the matter despite being afforded an opportunity to do so. Because of this dismal failure, the commissioner concluded that the appellant created the intolerable working conditions with particular emphasis on the fifth incident.

[18] On the objective facts, it is difficult to comprehend the reasoning of the commissioner on the finding of intolerability. Although Bavuma found it to be convenient on 3 September 2020; to lump together five incidents, all those incidents occurred in a space of two years or months in between. If the continuation of employment was truly intolerable, why would Bavuma tolerate what happened to her for years and in some instances months? This is truly perplexing and is devoid of any tapestry of intolerability in my considered view. The Constitutional Court in *Maleka*[4] held as follows:

> '[68] It is clear from the above[5] that the inquiry into intolerability is an objective one, which requires a fine-tooth comb approach to determine the presence of intolerable conduct or working conditions. Grogan states:

[4] Id fn 2 at para 68.

[5] The above being what was stated in *Sanlam Life Insurance Ltd v Mogomatsi* (2023) 44 ILJ 2516 (LAC) – "*In constructive dismissal disputes, a two-stage approach is normally followed: First, the employee must prove that the employer effectively dismissed him or her by making her or his continued employment intolerable. It is an objective test. The employee need not prove that he had no choice but to resign, all that is required is to prove that the employer made continued employment intolerable. The conduct of the employer towards the employee and the cumulative impact thereof must be such that viewed objectively, the employee could not be expected to cope with it*".

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

[19] In seeking to invigorate the reasoning of dismal failure, the commissioner placed reliance on the judgment of this Court in *Western Cape Education Department v GPSSBC and others*[6]. With considerable regret, the reliance was misplaced. That case involved temporary incapacity leave and ill health retirement applications which were not processed by the Department over a period of two years. Involved herein was a resolution of a grievance lodged by Bavuma. Bavuma expressed that she would subject herself to any process which will lead to the resolution of the issue at hand. When interim measures are proposed, Bavuma makes a *volte face*. Insisting on a report when only one consultation between her and the investigator happened was an unreasonable demand. On Bavuma's own version, on 8 September 2020, other than her providing the investigator with annexures to her grievance no proper discussions happened, which would have enabled a production of a report. In her letter of 9 September 2020, she recorded that she was advised as follows:

> '2.2 that the Board has sought the services of Law Emporium (Pty) Ltd with a view of overseeing the process, gathering information and conducting interviews with all relevant parties and witnesses in order to evaluate the merits of my grievance and provide advice and/or recommendations to the Board accordingly.'

[20] Regard being had to the fact that the allegations made in the grievance spans a period of over five years, it was unreasonable to expect the process to have been processed and completed over a period of less than a month. It was Bavuma who called for the immediate intervention of the Board and also undertook to subject herself to any process. Yet when the Board suggested a

[6] (2014) 35 ILJ 3360 (LAC).

process, she failed to co-operate and hurried to resignation. She clearly did not afford the appellant an opportunity to find a resolution of issues she had tolerated for years and months.

[21] In light of the above objective facts, the commissioner failed to adopt a fine comb approach to the presence of the intolerability issue. Intolerability implies the quality of being unbearable or impossible to endure. The Court in *Maleka*[7] had put it thus:

> '[70] The question that arises is what type of conduct on the part of the employer would be deemed intolerable? In other words, what constitutes intolerability? The Labour Appeal Court in *Solidarity* held that the word "intolerable" means a situation which is beyond that which can be tolerated or endured; or insufferable. The Court went further to say that it is "something which is simply too great to bear, not to be put up with or beyond the limits of tolerance". This means that the threshold test to establish intolerability is high.
>
> LABOUR APPEAL COURT
>
> [71] This Court in *Booi* held that the term 'intolerable' implies a level of unbearability, and must surely require more than a suggestion that the relationship is difficult, fraught or even sour…'
>
> [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 situation for an employee). It would not be enough that the employer's conduct is merely rude uncompromising or unbecoming… 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.'

[22] When the five incidents are viewed objectively, they did not bring about intolerability, hence Bavuma managed to continue with employment even after they had happened. In some instances, Bavuma was able to stand her ground and throw down the gauntlet on the difficult Mr Nothnagel. The fact

---

[7] Id fn 2 at paras 70 to 73.

that she was not guaranteed that Nothnagel's conduct will change is of no consequence.

[23] Overall, the commissioner was not correct when he concluded that Bavuma was subjected to intolerable working conditions.

