

SOUTH AFRICA / JUDGMENT

Johnson v Rajah NO and Others (JR33/15) [2017] ZALCJHB 25 (26 January 2017)

[2017] ZALCJHB 25

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR33/15

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THE

LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not reportable

Case no: JR 33/15

In

the matter between:

ELTIA
JOHNSON Applicant
and
MAHAMED
RAJAH
N.O. First
Respondent
METAL AND ENGINEERING
INDUSTRIES
BARGAINING
COUNCIL Second
Respondent
MALESELA
TAIHAN ELECTRIC (PTY)
LTD Third
Respondent

Heard:

13 October and 29 November 2016

Delivered: 26 January 2017
Summary: Review of an award finding that the applicant was unable to prove constructive dismissal. Test on review is correctness. Test is whether there was a reasonable alternative to dismissal. Application dismissed.

JUDGMENT

PRINSLOO J.

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 2 December 2014 wherein the First Respondent (the arbitrator) found that the Applicant was unable to prove that she was constructively dismissed and found that she indeed resigned.
- [2] The Third Respondent (Respondent or employer) opposed the application.
- [3] The matter was initially enrolled for hearing on 13 October 2016 but during argument it became evident that the entire record of the arbitration proceedings was not transcribed. The matter was postponed to 29 November 2016 to allow the Applicant the opportunity to transcribe and file the complete record. The cost occasioned by this postponement was reserved and I will deal with the issue of costs infra.

The test on review

- [4] The question in constructive dismissal cases is whether there was a dismissal or not. This has to be determined before an enquiry into the fairness thereof could happen. The question whether a dismissal had taken place, goes to jurisdiction and this Court as well as the Labour Appeal Court confirmed on numerous occasions that the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] does not find application in reviewing a jurisdictional ruling[2].
- [5] I have to decide whether the arbitrator was right or wrong and not whether the conclusion reached by the arbitrator was one that a reasonable decision maker could not reach.
- [6] The question this Court has to decide in view of the applicable test is whether the arbitrator correctly found that the Applicant indeed resigned and that she was not dismissed.
- [7] Having perused the Applicant's affidavits filed in support of her application for review and considering the test to be applied, I had certain concerns regarding this review application.
- [8] The grounds for review raised by the Applicant in her founding affidavit are not all that clear as the Applicant made a number of allegations regarding her constructive dismissal in general and not specifically in respect of the grounds for review. The Applicant, however,

averred that the arbitrator erroneously found that she should have filed a formal grievance when the test for constructive dismissal does not require that she should have no choice but to resign. The Applicant's case is that she has discharged the onus to prove the requirements for constructive dismissal and the arbitrator should have found that she was indeed dismissed.

- [9] In concluding paragraphs, the Applicant stated that the arbitrator failed to apply his mind to the matter, he acted arbitrary and

capriciously, misconstrued facts, took into account irrelevant facts and failed to take into account relevant facts and exceeded his powers. These allegations are not substantiated.

- [10] The Applicant also stated that the arbitration award falls to be set aside for want of reasonableness and then she elaborated on the allegations relating to unreasonableness.

- [11] The grounds for review raised by the Applicant in her supplementary affidavit are, firstly, that the arbitrator accepted unreasonable

evidence and ignored crucial evidence and she could not see "how another reasonable decision maker in the commissioner's shoes could not have found that I was constructively dismissed".

- [12] Secondly, that the arbitrator placed undue weight on the issue of a formal grievance and thirdly, that the arbitrator misdirected himself and that—

"in adopting the reasonable decision maker test, I cannot conclude that the commissioner's findings are that which a reasonable

decision maker could have reached given the evidence before him, no reasonable decision maker in his position could have found that I was not constructively dismissed."

- [13] In her heads of argument Ms Mutenga, on behalf of the Applicant, submitted that the arbitrator reached a decision that is not supported by the facts and that falls short of reasonableness and that the arbitration award should be set aside for the want of reasonableness.

