THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable
Case no: C04/2023

In the matter between:

LERATO MAKOMBE **Applicant**

and

CAPE CONFERENCE OF THE SEVENTH DAY ADVENTISTS **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

HILARY MOFSOWITZ N.O. **Third Respondent**

Heard: **21 November 2024**
Delivered: **28 March 2025**

Summary: Constructive dismissal claim based on an employer's failure and/or refusal to address an employee's numerous grievances over a period of years, including congregants who refused to accept a female pastor due to their religious beliefs. Employee transferred to several districts and diagnosed with a mental illness as a consequence and successfully treated but subsequently resigned to avoid a relapse. Constructive dismissal proved and dismissal unfair. Compensation is payable. Costs also awarded against the employer

JUDGMENT

GANDIDZE, AJ

Introduction

[1] The applicant, Lerato Makombe, is an erstwhile pastor of the Cape Conference of the Seventh-day Adventist Church (the Cape Conference). She resigned from her employment in November 2020 and referred a constructive dismissal case to the Commission for Conciliation, Mediation and Arbitration (CCMA). The claim was dismissed by the third respondent commissioner in an award dated 13 December 2022. In these proceedings, Makombe seeks an order, in terms of section 145 of the Labour Relations Act (LRA)[1] reviewing and setting aside the award and substituting it with an order that she was constructively dismissed, and that the dismissal was unfair. In that event, she seeks the maximum compensation of 12 months' salary.

[2] The Cape Conference opposed Makombe's review application. In the judgment, the terms 'Cape Conference' and 'employer' are used interchangeably, depending on the context.

[3] The Cape Conference's heads of argument were filed before Makombe's heads of argument, and a reservation of the right to file supplementary heads of argument was made upon receipt of Makombe's submissions. No supplementary heads of argument were filed on behalf of the Cape Conference. When the matter was heard, an "Employee's Chronology of Material Facts" document was submitted. The document incorporates responses to the employer's arguments, although this could have been done when Makombe's heads of argument were filed. Be that as it may, not much turns on this.

[1] No. 66 of 1995, as amended.

Background facts

[4] The review record was voluminous, and the factual disputes were extensive, covering a period spanning from 2014 to 2020. Notwithstanding this, the following appear to be the common cause facts that can be distilled from the review record.

[5] The Cape Conference is a church organisation for Seventh-day Adventists, with churches located in the Western, Northern, and Eastern Cape regions of South Africa. Its Administrative Centre is in Gqeberha.

[6] Makombe, also a member of the Cape Conference, commenced employment with the Cape Conference on 9 January 2014, as a Ministerial Intern. Later on, she became a Pastor. She earned a gross salary ranging between R21,368.00 and R25,119.68 per month; however, for the purposes of these proceedings, the Court was informed that it is accepted that Makombe's monthly salary was R21,368.00, as reflected in the arbitration award.

[7] Upon appointment, Makombe was deployed as a chaplain at Bethel College High School, Umtata and the Butterworth Walter Sisulu University Seventh-Day Adventist Movement campuses. She was to render chaplaincy services to students of these institutions who are members of the Cape Conference. At the same time that Makombe was assigned, three other female colleagues were similarly appointed as chaplains to institutions. Their male counterparts were assigned to districts with churches to serve as pastors.

[8] Makombe withdrew from Bethel College High School in November 2015 due to a conflict with the college staff regarding the duties of a chaplain. It appears that she continued serving as a chaplain for the other two campuses. It is common cause that before Makombe withdrew from Bethel College, she requested the employer to provide her with the job description of a chaplain, and it was not provided.

[9] In July 2016, Makombe was informed that she was being transferred to Queenstown. She was informed that her assigned supervisor would allocate tasks to

her but that she would not perform any administrative tasks. She appealed the decision to transfer her to Queenstown, citing the known hostility towards women in ministry in Queenstown, operational challenges, and the decision not to perform administrative tasks, which were part of her training requirements.

[10] She nevertheless moved to Queenstown in November 2016 after being advised that she would be charged with insubordination unless she transferred.

[11] Upon arrival in Queenstown, the congregants made it clear that they did not want a female pastor. Makombe reported the matter to the employer.

[12] In May 2017, Makombe applied for and was granted an interim interdict by the Queenstown Magistrate's Court, directing the employer to, *inter alia*, refrain from exposing Makombe to humiliating and undermining circumstances in the course of her employment. This related to the treatment meted out to Makombe by the congregants in Queenstown.

[13] Around the same time, the employer voted to withhold Makombe's service requests, thereby preventing her from rendering services outside her assigned area. Service requests are made by other Cape Conference churches, other than the church where a pastor is assigned, or by churches outside the Seventh-day Adventist denomination.

[14] In the same month, Makombe was seen by Hellen Maqela (Maqela), a clinical psychologist for psychotherapeutic intervention. During this intervention, Makombe reported stressors related to her work, and she was booked off sick for about ten days. After her discharge from the hospital, she continued to receive treatment, and her condition improved.

[15] In June 2017, Makombe referred an unfair labour practice dispute to the CCMA about her working conditions. The dispute was settled on the basis that she would be placed on special leave with full pay and benefits, that she would be moved to another district as decided by the executive committee of the Cape Conference,

that the employer would consider her study application submitted in June 2016, that the policy relating to service requests would apply to Makombe, and that Makombe '*should be ordained and elected as elder ito policy as it is the prerogative of the respondent*'.

[16] The following month, seven pastors, including Makombe, filed a group grievance regarding their working conditions and against the then-Cape Conference President. Makombe led the grievance. The group grievance was publicised on social media. Some of the pastors involved in the matter withdrew from the dispute. There is a dispute whether the Cape Conference addressed all or only some of the grievances.

[17] In line with the July 2017 CCMA settlement agreement, Makombe was informed that she would be transferred to Knysna, effective 1 August 2017. However, the transfer was not implemented due to accommodation challenges in Knysna. Instead, in September 2017, Makombe was informed that she had been transferred to Beaufort West, effective 1 October 2017. At the time, she was pursuing postgraduate studies at the University of Stellenbosch.

[18] Makombe appealed against the transfer and remained in Queenstown. It appears that some of the issues Makombe had with the placement were that it was far from Stellenbosch, where she was studying, and that it was also far from her assigned supervisor. At some point, the employer proposed and offered an allowance to cover the travelling and accommodation costs in Stellenbosch, which proposal was not accepted by Makombe, insisting that other male colleagues who were studying had been assigned to areas close to where they were studying.

[19] In January 2018, Makombe consulted again with Maqela, who referred her to a specialist psychiatrist. She was admitted to Care Cure Hospital from 29 January 2018 to 1 February 2018, where she was seen by psychologists, social workers, occupational therapists, nurses, and psychiatrists. She was diagnosed with major depressive disorder.

[20] The same month, the employer informed her that she would not receive a salary increase due to incomplete internship tasks. Aggrieved by this decision, she referred an unfair labour practice dispute to the CCMA, alleging, *inter alia*, gender discrimination. The CCMA ruled that the dispute must be referred as an unfair discrimination dispute. Makombe did not pursue the dispute further due to financial reasons.

