THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2196/18

In the matter between:

TISO BLACK STAR GROUP (PTY) LTD	**Applicant**
and	
KHANYISWA NDABENI	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
ERIC MYHILL N.O	**Third Respondent**

Enrolled: 12 August 2020

Delivered: 28 August 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 28 August 2020.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 4 October 2018 and issued under case number GAJB 12666-18 wherein the Third Respondent (the arbitrator) found that the First Respondent was able to

prove that she was constructively dismissed and ordered the Applicant to pay her compensation equivalent to 10 months' remuneration.

[2] The First Respondent (Respondent) opposed the application.

[3] This matter was enrolled for hearing on 12 August 2020. In accordance with the provisions of the 'Directive in respect of access to the Labour Court in light of the Covid-19 pandemic' dated 1 July 2020, which is applicable with effect from 6 July 2020 until the end of the third term, the Respondent agreed that this matter be disposed of without oral argument as the heads of argument filed are comprehensive. The Applicant requested a hearing to make oral submissions.

[4] I have considered the fact that the entire record of the proceedings was before me and that the parties filed comprehensive affidavits and written heads of argument, which were sufficient and comprehensive enough to consider the matter on paper. In my view there was no need for oral submissions in addition to what was placed before me.

The test on review

[5] The question in constructive dismissal cases is whether there was a dismissal or not. This has to be determined before the enquiry into the fairness thereof. The question whether a dismissal has taken place, goes to jurisdiction and this Court has 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].

[6] This Court has to decide whether the arbitrator was right or wrong and not whether the conclusion reached by the arbitrator is one that a reasonable decision maker could not reach.

[7] The question that this Court has to decide in view of the applicable test is whether the arbitrator correctly found that the Respondent was constructively dismissed.

Background facts

[1] (2007) 28 ILJ 2405 (CC) at paras 78 and 79.
[2] *SA Rugby (Pty) Ltd v SA Rugby Player's Association and Another* (2008) 29 ILJ 2218 (LAC), *MEC Department of Health Eastern Cape v Odendaal and Others* (2009) 30 ILJ 2093 (LC), *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC), *Majatladi v Metropolitan Health Risk Management and Others* (2013) 34 ILJ 3828 (LC).

[8] The Applicant is a media, entertainment and marketing communication group and it employed the Respondent as a reporter since 2006.

[9] The Respondent resigned on 4 May 2018 and subsequently referred an unfair dismissal dispute to the Second Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) where the issue to be decided was whether her resignation constituted a constructive dismissal and if so, whether it was fair. If the Respondent's dismissal was unfair, the arbitrator had to determine what the appropriate relief should be.

[10] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings.

The Respondent's case

[11] The Respondent testified that that Mr Monare, the managing director, said 'voetsek' to her and she asked for an apology, which she never received. In explaining the events that led to this, the Respondent testified that as a reporter she was working on a story in Pretoria. She used the Applicant's car and she parked illegally, which resulted in the car being towed away by the traffic police.

[12] The Respondent testified that if reporters used their own money for a story, they claim the money back from the Applicant. On 3 May 2018, when she went to Pretoria, she had used her money to pay for copies of court documents and at the time, she had two other claims outstanding where she was waiting to be reimbursed for money she had spent and claimed back.

[13] The Respondent's line manager was Ms Samantha Smith (Ms Smith) and when the Applicant's car was towed, Ms Smith was the first person she had reported it to. She had to make her way back from Pretoria to the Applicant's office in Parktown and she had used a taxi, bus and the Gautrain, for which she paid with her own money.

[14] The Respondent testified that when she had arrived back at the office, she was called into a meeting with the legal editor, Ms Susan Smuts (Ms Smuts), and informed that the Applicant was going to fine her for the car being towed away. She made it clear immediately that she was going to challenge it as another journalist did not pay. The Respondent admitted that she was in the wrong, but insisted that she used the car for a story and not her own personal

reasons. The Respondent's conduct irritated Ms Smuts and the Respondent said to her "*Since we are talking about money can I also have my money because the money that I used was money that I had set aside for my child's needs."* Ms Smuts responded that the Respondent has to wait, upon which she said that she has two other claims and she did not understand why she had to wait as she needed the money to buy things for her two-year old son.

[15] The Respondent testified that Ms Smuts went to the human resources department (HR) and she subsequently received an email from HR asking for her side of the story. She provided her version of the events to HR and she went home without money.