The Labour Court judgment

[24] In *Maleka*[8], the Court held as follows:

> 'Therefore, when the Labour Court was confronted with Maleka's application for review, the two questions that Court had to ask itself were, firstly, whether Mr Maleka was constructively dismissed (a jurisdictional issue) and second, if he was, whether the constructive dismissal was unfair (a merits issue). On the first question, the test is for all purposes, objective correctness….

[25] A proper reading of the Labour Court judgment suggests that it applied a wrong test in dealing with the issue of the alleged constructive dismissal of Bavuma. At paragraph 30 of the Labour Court judgment, the learned judge expressed himself as follows:

> '[30] …I must first be satisfied that her decision is outside the band of reasonableness, which no reasonable decision maker could have arrived at on the material evidence before her'

[26] Clearly, the Labour Court missed the first step, which requires objective correctness. In dealing with the question of intolerability, the Labour Court regrettably directed itself to a wrong question. It held:

> '[55] It is my considered view that the failure by the Applicant to investigate the matter as well as taking no steps against Mr Nothnagel was intolerable, especially considering his position as a Group CEO.'

[27] There is a clear misalignment between the conduct complained of in the grievance letter of 3 September 2020 and the alleged failure to investigate and the taking of steps. The intolerable conduct must be one or all of the five

[8] Id fn 2 at para 61.

incidents outlined in the grievance letter and not what occurs when remedial steps are taken. If the incident of 27 August 2020 was intolerable, such should have left Bavuma with one option – to resign. However, Bavuma did not resign. Such implies that she tolerated the conduct. It is thus incongruent to conclude that a failure to investigate and act on the "intolerable" conduct is in of itself an intolerable conduct.

[28] The grievance process was followed as an attempt to remedy the conduct complained of. In *Maleka*[9], the Court held:

> 'In circumstances where an employee elects not to follow such internal procedures, the employee cannot, as a matter of principle, claim constructive dismissal, unless of course the employee is able to prove circumstances that make it appropriate for him to be absolved from this obligation.'

[29] Thus, it cannot be correct that seeking alternatives to resignation could symbiotically serve as another avenue for intolerability. The reason why Bavuma invoked the grievance process was stated by her to be the following; (a) seeking the Board's immediate intervention on the behaviour she experienced from Mr Nothnagel; (b) the Board to remedy the situation; and (c) to subject herself to any proposed process that seeks to resolve the issues at hand. As a matter of principle, had she not invoked remedial steps, she could not claim constructive dismissal. As held in *Solidarity obo Van Tonder v Armaments Corporations of South Africa (SOC) Ltd*[10] and approved in *Maleka*, the grievance process hopes to find workable remedial solutions. Accordingly, in my considered view, the Labour Court erred when it considered what is aimed at finding a workable solution as an avenue for intolerability. That being so, it cannot be that when the appellant was seeking to find a solution it was exposing itself to a potential claim of intolerability.

[30] It was, in my considered view, fundamentally wrong for Bavuma to weaponize the remedial process as an intolerability avenue after having invoked it for the sole purpose of remedying what she considered to be an intolerable conduct.

---

[9] Id fn 2 at para 89.
[10] (2019) 40 ILJ 1539 (LAC).

[31] The weaponization received the Labour Court's approval when it held:

> '[60] It is therefore apparent that the Applicant made the continued employment relationship intolerable by not investigating the grievance. The fact that the Applicant indicated in their letter that they do not wish to lose the Third Respondent cannot be believed to be correct because even after she resigned, they were aware of the reasons for such resignation but never attempted to intervene.'

[32] With considerable regret, the above reasoning of the Labour Court is very difficult to comprehend. The objective facts are that as early as 7 September 2020, the appellant intervened as requested by Bavuma. An investigator by the name of Mr van Rensburg was appointed. The process to be followed was laid bare to Bavuma. Considering that the process had to look as far back as five years ago, it does not require a rocket science to observe that it was to be an involved process. On 8 September 2020, a consultative meeting took place. As of 23 September 2020, Bavuma was advised in writing that the investigation is on-going. It must be mentioned that the intervention of the Board was at the behest of Bavuma in order to remedy her complaints. Thus, once she terminated her employment relationship on 25 September 2020, it became a futile exercise for the appellant to continue with the investigation – remedial steps. What is there to remedy? Whether the investigation was complete or incomplete at the time of her resignation, it was of no moment since termination of employment – unilateral act – had already happened. The fact that she resigned before the remedial process initiated by her is completed can only suggest that she resigned hastily and prematurely. Therefore, she placed herself in a similar situation of an employee who resigned without invoking the remedial steps. In principle such an employee cannot claim constructive dismissal, *Maleka* held.