[21] In July 2018, Maqela prepared a report in which she described Makombe's condition as '*fluctuating (currently stable).* Makombe was again hospitalised in August 2018 for major depressive disorder. In October 2018, she was dismissed for refusing to transfer to Beaufort West.

[22] She was reinstated by agreement between the parties after referring an unfair dismissal dispute to the CCMA. The reinstatement took effect on 1 January 2019, when she was required to report to Beaufort West. The settlement agreement records that reinstatement was '*on the same terms and conditions'* and that the parties agreed to address the issue of Makombe's '*transfer to Beaufort West and conditions thereof'* by no later than 17 March 2019.

[23] The transfer to Beaufort West was not implemented after the employer received information that the congregants in Beaufort West would not accept a pastor who had reservations about being assigned to Beaufort West. Additionally, the employer was furnished with a report prepared by Maqela in July 2017 on Makombe's medical condition.

[24] Makombe remained in Queenstown until she was transferred to George in September 2019, at which point she relocated to George.

[25] In George, Makombe raised concerns about the safety of the accommodation she could afford, and the employer agreed to contribute towards her accommodation to enable her to afford safe accommodation. While the employer was attending to the accommodation concern, Makombe lived in Queenstown and commuted to George.

[26] From January to March 2020, Makombe was introduced to the George congregants. At a district event hosted in the first quarter of 2020, the employer received comments from congregants who were unhappy with a female pastor, which conflicted with their religious and biblical convictions. Makombe was instructed to remain in George and that she would be supported.

[27] In George, the congregants and church elders were hostile, demeaned and humiliated Makombe on WhatsApp groups. She was also barred from performing certain pastoral duties, which they regarded as reserved for male pastors, by the church.

[28] Makombe wrote to the employer about her plight in April 2020. She also followed up with them in May, June, July, August, and October 2020.

[29] In the meantime, in June 2020, Dr Seshoka, a psychiatrist, prepared a report on Makombe's health status and recorded that Makombe had been under his treatment since January 2018, that she was diagnosed with Major Depressive Disorder and admitted to the hospital and re-admitted in August 2018 for severe depression. The report records that Makombe was successfully treated for Major Depressive Disorder.

[30] In August 2020, Makombe wrote to the employer, stating that since April 2020, she had reported to the employer her hostile working conditions in George. A Zoom meeting was held with representatives of the employer, but no progress was made, and she heard nothing further from the employer.

[31] Subsequently, Makombe followed up, requesting a meeting with the employer before her scheduled surgery. She referred to two occasions when she was hospitalised and that *'the symptoms of depression I am experiencing are signalling that I am regressing to that undesirable state I cannot afford to revert to at this stage when my physical health is severely compromised too'*. She stated that she would

not continue to expose herself to a hostile context, had left the flat in George and would not return after the surgical procedure.

[32] In early October 2020, the employer contacted Makombe, and she informed the employer that all communications regarding her work concerns should be addressed through her attorneys.

[33] Days later, Makombe was informed that she would be transferred to Gqeberha, effective 1 January 2021.

[34] On 6 November 2020, Makombe received a letter from Pastor Papu, the President of the Cape Conference, regarding a poster on social media promoting a Methodist church event at which Makombe had been invited to preach. Issues raised were the fact that Makombe wore clerical regalia whereas the Cape Conference pastors did not wear regalia and that the poster referred to her as reverend, whereas as Seventh Day Adventists, the term used was pastor. Makombe responded by challenging the reasonableness of the concerns raised but indicated that she would withdraw from the event.

[35] Makombe resigned in a letter dated 8 November 2020, which the employer received on 8 December 2020. However, before receiving the resignation letter, the employer became aware of rumours that Makombe had resigned or was planning to resign as an employee of the Cape Conference.

[36] Notwithstanding the date on the resignation letter and the date the employer received it, the parties agreed that the resignation would take effect retrospectively as of 30 November 2020. The resignation letter records the following:

> 'I hereby tender my letter of resignation as a Pastor of the Cape Conference of the Seventh-day Adventist Church. Since the commencement of my employment in January 2014, my employment relationship with the Conference has caused me much emotional and psychological anguish and as such, I strongly feel that continuing under the employment of the Conference will severely jeopardise my wellbeing.

I will serve the required 1 months' notice, as per policy stipulation. I thank the Executive Committee for the opportunity to serve within the Cape Conference.'

[37] On the same day that Makombe penned the resignation letter, she visited the Life Queenstown Private Hospital where she was diagnosed with having panic and anxiety attacks, and she was booked off sick from 9 November to 10 November 2020.

[38] After Makombe had resigned but before the employer received the resignation letter, the employer attempted to meet with Makombe, but she indicated that she was unavailable as she was preparing for her wedding on 13 December 2020.

[39] A referral to the CCMA followed the resignation, with Makombe alleging constructive dismissal and seeking compensation. Commissioner Botha, who arbitrated the dispute, fell ill before she could finalise[2] the award. The parties agreed that the third respondent commissioner would finalise the award based on the record of the arbitration proceedings.

[40] The commissioner dismissed Makombe's constructive dismissal, hence the review application.

CCMA proceedings and the award

[41] The commissioner appreciated that she was required to decide whether Makombe had been constructively dismissed, as contemplated in section 186(1)(e) of the LRA.

[42] Makombe testified in support of her case and related the circumstances that she submitted drove her to resign from her position, dating back to 2014 when she commenced employment with Cape Conference.

[2] She had summarized the evidence but had not made any findings.

[43] Pastor Danie Potgieter, a district pastor for the Cape Conference, testified on behalf of the employer. Before Makombe resigned, Potgieter had served as the executive secretary and, at some point, as the president of the Cape Conference.

[44] Both parties also submitted expert notices dealing with Makombe's medical condition. It was agreed that the testimony of the experts could be dispensed with and that the commissioner could decide the matter based on the expert notices. Each party's issues with those expert notices will be looked at when the grounds for review are analysed.

[45] To avoid repetition, the commissioner's findings are dealt with when analysing Makombe's grounds for review, along with the Cape Conference's responses thereto. Before addressing the grounds for review, I outline the law governing reviews of arbitration awards in alleged constructive dismissal cases, as well as the legal principles underlying constructive dismissals.

The Legal Principles

[46] In terms of section 192(1) of the LRA, an employee alleging a dismissal must establish the existence of the dismissal.

[47] Whether or not there was a dismissal is a matter that concerns the jurisdiction of the CCMA[3], and on review, the test is correctness.[4] Ergo, the review court is called upon to decide the issue *de novo* and determine whether the commissioner's decision regarding whether an employee was dismissed or not was correct.[5]

[48] Section 186(1)(e) of the LRA defines a dismissal to include a situation where an employee terminates employment with or without notice because the employer

[3] *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 29 ILJ 2218 (LAC) and *Solid Doors (Pty) Ltd v Commissioner Theron and Others* (2004) 25 ILJ 2337 LAC at para 29.
[4] *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) para 101.
[5] *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others* [2014] 10 BLLR 987 LAC at para 19 read with para 35.

made continued employment intolerable. This is commonly referred to as a constructive dismissal.