- [14] In its opposing affidavit the Respondent did not take issue with the fact that the Applicant seeks to review the arbitration award because it was unreasonable. In fact, the Respondent defended the award by stating that the arbitrator's decision to dismiss the Applicant's claim is a decision that any reasonable decision maker under the same circumstances, could have made.

- [15] 'Reasonableness' finds no application in casu and I canvassed the issue with Ms Mutenga in Court. I have also provided the parties with a copy of a recent judgment[3] where this Court has dismissed an application for review where the applicant incorrectly relied on 'reasonableness' instead of 'correctness' and held that:

“In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA had jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner’s decision was correct.

It follows that in a matter such as the present, where the proper right of review is one based on correctness that is the case that must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator’s

decision. Mr Niehaus, who appeared for the applicant, did not dispute that the applicant had sought intervention on a basis that was incorrect. He requested the court to postpone the matter and to grant the applicant leave to file amended papers in order to address the error.

There are a number of considerations that compelled me to conclude that a postponement and the concomitant further delay in the resolution of these proceedings was not appropriate in the circumstances. First, as I have indicated, the fact of the matter is that the applicant has approached this court on the basis of pleadings that posit the incorrect test. All of the submissions in the founding papers, to the extent that they suggest that the arbitrator failed to appreciate the nature of the enquiry that she was to conduct and that her decision fell outside of the band of decisions to which reasonable people could come on the available material, are irrelevant. The applicant would be obliged to make out an entirely new case for review. The present situation is not dissimilar to that where a plaintiff elects the wrong cause of action to pursue his or her claim. It is not open to a plaintiff, generally speaking, in those circumstances simply to seek to remove the matter from the trial roll and introduce a new cause of action.”

- [16] I am inclined to follow the aforesaid judgment and raised my concerns with Ms Mutenga. The Applicant’s application is interspersed with allegations relating to reasonableness and the grounds for review are clearly seeking a review of the arbitration award because it falls short of reasonableness.
- [17] On this ground alone the application should be dismissed. Ms Mutenga conceded that the test is correctness and argued that the Applicant has made out a case wherein she challenged the correctness of the arbitrator’s findings. She argued that the Applicant’s reference to reasonableness is simply to unpack the issue of correctness as correctness has different elements. This argument is not convincing.
- [18] In my view, the only ground for review where the Applicant challenged the correctness of the arbitrator’s finding is where she alleged that the arbitrator erroneously found that she should have filed a formal grievance.
- [19] I re-iterate: reasonableness has no place in a review such as this one and the grounds for review related to reasonableness cannot be considered. I will consider this application only on the basis whether the arbitrator was correct to find that the Applicant was not constructively dismissed and whether he erroneously found that she should have filed a formal grievance.

Background facts

- [20] The Applicant was employed by the Respondent as a creditor's clerk for the period 4 January 2010 until 2 May 2013.
- [21] The Applicant sustained a back injury at work when she slipped and fell in October 2011. She subsequently underwent a number of medical procedures that caused her to be absent from work for extended periods.
- [22] The Applicant's doctor confirmed that she was fit for work from 2 April 2013 with certain restrictions, including not sitting or standing for more than half an hour at a time, not climbing stairs, not lifting heavy objects, not travelling extensive distances and that she be allowed to work half day shifts for the month of April 2013.
- [23] A letter was forwarded to the Respondent prior to the Applicant's return to work to ensure that she could be accommodated as per her doctor's recommendations. The Applicant testified that her doctor requested the employer to accommodate her by giving her an office downstairs, not climbing stairs, not travelling long distances and working half day.
- [24] When she reported for duty on 2 April 2013, the employer was not ready to accommodate her and she was sent home whilst her office was prepared. The employer paid her for the days she had to wait for the office downstairs to be prepared and she reported for duty on 8 April 2013 when the office was prepared. The Applicant testified that she was provided with a computer and telephone, but she could only make internal calls and was unable to liaise with suppliers.
- [25] On 5 April 2013 the Applicant had a meeting with the Respondent and she prepared the minutes of the meeting. The Applicant recorded that during the meeting she was given two options to decide on namely, whether she wanted to work half day at half her salary or stay at home without a salary for the month of April 2013. She further recorded that she would think about the two options and inform the employer on Monday, 8 April 2013, what she decided. The Applicant reported for duty on 8 April 2013 and she worked half day or 4 hours per day, which clearly indicated that she accepted the option to work half day and by implication at half her salary.
- [26] The Applicant felt that her privacy was infringed when other employees were able to access her electronic mails. The Respondent's