[33] The Supreme Court of Canada, in the matter, quoted with approval in *Maleka*, of *General Motors of Canada Limited v Johnson (General Motors)*[11] held amongst others as follows:

> '[72] …Dissatisfaction with the results of a legitimate grievance process cannot anchor a claim for constructive dismissal.'

[34] Similarly, a dissatisfaction that the grievance was not processed within the unreasonable time periods of the griever cannot anchor a claim for constructive dismissal.

[35] The Labour Court found that another issue that rendered the employment intolerable was that Nothnagel was not going to change. This is nothing but an anticipated intolerability. It is based on pure conjecture and nothing concrete. Regarding anticipated intolerability, the Court in *Maleka*[12] expressed the following:

> '[85] I do not believe that section 186(1)(e) envisages a future or anticipated set of circumstances that might result in intolerability entitling an employee to resign. This would be stretching the bounds of intolerability too far. In his resignation letter, Maleka stated that he was concerned about something that would only happen in the future.'

[36] Surely, the question whether Mr Nothnagel would change or not belongs to the future. It is truly perplexing for Bavuma to have believed that Mr Nothnagel would not change when, in relation to the 2015 incident, she held a view that as a professional he will with time mend his ways. Nevertheless, as an interim step, the appellant arranged that she would report to someone else. It falls within the realm of speculation for her to conclude that she would still work with Mr Nothnagel on the Astron project. What if the new supervisor would have removed her from the Astron project owing to the difficult relationship she had with Mr Nothnagel? All of these fall in the realm of anticipated intolerability. The fears harboured by Bavuma are nothing but a subjective

---

[11] 2013 ONCA 502 (CanLII).

[12] Id fn 2 at para 85.

feelings. Perhaps had she reported to work under a new supervisor and still experienced the wrath of Mr Nothnagel, speculation would recede to the background.

[37] To the extent that the Labour Court employed the reasonableness test as expounded in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[13], in dealing with the jurisdictional question whether the respondent employee was constructively dismissed, the Labour Court was in complete error and its judgment and order is liable to be set aside on appeal. That the Labour Court indiscriminately employed the reasonableness test is explicit from the following:

> '[81] In all the circumstances, the conclusion that the arbitrator reached is one that a reasonable decision-maker would have come to and I am, therefore, unable to conclude that his decision was one that a reasonable decision-maker could not reach.'

Analysis

[38] As discussed above, when the arbitration award and the Labour Court judgment were considered, it is crystal clear that this appeal oscillates to a greater detail on the relevant question of whether the appellant rendered continued employment of Bavuma intolerable or not. As held in *Solid Door*, there are three requirements that need to be established before a claim of constructive dismissal may succeed. For the sake of convenience, those requirements are: (a) the employee must have terminated the contract of employment; (b) The reason for the termination of the contract must be that continued employment has become intolerable; and (c) the employee's employer must be the one to have made continued employment intolerable.

[39] It is common cause in this matter that the first requirement was met. On 25 September 2020 Bavuma, in writing, terminated her employment contract. The conundrum presents itself with the second requirement. Section 186(1)(e) of the LRA, employs the word *because* for identifying the basis of the

[13] [2007] 12 BLLR 1097 (CC).

termination of the employment contract. The word *because* means for the reason that. In other words, for reason that the employer made continued employment intolerable for the employee, the employee terminated the contract of employment. To my mind, this calls for the causal connection between making of continued employment intolerable and the termination of employment.

[40] It is of some significance to observe that what is made intolerable is not merely employment but continued employment. In other words, the conduct must be one that renders continuation of employment intolerable. Thus, if an event or conduct happens but an employee continues with employment, it is oxymoronic to, months or years later, claim that the event or conduct rendered a continued employment intolerable. Similarly, anything that is likely to happen in the future is incapable of rendering a continuation of employment intolerable. Equally, it is oxymoronic to suggest that remedial steps are capable of rendering continued employment intolerable. Remedial steps – grievance process/investigation – are more often than not ignited by an employee who faces or faced an 'intolerable' conduct from an employer.

[41] In *General Motors*, the following was stated, which applies with sufficient vigour on the required element of intolerability.