[49] An employee claiming constructive dismissal must prove that (a) they terminated their employment, (b) because continued employment had become intolerable, (c) and that the circumstances that rendered continued employment intolerable were of the employer's making.

[50] In *Mafomane v Rustenburg Platinum Mines Ltd*[6] (*Mafomane*) the Court stated that the ultimate test remains whether it was reasonable to resign to escape the intolerable working environment, and each case must be decided on its own facts.

[51] In *Strategic Liquor Services v Mvumbi NO and Others*[7] *(Strategic Liquor Services)* the Constitutional Court (CC) clarified that the test for constructive dismissal does not require the employee to have no choice but to resign. Instead, it only requires that the employer has made continued employment intolerable.

[52] Whether continued employment is intolerable is determined objectively, and the employee's belief in this regard must be reasonable. In *Pretoria Society for the Care of the Retarded v Loots*[8] the Court stated that the employee resigns:

> '…on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed.'[9]

[53] In *National Health Laboratory Service v Yona and Others*[10] *(Yona)* the LAC stated the following:

> …The conduct of the employer towards the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not

[6] [2003] 10 BLLR 999 (LC) para 49.2.
[7] (2009) 30 ILJ 1526 (CC) para 4.
[8] (1997) 18 ILJ 981 (LAC).
[9] Ibid at 984E-F.
[10] (2015) 36 ILJ 2259 (LAC) at para 31.

reasonably be expected to cope with it. Resignation must have been a reasonable step for the employee to take in the circumstances.'

[54] In *Solidarity obo Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others*[11] the LAC stated that the word intolerable 'implies a situation that is more than can be tolerated or endured, or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance'.[12]

[55] In *Mafomane,* which was upheld by the SCA in *Murray v Minister of Defence*[13], the Court held that the requirement that the circumstances that rendered the employee's continued employment intolerable must have been of the employer's making means that they must be circumstances under the employer's control. The employer must have brought them about by its act or omission. The court also stated that this does not mean the employer must have done so intentionally.[14]

[56] In the same matter, the Court also found that there must be a causal relationship between, on the one hand, the intolerable working environment and, on the other hand, the resignation. Therefore, if the employee resigns for a reason other than intolerable working conditions, the resignation does not constitute constructive dismissal, even if the employee's continued employment has become intolerable.[15]

[57] An employee who alleges constructive dismissal bears the onus to prove this. In *Murray v Minister of Defence*[16], the SCA clarified the onus of proof that the employee must prove that the resignation was not voluntary and that it was not intended to terminate the employment relationship. The SCA also stated the following:

'[12] ….Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated

[11] (2019) 40 ILJ 1539 (LAC).
[12] Ibid para 39.
[13] (2008) 29 ILJ 1369 (SCA) at para 13.
[14] Paragraph 50.
[15] Ibid para 51.
[16] Id fn 13.

or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[58] In *Sanlam Life Insurance Limited v Mogomatsi and Others*[17] the LAC also stated thus on the issue of onus:

'[32] 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 reasonably be expected to cope with it. Second, after the dismissal had been established, the court will then evaluate whether the dismissal was unfair. The two stages may overlap and be interrelated.'

[59] These principles will be applied to determine whether the commissioner was correct in dismissing Makombe's claim of constructive dismissal.

Grounds for review

[60] In assessing the grounds for review, the issues have been grouped using the same or similar headlines as those used by the commissioner and the parties in their heads of argument, or headlines that I deemed apposite to the issue being decided.

The expert evidence, Makombe's medical condition and compassion

[17] (2023) 44 ILJ 2516 (LAC). See also: *Bakker v CCMA and Others* (2018) 39 ILJ 1568 (LC), and *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake N.O. and Others* (1998) 19 ILJ 1240 (LC) at 1250.

[61] It is submitted on behalf of Makombe that the commissioner failed to conduct a proper analysis of the expert evidence presented before her and reached an incorrect decision.

[62] Firstly, it is submitted that the commissioner relied on the employer's expert report, which was filed without complying with CCMA Rule 37A. In response, the employer submits that there was no objection when the employer's expert notice was filed, that it is too late to object in these proceedings, and that Makombe fails to set out the prejudice suffered due to the absence of a CCMA Rule 37A notice. The employer's submissions on the issue are compelling and I need not say any more.

[63] In the second place, several challenges have been put forward on behalf of Makombe regarding the employer's expert evidence. It is submitted that, unlike the employer's expert witness, her expert witnesses consulted, diagnosed, or treated her. The submission is also that her expert evidence was undisputed, and yet the commissioner preferred the employer's expert witness report. Further submissions are that the employer's expert witness commented generally on major depressive disorder and that such an opinion was worthless; that the employer's expert witness drew a legal conclusion that Makombe's perception of her work stressors did not meet the objective factual test of intolerability, which he could not do; and that Potgieter claimed to be qualified to comment on mental ill-health, a contention which he later withdrew. The submission is that in the final analysis, an assessment as to whether the employer's conduct rendered a continued employment relationship intolerable required that an objective test be applied, which took into account the realities of Makombe's mental ill-health. There is also some criticism of the commissioner's finding that the major depressive disorder and anhedonia may have made Makombe's experience at work feel more negative than it was, which is said to be a misinterpretation of the medical report of June 2020[18].

[64] The employer denies that Makombe's expert evidence was undisputed. It submits that Makombe did not testify about the medical reports and their contents

[18] Which recorded that the Makombe had been assessed as '*severely depressed, with insomnia and low energy level with feeling of worthlessness, poor appetite and anhedonia, with poor memory and concentration following severe stressors that also affected her socio-occupational functioning.'*

were only addressed with her and Potgieter during cross-examination. The employer admits that its expert, Dr. Bezuidenhout (Bezuidenhout), did not consult with Makombe and that his expert report was limited to the information contained in the medical reports of the practitioners who consulted with Makombe. It submits that the conclusions reached regarding the medical reports are defensible and that the commissioner merely interpreted what was contained in the psychiatrist's report with reference to the definition of anhedonia (an inability to experience pleasure) as reflected in the Bezuidenhout expert report, which Makombe did not dispute. The employer clarifies that it did not and still does not dispute Makombe's mental health diagnosis but disputes that it caused it. It submits that the medical report referred to work stressors as reported to the practitioner by Makombe, and that there was no independent medico-legal assessment to determine whether the employer was the cause. The submission is further that if the stressors were work-related, Makombe's expert witnesses would have recommended that the employer intervene and that they made no such recommendation. Instead, the reports record that Makombe's condition was stable. It also submits that the commissioner's finding that she could not find that Makombe's working conditions were the sole cause of her medical condition was based on Makombe's assertion that they were the sole cause. The employer further submits that Makombe's expert notice was prepared in consultation with her legal representatives and is not signed by the author, and that it incorrectly records that Maqela and Seshoka found that Makombe's medical condition was directly linked or caused by her working conditions, when the relevant medical reports do not contain any reference to this.

[65] In assessing the contentions of the respective parties, the commissioner accepted that Makombe suffered from psychological and psychiatric illnesses based on the medical reports placed before her. In these proceedings, the employer states that it does not dispute Makombe's medical condition. The only issue remaining is what the commissioner found about the link between the intolerable working environment and Makombe's medical condition.