version was that other employees had to have access to her electronic mails in her absence as they needed documents or statements. In cross-examination the Applicant conceded that the employer only accessed documents for business purposes and that the employer was entitled to do so in terms of its IT Policy.

[27] The Applicant conceded that the employer accommodated her in an office downstairs, that it moved her computer, printer and telephone to the new office and that a messenger brought documents to her downstairs and took it upstairs where the finance department was located so that she did not have to climb the stairs. She was not expected to carry any heavy objects.

[28] The Applicant testified that her doctor subsequently recommended that she be accommodated as aforesaid for another month (i.e. May 2013), whereupon the employer informed her that they were unable to accommodate her in that office for another month. The Respondent

informed the Applicant that the office she was accommodated in for April 2013 belonged to the technical department and they required the use of the office urgently. Also, that the effective operations of the finance department were affected by the fact that the Applicant was sitting in a separate office downstairs and away from the rest of the finance department.

[29] When the Applicant received her salary advice for April 2013 she discovered that the employer paid her for half a day because she

worked half day. She wrote an e-mail to the Respondent's human resources director, Mr Mafereka (Mafereka), wherein she stated that she was paid full day from 1–5 April 2013, which is the period the Respondent took to prepare a downstairs office for the Applicant and from 8–30 April she was paid for 4 hours per day. The Applicant insisted that she should be paid a full day's salary as her doctor indicated that she should be on a half day, which is equivalent to light duty and therefore she should get a full day's salary. I fail to see the logic or any reasonableness in this expectation of the Applicant.

[30] Mafereka responded that the employer has accommodated the Applicant by giving her an office downstairs so that she did not have to use the stairs and that her recovery is not adversely affected and she was allowed to work half day to attend her physiotherapy sessions. Mafereka explained that when the Applicant only works half day, the employer has no obligation to pay her a full salary as she is paid for the services she rendered. He further explained that the job of a creditor's clerk is of such a nature that it cannot be made any lighter and the Applicant's insistence that being on light duty qualifies her to a full salary is incorrect and "rejected with the contempt it deserves".

[31] The Applicant conceded in her testimony that she did not file a complaint or lodged a grievance with the employer in respect of any of the issues she felt aggrieved about. She did not take any steps for the employer to investigate her complaints or to do anything about it.

[32] In cross-examination it was put to the Applicant that the employer was unable to accommodate her longer in the office as it was needed by the technical department and without lodging a grievance or affording the employer a further opportunity to accommodate her elsewhere, the Applicant resigned on 2 May 2013. The employer was not afforded an opportunity to accommodate the Applicant as she chose to resign prior to

dealing with the matter internally. The Applicant testified that everyone was aware of her circumstances and for her to go to the CEO would not have changed anything.

[33] On 2 May 2013 the Applicant resigned because she was of the view that the Respondent made it intolerable for her to continue her employment.

Analysis of the arbitrator's findings and grounds for review

[34] The arbitrator found that the Applicant was unable to prove that she was constructively dismissed.

[35] Before considering the merits of the Applicant's case, I first summarise the principles and the legal test to be considered and applied in constructive dismissal cases.

The test for constructive dismissal

[36] Section 186(1)(e) of the Labour Relations Act[4] (Act) defines a constructive dismissal to mean that an employee terminated a contract of employment with or without notice because

the employer made continued employment intolerable.

[37] Where an employee claims constructive dismissal, the onus is on the employee to prove that the resignation was not voluntary and it was not the intention to terminate the employment relationship. Once the employee discharges the onus, the conduct of the employer must be assessed and the question is whether the employee could reasonably have been expected to put up with the conduct of the employer.