> '[66] Workplace becomes poisoned for the purposes of constructive dismissal only where serious wrongful behaviour is demonstrated… A plaintiff's subjective feelings or even genuinely held beliefs are insufficient to discharge the onus. There must be evidence that, to the objective reasonable bystander, would support the conclusion that a poisoned workplace environment had been created…
>
> [67] Moreover, except for particularly egregious stand-alone incidents, a poisoned workplace is not created, as a matter of law, unless serious wrongful behaviour sufficient to create a hostile or intolerable work environment is persistent or repeated…'

[42] The five incidents complained of, were ostensibly not considered to be serious by Bavuma as and when they occurred. They were so sparse over a period of

months and years. The fact that Bavuma continued employment after they happened lends credence to lack of hostility, intolerability and poison on the part of the incidents. Otherwise, the lodging of a grievance needed not to wait for the single event of 27 August 2020.

[43] In *General Motors*, the following was said:

> '[91] … Further, in order to establish a claim of constructive dismissal, an employee must prove that the employer's conduct constituted a repudiation of the contract of employment, such that the employer no longer intended to be bound by the contract.'

[44] Logic dictates that if an employee does not ignite the grievance process, an employer or its delegate may not be kicked into gear. All of which that happened after 7 September 2020 up to and including 25 September 2020, was a process initiated at the behest of Bavuma, which was solely aimed at resolution of the five incidents which caused Bavuma grief. Bavuma wished to have the grief removed so that she can continue with employment as she did until 3 September 2020, when she suggested to work from home. The suggestion to work from home simply meant that her continued employment would not be rendered intolerable when she worked from home. Ostensibly, she continued to tolerably work from home until her quest to obtain an investigation report was rebuffed for reasons that the investigations were on-going. It must axiomatically follow that the grief as of 3 September 2020 was the five incidents and nothing else.

[45] To then suggest that the alleged "delay" in investigating rendered continued employment intolerable is not only oxymoronic but it is also at odds with the law. The Court in *General Motors* aptly remarked as follows:

> '[94] Even if GM's investigations of Johnson's racism complaint were imperfect, the investigations did not reveal any intention by GM to repudiate its employment contract with Johnson…
>
> [95] Nor as a matter of law, did Goard's position concerning Johnson's potential return to work constitute a repudiation of the employment

> contract. GM, through Goard, offered Johnson two employment opportunities outside the assembly plant body shop. These offers of continuing employment are inconsistent with the notion that GM was resiling from its employment relationship with Johnson. In fact, GM concluded that Johnson himself had effectively elected to terminate his employment relationship with GM only after Johnson declined to accept the employment positions offered by GM, failed to return to work and failed to provide GM with current medical evidence to support his claim of continuing disability.
>
> [96] The trial judge appears to have concluded that GM repudiated Johnson's employment contract by failing to provide him with a discrimination free employment. With respect, this misconceives GM's obligations in the circumstances.

[46] Strikingly similar to the *General Motors* case is the fact that the appellant offered Bavuma an interim alternative reporting but she failed to report for duty, over an extended period after the offer, until she resigned. There was no obligation on the part of the appellant to immunize Bavuma from any future contact with Mr Nothnagel. Again, the Court in *General Motors* dexterously expressed itself as follows:

> '[99] GM, however, was not obliged to immunize Johnson from any future contact with Markov or other body shop employees… In any event, the mere possibility of contact with body shop employees, including Markov, does not alone establish that such exposure would result in future discriminatory treatment of Johnson…'

[47] Similarly, the fact that Bavuma could have been in contact with Mr Nothnagel does not in of itself repudiate an employment contract nor lead to any form of intolerability. This Court is not convinced that the four incidents before 27 August 2020 could have caused intolerability. As the Court in *Maleka* found, intolerability must result in difficult, unpleasant or stressful situation for the employee. The fact that Bavuma continued with employment for months and sometimes years after the incidents can only mean that those were tolerable incidents. This becomes so because she did not once report any of those four

incidents to the powers that be. The Court in *Maleka* borrowing from foreign jurisdiction, in particular *General Motors* case, accepted the following:

> '[72] … what is evident is that a claim for constructive dismissal must be objectively scrutinised in order to ascertain, from the facts, whether the conduct or series of acts by the employer have "poisoned the environment" or is such that it constitutes the "last straw" which broke the employment relationship, thereby justifying employee's resignation.'