[66] The commissioner found that there was insufficient evidence to support the conclusion that Makombe's work situation was the sole cause of her condition.

[67] Accepting that finding for the moment implicit in it is an acceptance that Makombe's medical condition was also due to stressors related to her work. However, more importantly, Maqela's report, which the commissioner referred to, noted that Makombe reported her stressors were related to her work, as reported to her by Makombe. If Maqela had not accepted Makombe's report, she would have stated this in her report or would have excluded any reference to work-related stressors from the report. There was no evidence before the commissioner of any other stressors. Bezuidenhout's expert opinion that Makombe's illnesses can lead to an over-negative evaluation of a person's life and work was a hypothetical answer to a hypothetical question. He did not consult with Makombe, and he did not find that Makombe's medical condition was due to an overly negative evaluation of her personal life. The employer did not volunteer any other possibilities for what might have caused Makombe's medical condition, except for a passing suggestion that the reprimand for the Methodist Church engagement may have caused her stress. The challenge with the submission is that the issue of the Methodist Church engagement referred to only arose in October 2020, whereas Makombe had been receiving treatment for her medical condition since 2017.

[68] The commissioner's finding that Makombe suffered from anhedonia was an unjustified attempt to find another stressor for Makombe when none existed. Bizarrely, the commissioner went even further to state that Makombe was most likely the cause of her own stress at work, despite this not being supported by any evidence.

[69] That Maqela's report did not require the employer to implement any interventions in the workplace does not assist the employer's case, especially one involved in the ministry. The employer did not need a recommendation from Maqela to know that Makombe required assistance. It was aware of Makombe's challenges in the workplace. It knew that assistance was needed but did nothing. In the matter of *Yona* that the commissioner found to be distinguishable, the Court found that the employer had not shown compassion towards an employee suffering from a severe work-related illness. The commissioner did not say in what respects the fact in *Yona*

were distinguishable unless she meant that Makombe's stressors were not work-related, which cannot be as she found that the work stressors were not the sole cause of Makombe's medical condition.

[70] Makombe's evidence was that when other colleagues were hospitalised, arrangements were made for other pastors to visit and pray with them in the hospital, which was not done for her. Instead, on one occasion, she received an email requesting her to repay her travel allowance for a trip she did not undertake because she fell ill. She also testified that even though the employer did not have an employee wellness programme, Potgieter's office assisted employees who reported serious injury and in this case she received no help from Potgieter's office. None of this evidence was disputed, except to say that the employer only became aware of her hospitalisation in December 2018. On the occasion Makombe was required to repay the travel funds, the employee was informed that she was in hospital, and still did nothing.

[71] I find that there was sufficient evidence that Makombe's medical condition was due to her work stressors, that there was no evidence of any other stressors and that the employer failed to show care and compassion.

The commissioner's handling of hearsay evidence

[72] It was submitted on behalf of Makombe that the commissioner misdirected herself when applying the principles governing the admission of hearsay evidence. This related to e-mails and letters written before Potgieter's time, which formed part of the employer's bundle. There was an objection to admitting the documents because the authors of the documents were not called as witnesses. It is said that the commissioner provisionally admitted the hearsay evidence and later made findings based on that evidence, which was not specified, despite the witnesses not being called and Makombe disputing the contents of the documents. The submission is also that the hearsay evidence remained inadmissible unless admitted under one of the exceptions set out in the Civil Proceedings Evidence Act[19] or the Law of

[19] Act 25 of 1965.

Evidence Amendment Act[20] (LEAA), that sections 3(1)(a) and (d) of the LEAA do not apply and that the employer could not rely on section 3(1)(c) of the LEAA.

[73] In response the employer submitted that at the commencement of the arbitration proceedings, the parties agreed that the documents in their respective bundles are what they purport to be, that they need not be formally proved unless one of the parties gives the other parties notice that the validity of a document is disputed in which event the document must be proved in the ordinary fashion. It is also submitted that the Makombe's representative placed on record that there were no objections to the documents in the bundles, except for the Pastoral Placement Policy.

[74] It is the employer's further submission that in her evidence, Makombe did not dispute the documents in the employer's bundle. She also did not dispute the complaints lodged against her. Furthermore, Potgieter, as a member of EXCOM and later the executive secretary, was either copied on communications or was a party to the discussions held regarding Makombe's complaints. It is also said that the employer faced challenges in addressing the prejudices of congregants and attempted to rectify them. Furthermore, it is stated that the congregants never complained about Makombe being a female pastor, but rather about her conduct.

[75] I start with the criticism of the commissioner for admitting hearsay evidence. It is evident from the award that the commissioner was alive to the law applicable to hearsay evidence. She referred to case authorities as well as the LEAA and found that she would consider the weight to be attached to the evidence.

[76] Thereafter, the commissioner went on to list the evidence, which was said to be hearsay, and found that Makombe herself had not disputed the evidence in her oral evidence and that her documents supported the accounts said to be hearsay evidence. I do not have much difficulty with the commissioner's finding save for one or two issues.

[20] Act 45 of 1988.

[77] The first is the hearsay evidence about alleged conduct on the part of Makombe that the congregants raised. Makombe denied that she had conducted herself as described by the congregants. The congregants were available to testify but were not called. In my opinion, that evidence should not have been admitted.

[78] The other error relates to the finding that Makombe was paid allowances. The employer accepts that this finding was erroneous and it records the correct factual position as being that Makombe was offered an allowance to assist with her travelling costs from Beaufort West to Stellenbosch, which offer she declined.

The cross examination of Makombe

[79] Another ground for review relates to Makombe's cross-examination. It was submitted that the employer's representative asked compounded and repetitive questions and this is said to have resulted in the proceedings being dragged out. The employer denies the allegation and submits that questions were rephrased where Makombe had difficulty with the structure of the questions put to her. It is also submitted that Makombe failed to specify how the alleged unfairness resulted in a distorted outcome. Finally, the employer also takes issue with the failure to cite the commissioner who heard the evidence.

[80] I have reviewed the transcript, and it appears that the employer representative posed lengthy propositions to Makombe. On each occasion this occurred, Mr Hendricks for Makombe requested that the questions be broken down for the witness, and the commissioner intervened to ensure this happened. That's where it ends.

The nature of the enquiry to be conducted

[81] It is submitted on behalf of Makombe that the commissioner misdirected herself by conducting an enquiry other than determining whether the employer made continued employment intolerable for Makombe. The submission is that sufficient evidence of the employer's conduct was presented, with the consequence that the

onus shifted to the employer to prove that it did not act unfairly. The commissioner is said to have failed to look at the employer's conduct as a whole to determine its effect on Makombe and whether she could be expected to put up with it after reasonably attempting to preserve the employment relationship for as long as she did, and after lodging grievances, escalating matters to the Southern African Union Conference,[21] filing CCMA claims and instituting court proceedings. It is submitted that the employer has committed a long list of transgressions, and any one of the alleged transgressions is sufficient to prove constructive dismissal.