[38] This Court has previously considered what an employee must prove to claim constructive dismissal. An employee must prove that—[5]

1. He or she terminated the contract of employment;
2. continued employment became intolerable for the employee; and
3. the employer must have made continued employment intolerable.

[39] I will deal with these requirements separately.

The employee terminated the contract of employment

[40] The Labour Appeal Court[6] made it clear that employees claiming constructive dismissal must prove that they, and not their employer, terminated the contract of employment.

[41] The resignation must also not be for a voluntary reason such as to take up alternative employment, to access pension benefits or for some or other reason motivated by personal circumstances.

[42] In *Pretoria Society for the Care of the Retarded v Loots*[7] (Pretoria Society), the Labour Appeal Court held that when an employee resigns as a result of constructive dismissal, the employee is in fact indicating

that the situation has become so unbearable that the employee cannot work. Effectively the employee is saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee resigns because he or she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If this assumption was wrong and the employer proves that the employee's fears were unfounded, there was no constructive dismissal but in fact a resignation.

[43] In *Strategic Liquor Services v Mvumbi N O and Others*[8] the Constitutional Court held that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable.

[44] This moved away from the position that in a constructive dismissal case the employee had no other choice or option but to resign.

[45] In *Asara Wine Estate and Hotel (Pty) v Van Rooyen and Others*,[9] this Court expressed the view that it was doubtful that the strict test namely, that employment should be so intolerable that the employee had no option but to terminate the employment relationship would survive the Constitutional Court formulation in *Strategic Liquor Services*.

[46] In *Asara* the Court considered the authorities and held that where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee.

[47] In my view the position is this: the employee needs not establish that he or she had no choice but to resign. Where the employee resigns and claims that he or she was constructively dismissed, the test is whether a reasonable alternative to resignation existed.

Continued employment became intolerable for the employee

[48] In *Pretoria Society* the Court further held that the employee must satisfy the Court that at the time of the termination of the contract, he or she was under the genuine impression that the employer behaved in a manner that rendered the relationship intolerable and would continue to do so.

[49] The operative word is 'intolerable'.

[50] The courts have confirmed that the use of the word 'intolerable' means that there is an onerous burden on the employee and the employee is required to show that continued employment would be objectively unbearable. Intolerability is not established by the employee's say-so, perception or state of mind. What is relevant is the conduct of the employer viewed in an objective

sense[10].

[51] The test remains that the conduct of the employer must be judged objectively.[11] The subjective apprehensions of an employee cannot be a final determinant of the issue. In *Smithkline Beecham (Pty) Ltd v CCMA & Others*[12] the Court held that—

“it would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when those perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the Act.”

The employer must have made continued employment intolerable

[52] The third requirement to prove a constructive dismissal is that the circumstances that led to the employee's resignation, must have been brought about by the employer. This means that the employer must have performed actions which created the intolerable circumstances.

[53] In *Pretoria Society the Labour Appeal Court* held that the enquiry is whether the employer—

“without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged

reasonably and sensibly is such that the employee cannot be expected to put up with it.”[13]

[54] In *Murray v Minister of Defence*[14] the Supreme Court of Appeal (SCA) accepted that there are many things an employer may fairly and reasonably do that make an employee's position intolerable. However, the SCA confirmed that the employer must be culpably responsible in some way for the intolerable conditions. It held that—

“the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For

one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been

of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must . . . have lacked ‘reasonable and proper cause.’”[15]

[55] In *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others*[16] the Labour Appeal Court approved a salutary caution that constructive dismissal is not for the asking and held that:

“With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal.”