[48] The question whether intolerability had set in, involves an objective factual assessment. It may well be that the management style of Mr Nothnagel is one that is harsh at times, but there is clear evidence that in response, Bavuma was able to throw down the gauntlet and plead her own case. In consummating the case, the Court in *General Motors* stated the following:

> '[103] There is no reason to question that Johnson genuinely believed that he had been the victim of racism in his workplace. I accept that his perception of events unfortunately led to stress and mental anguish. However, I also conclude that the evidentiary record in this case does not support the trial judge's findings of racism, a work environment poisoned by racism and, hence Johnson's constructive dismissal.'

[49] Turning to the last incident of 27 August 2020. Inasmuch as Bavuma considered the conduct to be threatening, unlike with the past incidents, she did the right thing by bringing it to the immediate attention of the appellant. In terms of the Disciplinary Code of the appellant, threatening violence, assault, intimidation or victimization could result in summary dismissal but only after a formal disciplinary enquiry. A formal enquiry happens if a disciplinary hearing is initiated which will be conducted by the chairperson of the disciplinary investigation[14].

[50] Of significance, at the formal enquiry Mr Nothnagel would be afforded an opportunity to place before the disciplinary investigation his version of the events. But before all of that could happen, Bavuma resigned. This

[14] Clause 5.2 of the Disciplinary Code of Royale Energy (Pty) Ltd.

unjustifiably denied the appellant an opportunity to find a workable solution. Accordingly, it does not lie in the mouth of Bavuma to state that a situation of intolerability was created when a solution was ultimately not found. When she resigned, termination of employment was not a measure of last resort. The fact that in her resignation letter she threw all the phrases that paints a horrible picture does not magically sprout intolerability.

[51] The Court in *Maleka*[15] remarked as follows:

> '[94] …It cannot be that every time an employee's feelings are hurt or they are undermined or unfairly treated, they are entitled to resign and claim a constructive dismissal, without having attempted to resolve the grievance with the employer. This would not only have a devastating effect on the employee, but it would also adversely affect employers and the economy as a whole.

[52] To my mind, Bavuma should have waited to see how ultimately the appellant deals with the events of 27 August 2020 before resorting to resignation. It is apparent from the facts of this matter that since 3 September 2020, Bavuma was not reporting for duty until her resignation, which seem to have been prompted by the absence of the investigation report. On the objective assessment of the facts of this case, it is not far-fetched to surmise that had the appellant acceded to the mutual separation terms, Bavuma would not have resigned and claimed constructive dismissal. It was soon after the rejection of the proposal that a demand for the investigation report suddenly emerged like dew in the morning.

[53] Accordingly, this Court is not satisfied that the fifth incident was, when objectively viewed, one that was intolerable to lead to a termination of employment. Therefore, Bavuma was not constructively dismissed. To the extent that the Labour Court found otherwise, it was in error.

[54] There is a challenge on the issue of validity of the compensation value awarded by the commissioner. Given the view I take at the end, it is

---

[15] Id fn 2 at para 94.

unnecessary to decide that issue in this appeal. For the sake of posterity, I do state in passing that awarding of compensation involves an exercise of a true discretion. A Court of appeal interferes with the exercise of a true discretion sparingly. The interference is often guided by application of wrong principles, *mala fides* and capriciousness. These factors are absent in the present case with regard to the award of compensation.

Conclusions

[55] On the objective assessments of the facts of this case, it is not objectively correct that Bavuma was subjected to constructive dismissal. Accordingly, the CCMA lacked jurisdiction to deal with the dispute and its award is a nullity in that regard and ought to have been set aside by the Labour Court. The order of the Labour Court falls to be set aside as well.

[56] Because of all the above reasons, the appeal must be upheld.

[57] In the premise, the following order is made:

Order

1. The appeal is upheld

2. The order of the Labour Court is set aside and replaced with the following order:

   2.1 The arbitration award dated 22 June 2021 issued by Commissioner Dheliwe Mavuma under case number GATW12790-20 is hereby reviewed and set aside

   2.2 The third respondent, Ms. Elaine Phumza Bavuma, has not been constructively dismissed.

   2.3 The CCMA lacked jurisdiction to entertain the dispute alleging unfair dismissal.

3 There is no order as to costs.

_____

G. N. Moshoana

Acting Judge of the Labour Appeal Court of South Africa

Djaje AJA and Masipa AJA concurring.

APPEARANCES:

For the Appellant	:	Mr PH Kirstein	
		Instructed by:	Grosskopf Attorneys, Pretoria.
For the Respondent	:	Mr M Mbada	
		Instructed by:	Fenyane & Associates Inc Attorneys, Midrand.