[82] In response, the employer submits that the numerous complaints by Makombe do not prove that, as an employer, it was at fault. Its further contention is that during the arbitration proceedings, it demonstrated that Makombe's complaints were without substance, but it nevertheless attempted to address them via e-mail, telephone calls and Zoom meetings.

[83] In the award, the commissioner quoted relevant case authorities on constructive dismissals and noted that Makombe contended her resignation was not voluntary but was inspired by the respondent's unfair conduct. The award also notes that it was undisputed that Makombe raised numerous concerns, complaints, and grievances over a considerable period, and that these concerns were communicated to various individuals employed by the employer. The commissioner found that the documentation supported Makombe's contentions that she had raised concerns and rejected the employer's contention that the concerns were not addressed because Makombe was required but failed to file grievances. The commissioner reasoned that substance must prevail over form, and I agree with this finding.

[84] As to Makombe's concerns, the commissioner found that there were numerous.

The discrimination claim

[21] The mother body for Seventh Day Adventist Churches.

[85] First was the discrimination claim based on gender, which she found that could not be entertained as no discrimination claim had been filed with the CCMA. I align myself with this finding.

The group grievance

[86] Second was the group grievance. The commissioner found that there was no corroborating evidence at all, that Makombe was the initiator of the group complaint, that there was no evidence that the other pastors lodged further complaints or that any pastors resigned on account of the intolerable conditions, that other female pastors had been successfully assigned in the same geographical areas as Makombe, that in the later years of Makombe's employment, Papu and not Mbaza was the president and that in October 2018 Makombe settled the dispute on the basis that she would be reinstated on the same terms and conditions that applied before her dismissal.

[87] The reasoning of the commissioner on these issues is, in my view, flawed. That a group grievance was lodged was not disputed. Makombe's initiation of the group grievance does not negate the fact that six other pastors also complained about the working conditions at the employer. According to the employer, some of the issues raised in the group grievance were resolved, although not all of them, as the commissioner found. Makombe's undisputed evidence was that the employer was compelled to act on the group grievance, which had been shared on social media. That the other pastors did not lodge further complaints or resign due to intolerable conditions in the workplace cannot be used to discredit Makombe's version of what she testified to experiencing. While the test of intolerability is objective, the starting point is to place oneself in the employee's shoes. The female pastors who were allegedly successfully placed did not testify to confirm this, and their circumstances are unknown. The commissioner's finding regarding the other female pastors indicates that the issue of gender discrimination could not be overlooked in the constructive dismissal inquiry simply because Makombe did not file a discrimination claim. The issue could still be considered, but only to determine

whether the employer created an intolerable work environment and not to decide a discrimination claim.

[88] Another irrelevant consideration taken into account by the commissioner is that Papu took over from Mbaza at some point. The complaints registered by Makombe over the years were not directed solely at Mbaza, but the working conditions, the specifics of which Makombe pointed out. The group grievance served to demonstrate that it was not only Makombe who faced challenges in the workplace. Although most of the issues raised in the group grievance were resolved, the issues that affected Makombe remained unresolved.

[89] Another finding by the commissioner, which the employer defends, is that because Makombe agreed to be reinstated in October 2018 on the same terms and conditions, this weakened her claim that she had been constructively dismissed. The employer submits that the commissioner was correct given the decision of the Court in *Value Logistics Ltd v Basson & Others*[22] where the Court found that an employee who had resigned and later sought to withdraw the resignation cannot claim that he was constructively dismissed as objectively speaking, on the employee's admission he wanted to retract the resignation because continued employment was not intolerable. I disagree with this approach. First, the claim that was settled was not a constructive dismissal claim. Makombe was dismissed, and she fought to regain her job. Secondly, it is nonsensical to suggest that an agreement to be reinstated was an agreement to be subjected to the same treatment she had been complaining about. The same agreement records that the transfer to Beaufort West and the conditions thereof would be agreed upon, including the logistics of the transfer. The October 2018 settlement agreement does not preclude Makombe from relying on her entire experience at the Cape Conference to paint a picture of how she reached a point where she could no longer tolerate the intolerable conditions created.

[90] However, the group grievance was not the proximate cause of Makombe's resignation in November 2020.

[22] [2011] JOL 27284 (LC).

Job description

[91] Makombe's other grievance related to not being provided with a job description when she was a chaplain in Bethel. The commissioner accepted that Makombe had requested a job description, which was not provided, but found that she ought to have known the nature of her job given her educational qualifications, coupled with the fact that the heads of arguments submitted on her behalf summarised her duties.

[92] The commissioner, in my view, got it wrong on this issue too. Makombe required a job description for a chaplain because she was required to teach Bible studies to students, was required to be a member of the Housing Committee and to conduct devotions which were previously done by the staff. She was trained as a pastor and had not received any training as chaplain. As the staff at Bethel College and Makombe differed on what she was required to do, a job description would have clarified the job responsibilities of a chaplain. The employer did not provide the job description despite request, resulting in Makombe withdrawing from Bethel College. Makombe testified that the other female colleagues who were deployed as chaplains also requested the chaplain job description. She was not disciplined for withdrawing from Bethel, and from that, an inference can be drawn that the employer accepted that she had valid reasons for the withdrawal.

[93] In saying the above, I am not suggesting that the refusal of a job description, on its own, created an intolerable work environment for Makombe and can be the basis for a constructive dismissal in 2020. The commissioner made a similar finding. The point I make is that the commissioner was incorrect in finding that the request for a job description was not well-founded.

Distance between Makombe and her supervisors

[94] Another grievance was that while Makombe was an intern pastor, she needed to be supervised, and the supervisor would complete certain documents as proof that certain tasks had been completed. Initially, her supervisor was approximately

365 kilometres away. When she was informed about the transfer to Beaufort West, her supervisor would have been 200 kilometres away from her.

[95] The commissioner found that the employer appreciated the difficulties posed by this arrangement and that other pastors were also affected by this. The commissioner went further and stated that while it was ideal for Makombe to be assigned to a place close to her supervisor, this was not always practical. The commissioner went on to find that certain arrangements were made to accommodate the distances.

[96] On the evidence, the travel and accommodation offers were not arrangements made to ensure that Makombe's internship tasks were completed but to assist with the travel cost to and accommodation costs in Stellenbosch.

[97] The commissioner's finding that in the era of advanced technology, communication from a distance was not complicated ignores Makombe's evidence that supervisors were required to observe and supervise an intern pastor giving, for example, the Holy Communion, which could not be done on a virtual platform. The commissioner's finding also overlooks that Makombe was penalised for incomplete tasks, as her salary was not adjusted. As for how the other intern pastors navigated this challenge, it is unknown, as they did not testify. However, Makombe testified that she was aware of one intern pastor who signed their internship tasks on behalf of their supervisor, which she found to be unethical and unacceptable. That version went unchallenged.

[98] The employer's version that the supervisor referred to in the employment contract is the president, and not an intern supervisor does not deserve further consideration. Is the employer suggesting that the president was responsible for supervising the internship tasks of all interns? It accepted that the issue of interns being in close proximity to assigned supervisors was a challenge.

[99] But again, I accept that viewed on its own, the proximity of a supervisor is not the grievance that broke the camel's back, leading to Makombe's resignation in November 2020.