[56] In *Murray* it was accepted that the employer may not have control over what makes conditions intolerable and even if the employer is responsible,

it may not be to blame.[17]

- [57] The employer therefore must be culpably responsible for the intolerable conditions. There must also be a nexus or causal link between the acts of the employer and the decision to resign.
- [58] In my view this touches on another important and relevant aspect namely whether the employer was aware of the alleged intolerable conditions and afforded an opportunity to address and rectify it.
- [59] In *Smithkline* this Court held that where an employee could reasonably have lodged a grievance regarding the cause of the unhappiness but failed to do so before resigning, such employee may find it hard to persuade the court or an arbitrator that he or she had to resign. The Court emphasized that if the employee is too impatient to await the outcome of the employer's attempts to find a solution, to the perceived intolerable situation, and resigns, constructive dismissal is almost always out of the question.
- [60] In *Kruger v Commission for Conciliation, Mediation and Arbitration and Another*[18] the employee did not follow a grievance procedure as she believed that the grievance procedure was no longer an option.[19] The Court found that employees should not second guess the outcome of lodging a complaint in terms of the employer's grievance procedure, especially not where the employee is contemplating resignation coupled with an allegation of constructive dismissal and such employee had never raised the issue with the employer before. The Court held that—

“ . . . when there are remedies available to an employee which had not been exhausted, as in this case, the employee has not discharged the onus of proving that she was constructively dismissed. . . . An employee may not choose constructive dismissal while other options are available. The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, is such that the employee could not have been expected to put up with it.”[20]

- [61] The judgment in *Kruger* supports the notion that an employee cannot resign and claim constructive dismissal while other options are available. As I already alluded to, the test is whether a reasonable alternative existed.
- [62] In *Albany Bakeries Ltd v Van Wyk and Others*[21] the Labour Appeal Court effectively took the view that an employee should make use of alternative remedies. This would obviously include an internal grievance procedure. The Court held that:

“How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.

As is clear from the remarks of Conradie JA an employee should make use of a grievance procedure. Such a grievance procedure exists and was annexure B in bundle A of the documents in the arbitration. It provides for a discussion of a problem with an immediate superior with the assistance of a representative. If the employee is not satisfied with that, there is a further step that may be taken to the next level of management. The procedure even provides for an enquiry to be held for the purpose of clarifying the issues.”[22]

[63] It is in this context that the arbitrator’s findings stand to be determined.

The arbitrator’s findings and grounds for review

[64] In her testimony the Applicant claimed that the conduct of the Respondent made it intolerable and impossible for her to continue

working for the Respondent. The Applicant gave 16 reasons for her resignation and stated that she exhausted all possibilities to

resolve the matter amicably, but she was left with no option but to resign. The 16 reasons provided by the Applicant could be summarised

as: when she arrived at work on 2 April 2013, no arrangement was made to accommodate her as per her doctor’s request; the Respondent investigated the legitimacy of her medical certificates and sickness; line management instructed her colleagues not to interact with her; her privacy was infringed when management gave her colleagues permission to access her electronic mail and to enter her office to remove work related documents without her consent; limitation of resources to perform her work adequately; management’s request that she should consider taking unpaid leave; and the unilateral cut of her salary which constituted a unilateral change in conditions of employment and breach of contract.

[65] The Applicant testified that her doctor requested the employer to accommodate her by giving her an office down stairs, not climbing

stairs, not travelling long distances and working half day for April

2013. The testimony adduced at the arbitration showed that the Applicant’s doctor’s recommendations were implemented until the Applicant’s resignation on 2 May 2013.

[66] The arbitrator found that the test for constructive dismissal is objective and the complaints must be proved and the Applicant’s

feeling aggrieved was not sufficient.

[67] He further found that the Respondent accommodated the Applicant as recommended by her doctor by moving her office downstairs and

allowing her to work only half day. The Applicant’s expectation to work half day and be paid a full day is unreasonable and the employer cannot be expected to pay her full salary when she works half day only.

[68] The arbitrator accepted that the employer's Mafereka was insensitive in the choice of words he used when he responded to the

Applicant's electronic mail, but his response was not sufficient to render the employment relationship intolerable.

[69] The arbitrator found that the Applicant was unable to explain why she did not file a formal grievance or gave the employer an opportunity to address her issues. He held that the Applicant had a reasonable alternative and she could have filed a grievance.