No assistance to Makombe to be ordained as an elder

[100] The picture changes from this grievance onwards. Another one of Makombe's grievances was that the employer failed to facilitate her election and later ordination as an elder. Being ordained as an elder would have allowed Makombe to meet the policy requirements, enabling her to function as a fully-fledged pastor. It is common cause that the request for assistance to be elected and ordained as an elder was first made when Makombe was in Bethel. When Makombe resigned six years later, she was yet to be elected and ordained as an elder.

[101] Makombe testified that the requirement to transfer membership to be elected and ordained as a leader was not imposed on her male predecessor, and that pastoral interns were exempt from the local membership requirement to be elected and ordained as elders. When requested by the ministerial director to clarify the relocation of ministerial internship memberships, the employer did not respond. She further testified that she objected when she found out that someone had transferred her membership without consulting her.

[102] Potgieter testified that Makombe declined to have her membership moved, thereby creating her own problems. She would have been elected as an elder if she had transferred to Queenstown, but she refused to transfer. When Makombe was in George, her membership was still in Silverleaf Somerset West, and she refused to transfer it to George. The requirement was applied to all without exception, including Potgieter. Therefore, Makombe was the author of her own misfortune. He also testified that the employer had no say in Makombe's ordination or election as an elder. However, he accepted that Pastor Papu, Pastor Lefume and Pastor Stander attempted to intervene in the process of electing Makombe as an elder and that in the settlement agreement concluded at the CCMA, the employer agreed to assist.

[103] Responding to Makombe's allegation that she had been treated differently from a male colleague, Potgieter testified that the only differences between female and male pastors were that while males are '*ordained'* to the gospel ministry, females are '*commissioned'* and that female pastors required permission from the conference president to baptise. Other than these differences, all pastors could minister.

[104] That version was disputed in cross examination, it being contended that commissioned female pastors earned less than ordained male pastors, that female pastors cannot serve as chaplains of government institutions and cannot be the organisational head of a church organisation. This debate would have been best dealt with as part of a discrimination claim which the commissioner correctly found was not before her.

[105] The commissioner found that Makombe was not ordained as an elder because she refused to transfer her membership to Queenstown district and refused instructions, which negatively affected the process of becoming an elder. But that finding completely ignores Makombe's evidence without providing reasons.

[106] On this issue, I have no hesitation in finding that it is no surprise that the same congregants who were hostile towards a female pastor decided not to support Makombe's election and ordination as an elder. The employer's response remained that it had no say in the process. Its attempts to assist with this issue fell far short of what was required of an employer that had given an undertaking to assist Makombe. Assigning Makombe to a district where female pastors were accepted might have resolved the situation, but this did not happen. This situation led to an intolerable working environment for Makombe.

Makombe's transfers and placements

[107] It is common cause that she was transferred from Bethel to Queenstown (then to Beaufort West and Knysna, even though the transfers to these two places were not implemented) to George and finally to Gqeberha.

[108] The commissioner found that Makombe was transferred on several occasions to remove her from conditions she described as hostile. She also found that Makombe's employment contract and the Church Manual allowed the employer to transfer employees and that the employer transferred Makombe on account of her unhappiness in the area where she was assigned.

[109] In my view this reasoning completely misses the point. Makombe did not object to the transfers, but rather to being transferred to areas known to be hostile towards female pastors. The request to be consulted before the assignment would have allowed her to conduct her due diligence regarding whether the congregants would receive her well. This was a reasonable request. Consulting Makombe, as requested, did not impose an onerous burden on the employer. That congregants in certain areas were opposed to female pastors made it imperative for the employer to consult with Makombe before assigning her while retaining the right to make the final decision. The employer did not even attempt to consult Makombe, insisting that it could unilaterally transfer and place Makombe. The employer's failure to consult Makombe was unfair.

[110] The Placement Policy circulated to employees made provision for consultation, and Makombe could rely on its provisions for the first time in the arbitration. The employer's attempt to distance itself from the Placement, arguing that it was a proposal, is rejected.

Placement in George

[111] This was indeed the final straw, as the commissioner observed.

[112] Makombe experienced grave hardship and humiliation in George. For example, she was insulted and ridiculed in a WhatsApp group she was part of. A male colleague felt compelled to intervene and pleaded Makombe's case to the Cape Conference but to no avail. The commissioner also correctly recorded that

Makombe believed her grievances had gone unattended for six months (or four months)[23], hence the decision to instruct lawyers to handle the matter on her behalf.

[113] Despite these findings and observations, the commissioner went on to take into account irrelevant matters to the inquiry before her. She found that the employer assisted Makombe in finding safe accommodation in George. The employer is to be commended for this step, but this was before Makombe was introduced to the congregants.

[114] When introduced to the congregants, the congregants did not mince their words. A female pastor was against their religious convictions and therefore not welcome. Representatives of the Cape Conference were present when the congregants conveyed this unequivocal message. And yet, they did not immediately intervene; instead, they chose the safe option of assuring Makombe after the meeting that the congregants could not dictate to the Cape Conference and that she would be supported. No support was offered to Makombe on this, other than the vague assurance that she would be supported.

[115] In terms of the Occupational Health and Safety Act[24] an employer has an obligation to create a safe working environment. There is also the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* which was published after Makombe's resignation. Even though the cause of action in this matter was not a discrimination matter, the Code is instructive in that it imposes an obligation on employers to protect employees in any situation in which the employee is working or which is related to their work.

[116] The commissioner referred to a number of meetings that Makombe failed to attend in order to address her concerns. That finding is erroneous.

[117] There was one Zoom meeting which Makombe attended. Thereafter, she requested a follow-up meeting. A meeting was scheduled, which she missed

[23] As the employer contended.
[24] No 85 of 1993.

because she did not see the email. She then requested that the meeting be rescheduled. She did not attend the other meetings (which were not aimed at addressing her concerns) because she was in the hospital. The meeting called in December 2020 was after she resigned and therefore could not have been for purposes of addressing Makombe's concerns.

[118] However, more importantly, it is clear that the challenge faced by Makombe could not be addressed in meetings between Makombe and the Conference without involving the congregants who opposed a female pastor. At the introductory meeting in George, the congregants openly voiced their opposition to a female pastor, and the employer's only defence is that it could not discipline church members. That is an admission that it was either unable or unwilling to address the hostile work environment created by congregants. Therefore, the commissioner's finding that the employer intervened and attempted to assist Makombe in resolving the problems is not supported by the evidence. Whatever assistance the employer offered did not address the core of Makombe's grievance, which was that the congregants in George were opposed to a female pastor.

[119] It was for the employer, and not Makombe, to find a solution to the problem, and it is no defence to argue that the practice of the Cape Conference was not to discipline congregants, as testified by Potgieter.

[120] The commissioner's finding that the attitude displayed by congregants was due to Makombe's conduct, given the numerous complaints against Makombe for non-attendance at work and her failure to perform certain duties, ignores the uncontested evidence that the congregants were opposed to a female pastor. Of the ten churches in George, initially, only two churches were prepared to work with Makombe. The situation changed after the eight churches influenced the two churches on the matter, as testified to by Makombe and not disputed.

[121] The employer's contention that it did not create a hostile work environment but the congregants did fall to be dismissed. We know from case law that individuals under the employer's control can create a hostile work environment, and the

employer would be found to have created intolerable working conditions, even if it fails to remedy the situation by omission. The congregants were under the employer's control, and the employer failed to remedy the situation by omission.

[122] The preaching event, which was intended to increase Makombe's profile, would not have addressed the core of Makombe's challenge in George: congregants opposed to a female pastor. Moreover, there is evidence that the service request for Makombe to preach in Lesotho in April 2020 was sent to the employer in February 2020, and it would have received it. After the employer raised its concerns about Makombe's participation in the event, she relented and advised that she would not participate, even though she disagreed with the employer's stance on the matter.

[123] The commissioner found that Makombe was paid for periods that she did not report for duty. This is correct, and the employer is to be commended for this. However, that an employer paid an employee a salary to which the employee is not entitled cannot be used as a defence to a claim that the employer created an intolerable work environment; otherwise, employers with deep pockets will be able to buy their way out of being found to have constructively dismissed an employee by simply paying their salaries. In addition, the employer dismissed Makombe for not reporting for duty but agreed to reinstate her when a dismissal dispute was referred to the CCMA. It did so because it accepted that Makombe was justified in not reporting for duty as her concerns had yet to be addressed. The employer was required to address the core of Makombe's issues, which it was aware of. It cannot be a defence, as found by the commissioner, that Makombe left her assigned places and exacerbated the situation, thereby becoming the author of her own misfortune. Even if, in constructive dismissal cases, the conduct of both parties must be scrutinised, I accept, as submitted on behalf of Makombe, that she withdrew from the workplace to a place of safety. This was a reasonable reaction, given that the employer failed to address her grievances months after the grievances were registered.

[124] The commissioner found that the employer addressed Makombe's grievance about George's hostile congregants by transferring her to Gqeberha. The transfer to

Gqeberha was communicated in October 2020 and was scheduled to take effect on 1 January 2021. Therefore, it took the employer from January 2020 to October 2020 to remove Makombe from the congregants who opposed a female pastor. After the April 2020 Zoom meeting, Makombe followed up with the employer on the issue several times to no avail. The commissioner's reasoning that the employer was slow in responding to Makombe's concerns because committees make decisions and the COVID-19 pandemic also had an effect is no excuse at all, especially for a commissioner who had reasoned that technology could have been used to supervise Makombe while she attended to her internship tasks. These meetings could have been held on virtual platforms, but as I have already found, meetings without congregants would not have resulted in a solution. Unless, of course, the sessions were aimed at discussing transferring Makombe to districts which were not opposed to female pastors, which was not the case. In any event, Potgieter testified that Makombe's concerns were not addressed because she did not file a formal grievance, a contention rejected by the commissioner. I have already stated that I agree with the commissioner on this issue.

[125] As had happened in the past, the transfer from George to Gqeberha was effected without consulting Makombe, despite the employer's undertaking to consult Makombe before making the transfer. On the facts of this matter, the explanation that the contract allows the employer to transfer unilaterally must be rejected, as experience ought to have taught the Cape Conference that transfers effected without consulting Makombe would not be successful. The employer did not even attempt to resolve Makombe's core grievance.

[126] Makombe did not leave George because she did not want to work, and she did not leave for no good reason. Only an uncaring employer would suggest such a thing, given the contents of Makombe's email, which advised that she would not return to George after her surgery.

[127] Makombe testified that she got married on or about 13 December 2020, and the employer seized on this development to argue that Makombe had resigned because she wanted to move to her husband in Queenstown; the commissioner

accepted this. Another theory was that Makombe resigned because she wanted to join the Methodist Church. Yet another proposition put to Makombe was that she had resigned because she wanted to be compensated, and the amount received would tide her over until she got another job. The evidence before the Commissioner did not support any of these contentions.

[128] The suggestion that Makombe wanted to be assigned to Queenstown, where her husband lives, and not Gqeberha, ignores that Makombe had been assigned to Queenstown before, and the congregants rejected her. Surely the submission is not that she wanted to return to the same place where she had been rejected? For almost a year, Makombe's grievances about the congregants in George remained unresolved. The employer created an intolerable working environment by failing to address the issue of the George congregants who opposed Makombe as a female pastor. On the day she penned the resignation letter, Makombe had panic attacks and was hospitalised. In argument, Mr Cassels submitted that it was not known what caused the panic attacks, but did not offer possibilities of what might have caused them. She was resigning because her working conditions caused her emotional and psychological anguish, and understandably, she did not want to relapse, as in June 2020, her treating psychiatrist stated that she was successfully treated for major depression. Makombe acted reasonably by removing herself from conditions that made her susceptible to a relapse.

[129] There was no evidence to suggest that Makombe resigned because she wanted to join the Methodist Church or that she joined the Methodist Church after resigning. Even if she had joined the Methodist Church, she could not be faulted for seeking employment.

[130] A letter of demand was sent to the employer, claiming compensation for pain and suffering. Makombe was within her rights to consider taking legal action against the employer for the pain and suffering she alleged she had suffered. She did not walk away from her job in the hope that the employer would pay her the R400,000.

[131] On why she resigned, Makombe testified thus:

> ‘And I think, lastly, its important for me to note that leaving employment was probably the most difficult decision I have ever had to make, leaving both the Seventh Day Adventist Church and employment as a pastor of the church because it was my calling or it is my calling, to serve as a minister for God, and I have had to undo myself and I was born into the Seventh Day Adventists Church, I've had to divorce myself from the church's beliefs. Ja, perhaps I should stop there, it was not an easy decision, but at this stage it was literally a matter of life and death for me, I just could not. I was dying a slow death emotionally, certainly spiritually and possibly even physically, so staying at this stage or that stage was no longer an option for me.’

[132] Makombe provided a compelling reason for her resignation, namely that the employer made continued employment intolerable, and her decision to resign was reasonable. There was no hope of the employer reforming because its stance was that when it came to congregants, its hands were tied.

[133] The commissioner acknowledged that certain church congregants were dissatisfied with Makombe, expressing hostility towards her and that they did not accept her as their pastor, nor did they want her to administer to their religious traditions. What the congregants did not want Makombe to do was what she was employed to do. The commissioner found that the employer was slow in addressing her concerns or, at times, failed to address Makombe’s grievances. The employer was unable to address Makombe’s concerns, as transferring from one location to another, where congregants were hostile to Makombe for being a female pastor, was not a sensible way to address the matter.

[134] The commissioner’s finding that Makombe resigned on notice and that, generally, this serves to disprove an intolerable situation is patently incorrect. Section 186(1)(e) is clear that an employee can resign with or without notice.

Concluding remarks

[135] Makombe's resignation was not in dispute. The resignation was not voluntary. She resigned to avoid a relapse because, over some time, the employer failed to address her concern that the congregants to whom she had been assigned did not accept her, and this impacted her progression to being elected and ordained as a leader. George was the last straw.