[70] The arbitrator further found that the Applicant did not show in any way that she had a valid reason for believing that the employment

relationship was intolerable because of the behaviour of the Respondent or that she genuinely believed that the employer would

continue with the intolerable behaviour.

[71] The Applicant's grounds for review are limited to whether the arbitrator erroneously found that she should have filed a formal

grievance and holistically whether he was correct to find that the Applicant was not constructively dismissed.

Filing of a grievance

[72] The Applicant's case on review is that the arbitrator erroneously found that she should have filed a formal grievance.

[73] The arbitrator found that the employee had a reasonable alternative and could have filed a grievance, which she did not do. Her explanation for not filing a grievance or raising her complaints with the CEO was that it would not have made any difference.

[74] The Courts made it clear that an employer should be made aware of the alleged intolerable conditions and be afforded an opportunity to address and rectify it. An employee cannot merely resign and claim constructive dismissal while other options are available and as I already alluded to the test is whether a reasonable alternative existed. An employee cannot resign without affording the employer an opportunity to rectify the causes of his or her complaints and successfully claim constructive dismissal.

[75] The Applicant's assumption that it would not have made any difference had she filed a grievance, is not a reasonable assumption

and was not substantiated by any facts.

[76] The Labour Appeal Court made it clear that that an employee should make use of alternative remedies which include an internal grievance

procedure. It was not open for the Applicant to second guess the outcome of lodging a complaint or formal grievance.

[77] The arbitrator correctly found that the Applicant should have filed a grievance and that she had a reasonable alternative. There is no merit in this ground for review and no reason for this Court to interfere with this finding on review.

Was the Applicant constructively dismissed

[78] In Pretoria Society the Labour Appeal Court held that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.[23]

[79] The transcribed record placed before me shows that the Respondent complied with the Applicant's doctor's recommendations

and that it made an effort to accommodate her and her physical condition by preparing a downstairs office for her and by allowing

her to work half day for April 2013, as her doctor requested. When the Applicant needed to be accommodated for a further month, it became difficult for the employer as the office was needed by another division and the operations of the finance department were affected. The Applicant however remained in the downstairs office until her resignation on 2 May 2013. At no point was the Applicant removed from the office and before affording the employer an opportunity to accommodate her further, she resigned.

[80] I am not convinced that the employer conducted itself in a manner calculated or likely to destroy or seriously damage the relationship

with the Applicant. The employer's conduct, judged as a whole, was not such that the Applicant could not reasonably be expected to put up with it. In fact, the employer accommodated the Applicant and her resignation, without lodging a grievance or raising a complaint and without affording the employer a further opportunity after April 2013 to accommodate her, was premature and did not constitute a constructive dismissal.

[81] In her evidence the Applicant testified that she consulted somebody and that she was advised in resigning and claiming constructive

dismissal. In my view, the Applicant was ill-advised and she lost sight of the onerous burden on an employee to show that continued employment would be objectively unbearable. Intolerability is not established by the employee's say-so, perception or state of mind. What is relevant is the conduct of the employer viewed in an objective

sense.[24]

[82] In my view and in applying the applicable principles I am not persuaded on the objective facts that the Applicant in fact discharged to onus of proving a constructive dismissal and her claim has to fail.

[83] The arbitrator correctly found that the Applicant failed to establish a constructive dismissal and that is not a finding this Court will interfere with.

Costs

[84] This leaves the issue of costs.

[85] In *Wallis v Thorpe and Another*[25] the Court held:

“In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The ordinary rule, i.e. that costs follow the result, is a factor to be taken into account, but it is not a determinative factor. . .” [26]

[86] In *Public Servants Association of SA on behalf of Khan v Tsabadi N.O. and Others*[27] it was emphasized that—

“. . . unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.”[28]

[87] Ms Chenia for the Respondent argued that the costs should follow the result. In respect of the postponement Ms Chenia argued that the matter was postponed in October 2016 because the Applicant failed to file the complete record of proceedings and the Respondent is entitled to the wasted costs occasioned by the postponement.