[136] The employer was culpable. It failed to address the issue of the congregants who were hostile towards Makombe. The congregants were under the employer's control. As an employer, it had an obligation towards Makombe, the employee, to '*do something*' about the hostile work environment. It could not fold its hands as it did ostensibly because it could not discipline congregants and leave Makombe to fend for herself. The employer paid lip service to wanting to assist Makombe but did nothing. The contention that the employer tried to act as a buffer between Makombe and the congregants, as found by the commissioner, is not supported by any evidence. What is evident from the facts is that the employer did not want to ruffle the feathers of the congregants by acting against them and instead accommodated them at Makombe's expense.

[137] Constructive dismissal cases are not limited to situations in which an employer behaves in a '*deliberately oppressive manner*,' as the commissioner found. Case law is clear that an employer can create circumstances that render continued employment intolerable by omission and that the employer need not have acted intentionally.

[138] Makombe did not resign on the first occasion that she encountered resistance from the congregants in the districts to which she was assigned to work. She wrote to the employer requesting its intervention. When the employer failed to intervene, she withdrew to a "*safe place*," as she put it. It was reasonable for her to remove herself from a place where she faced hostility and in circumstances where the employer, who was aware of the hostility, took no action to protect her.

[139] Makombe was transferred from Bethel to Queenstown, then to Beaufort West (but not implemented), then to Knysna (also not implemented), then to George, and

finally to Gqeberha. All these transfers were effected under the guise that the employer was attending to Makombe's concerns. Makombe was not consulted before the transfers. Consultation with Makombe before each transfer became indispensable, allowing her to conduct due diligence on the district where she was being transferred and determine whether the congregants would be accepting of a female pastor. The Placement Policy required consultation. Fairness also required that Makombe be consulted, and the employer had agreed to do so. The employer ought to have consulted Makombe. As it turned out, the districts she was transferred to or moved to had vocalised reservations against female pastors. Therefore, transferring Makombe to a different district without first establishing the stance of the congregants was not a solution.

[140] There is no substance to Mr Cassels's submission that there is no general right to be consulted in a Church context. Every employer, including Churches, is subject to our labour laws unless there is legislation that exempts such an employer from complying with its obligations. Mr. Cassels did not point to any such legislation.

[141] The commissioner's finding that, in all likelihood, the attitude the congregants displayed resulted from Makombe's conduct reveals the extent to which the commissioner failed to consider the common cause facts placed before her, namely that the congregants were opposed to a female pastor. Makombe testified that there were districts where she would have been accepted as a female pastor, and the employer responded that there were no vacant positions in those districts. Even if that were the case, in circumstances where the employer was aware of the problem that some districts opposed female pastors, it could have done more to accommodate Makombe in the districts where the congregants would accept her. It did nothing.

[142] As it relates to the litany of grievances by Makombe, I have been guided by what the SCA stated in *Murray*:

> '[66] The trial court's judgment omitted to reach this conclusion because, in my respectful view, it fragmented each of the plaintiff's complaints, considering them one by one in isolation, concluding in relation to each that

they neither were pivotal to his resignation nor rendered his position intolerable. When one considers the case as a whole, however, the conclusion is hard to avoid that the navy breached its duty of fair dealing in the denouement of his acquittal in the second court-martial.

[143] Indeed, I considered Makombe's reasons for resigning one by one, but I concluded that Makombe was constructively dismissed, taking into account Makombe's entire employment with the Cape Conference. Even if I disregarded some of the grievances as having been the proximate cause of the resignation, the cumulative effect of the grievances was such that intolerability was established. The experiences in George were the last straw.

[144] In *Albany Bakeries Limited v Van Wyk and Others*[25] the Court made it clear that an employee must exhaust reasonable alternatives to resignation before resigning. In *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others*,[26] the Court stated the following:

> "Where it appears from the circumstances of a particular case that an employee could or should reasonably have channelled the dispute or cause of unhappiness through the grievance channels available in the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudiced against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in the circumstances."

[145] Makombe registered each one of her grievances with the employer. At one point, she obtained an interdict against the employer. She referred three disputes to the CCMA and acted reasonably in settling them rather than litigating, as the commissioner suggested she ought to have done. To label her a serial complainer, as the employer suggested, was unnecessary and unfair. She even hired an attorney

[25] (2005) 26 ILJ 2142 (LAC) at 2150C – E.
[26] (2008) 29 ILJ 356 (LC) at para 12.

to intervene on her behalf and negotiate with the employer to remedy the situation. None of these alternatives resolved the problem.

[146] The situation that Makombe found herself in, viewed objectively, she could not be expected to endure it any longer. The employer had demonstrated, over a period, that it was either unwilling or unable to address the challenge of congregants opposed to a female pastor. Even as a strong-willed employee who was not easily intimidated, everyone has a limit. She could not be expected to endure the intolerable conditions indefinitely, at the expense of her health, even if it meant ending up unemployed. A link has been established between the intolerable working conditions and Makombe's resignation. Makombe successfully discharged the onus and proved that she was constructively dismissed. The employer failed to prove that the dismissal was fair. The commissioner's decision to the contrary was wrong and is hereby reviewed and set aside.

Costs

[147] The Makombe seeks costs against the employer.

[148] The employer resists the order, relying on section 162 of the LRA, which provides that costs are awarded according to the requirements of law and fairness and Constitutional Court decisions that interpret the provision[27]. It further submits that it had a valid defence to Makombe's claim and successfully defended itself against the claim; therefore, there is no reason why it should be mulcted with a costs order. Instead, it is Makombe who must be ordered to pay costs for initiating a meritless review application, which the employer had to oppose.

[149] Makombe's submissions on costs relate to cost orders in CCMA proceedings. The correct test in this Court is that submitted on behalf of the employer.

[27] *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC) and *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC).

[150] Having considered the matter and my reasons for arriving at the conclusion I have, the employer must pay Makombe's costs. She has been successful in her review application. The treatment she received at the hands of an employer involved in the ministry, which subscribes to the ethos of care and compassion, is unfathomable. It folded its hands and allowed an employee that it employed to fend for herself under the guise that it could not tell congregants what to do. Makombe developed a medical condition as a result, and the employer showed no sympathy and compassion, instead choosing to regard Makombe as a serial complainer. Makombe has incurred extensive legal costs in pursuing this matter to its current stage. The compensation that I have awarded will be a drop in the bucket compared to the legal costs that she has incurred. A cost order, in accordance with the requirements of law and fairness in this matter, requires the employer to pay Makombe's costs on a party-and-party scale.

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

Order

1. The arbitration award issued under the auspices of the CCMA in case number WEGE30-21 is hereby reviewed and set aside and is substituted with an order that:

1.1 Lerato Makombe was constructively dismissed, and the dismissal was unfair.

1.2 The Cape Conference of the Seventh Day Adventist Church is ordered to pay Lerato Makombe compensation equivalent to 12 months' salary, hence (R21 368.00 x 12 =R256 416.00)

1.3 The compensation must be paid within twenty days of the date of this judgment.

2. The Cape Conference is ordered to pay Makombe's costs.

T. Gandidze

Acting Judge of the Labour Court of South Africa

Appearances:

For Makombe: Mr Clive Hendricks
Instructed by: Marais Muller Hendricks Inc

For the Respondent: Mr G. Cassells
Instructed by: Maserumule Attorneys