[88] Ms Mutenga argued that both parties had the responsibility to ensure that the bundles were in order and had the Respondent been vigilant, it would have discovered early that the record was incomplete and there would have been no reason to postpone the matter on 13 October

2016. I found this submission astonishing. How the Respondent is to be blamed, where the Applicant is legally represented and her representatives had the duty to file the transcribed record, is beyond my understanding. Had the Applicant’s representatives

been vigilant, they should have noted that the record they filed was incomplete.

[89] In my view the Applicant is not to be blamed and should not be burdened with the costs occasioned by the postponement on 13 October

2016. The Applicant’s attorneys had the duty to file the complete transcribed record, which duty they neglected, and they are to pay the wasted costs occasioned by their failure to file the entire transcribed record.

[90] I can see no reason to deviate from the ordinary rule that costs should follow the result.

[91] The Respondent was compelled to engage in litigation and oppose an application that had no merit from the onset. The Applicant came to Court without merit and with no consideration of the prospects of success, causing the Respondent to incur legal costs and the

Respondent is entitled to costs.

[92] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. A review application is not the next automatic step after arbitration and the practice to review arbitration awards where there are no grounds to do so, should be discouraged.

Order

[93] In the premises I make the following order:

1. The application for review is dismissed with cost;
2. The wasted costs occasioned by the postponement of the matter on 13 October 2016 are to be paid by Mothuloe Attorneys.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant : Advocate H Mutenga

Instructed by : Mothuloe Attorneys

For the Third

Respondent : Ms Chenia of Cliffe Dekker Hofmeyr Inc. Attorneys

[1] [2007] 28 ILJ 2405 (CC) at paras 78 and 79.

[2] South African Rugby Players Association (SAPRA) and Others v SA Rugby (Pty) Limited and Others; SA Rugby Pty Limited v South African Rugby Players Union and Another

[2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); [2008] 29 ILJ 2218 (LAC) at paras 39-41; MEC, Department of Health, Eastern Cape v Odendaal and Others

[2009] 30 ILJ 2093 (LC) at para 6; Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others

[2012] 33 ILJ 363 (LC) at paras 21-3. (Asara); Majatladi v Metropolitan Health Risk Management and Others

[2013] 34 ILJ 3828 (LC) at para 22.

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- [3] NUMSA obo Zahela and 3 Others v Volkswagen SA (Pty) Ltd and Others, unreported case number PR 137/13, handed down on 16 November 2016.
- [4] Act 66 of 1995.
- [5] Eagleton and others v You Asked Services (Pty) Ltd (2009) 30 ILJ 320 (LC) at para 22.
- [6] Solid Doors (Pty) Ltd v Theron (2004) 25 ILJ 2337 (LAC).
- [7] (1997) 18 ILJ 981 (LAC) at page 984.
- [8] (2009) 30 ILJ 1526 (CC) at para 4.
- [9] Asara above n 2.
- [10] Van Niekerk et al, “Law @ Work” (Lexis Nexis, Durban, 2008) at page 213.
- [11] Smithkline Beecham (Pty) Ltd v CCMA and Others (2000) 21 ILJ 988 (LC) at para 38.
- [12] Id.
- [13] Pretoria Society above n 7 at page 985.
- [14] 2009
- (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA) at para 13. (Murray)
- [15] Id.
- [16] [2010] 12 BLLR 1235 (LAC) at page 1239; (2010) 31 ILJ 2331 (LAC) at page 2336.
- [17] Murray above n 14.
- [18](2002) 23 ILJ 2069 (LC), (2002) 11 BLLR 1081 (LC).
- [19] Id at para 14.
- [20] Id.
- [21] (2005) 26 ILJ 2142 (LAC).
- [22] Id at paras 28-9.
- [23] Pretoria Society above n 7 at page 985.
- [24] Van Niekerk et al, “Law @ Work” (Lexis Nexis, Durban, 2008) at page 213.
- [25] [2010] 31 ILJ 1254 (LC).
- [26] Id at para 16.
- [27] 2012 33 ILJ 2117 (LC).
- [28] Id at pages 2119- 2120.

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