[16] The Respondent received a response from HR late that day and the email she had received, angered her because it was as if the Applicant did not care at all and the attitude was that she would get her money. For the Respondent, the issue was not about having the money, but rather about not knowing when she would get it and her version was that she needed it 'now' for her child. She took her child to school without nappies.

[17] The Respondent normally started to work at 09:00, but the next morning she received a call at 07:00 to go to Pretoria to fetch the car that was impounded. She was also told to submit her story. According to the Respondent this was not right and the Applicant did not care, she was '*gatvol'* and felt like she did not '*want anything to do with these people because they are not humans'* and she tendered her resignation letter. She resigned because she felt that *"…these people don't care. Why am I here?"* She was of the view that nothing was going to get better.

[18] The Respondent testified that after the commotion, the HR started to act and they informed her the next morning that *"we're going to try and solve this."* She explained that HR asked her to bring her invoices for the expenses that she incurred so that they could handle the issue. She went to the office of Mr Monare to collect the invoices as it was with him and he had told her to 'voetsek' and to get out of his office. She testified that she did not deserve 'voetsek' as HR was looking for the invoices to reimburse her and she merely went to collect them.

[19] After the 'voetsek' incident, she ran to HR to tell them that she could not get the invoices and she told them what had happened. The Respondent spoke to Ms Mothusi in the HR department, who told her to calm down and to wait for

HR to handle this. The Respondent went to Mr Sabelo Sikiti (Mr Sikiti), a staff representative and told him what had happened. She explained that she sat at her desk and nothing had happened. She had already submitted her resignation and she wanted an apology. She was angered by the fact that the Applicant did not care.

[20] On the Respondent's own version, she had resigned before Mr Monare had told her to 'voetsek'.

[21] The Respondent testified that she wanted an apology for the 'voetsek' as she was not a dog and she did not deserve that.

[22] She testified that Mr Bongani Siqoko (Mr Siqoko), the editor in chief of Sunday Times, had called her into a meeting and wanted to hear her side of the story and after she told him what had transpired, he gave her seven days to think about her resignation. She went home to think about it and after seven days, she said that she wanted a public apology in a loud voice from Mr Monare.

[23] Mr Monare did not apologise and after the expiry of the seven days, she told Mr Siqoko that if there was no apology, her resignation stands because she is not a dog. No apology came and she completed her one month's notice period and left the Applicant's employ.

[24] The Respondent testified that HR had told her to complete a grievance form as the Applicant has a grievance procedure, but her view was" *I'm like what was the point of doing a thingy where else we've been talking about these issues."* She explained that when she had submitted her resignation letter, the response from HR was for her to complete a grievance form but she did not because *"What was the point? I was leaving."*

The Applicant's case

[25] Ms Mothusi, the Applicant's HR manager, presented the Applicant's version of events as follows: On 3 May 2018, Ms Smuts came to HR to report that the car had been impounded and she asked for guidance from Ms Mothusi. It was around 16:00 and Ms Mothusi said that she was not able to assist without first hearing the employee's side of the story and she could not give advice based on assumptions. Ms Mothusi requested Ms Smuts to get a letter of explanation from the Respondent, which was done. Ms Mothusi was copied in on the email and a few minutes after it was sent, she responded to clarify to the

Respondent exactly what was needed from her was to understand her version of the events. Ms Mothusi made it clear that she would only be able to provide guidance once the Respondent's statement had reached her.

[26] The Respondent responded at 17:00 on 3 May 2018 stating that she wanted to understand if the Applicant intended to institute disciplinary action against her. She further indicated that she was told that she would have to pay a fine and she wanted to know when the money would be deducted from her salary so that she could prepare herself for that. The Respondent further recorded that another journalist who had the same experience, was not fined and was not disciplined and she wanted confirmation of this fact and why policies applied to some and not to others. In the response, the Respondent also raised the issue of money that she had used to copy files at the court in Pretoria and to pay for her transport back to the office, which was intended for nappies and formula for her child. She stated that it takes forever to get reimbursed for expenses incurred and that she had submitted a claim the week before that was not yet paid and she was required to stretch her money until month end.

[27] Ms Mothusi explained that when the Respondent had sent this email at 17:00, she had already left the office and she only attended to emails late at night. She responded to the Respondent's email at 21:54 and stated that it has not occurred to her that the issue would end up in any disciplinary action and that the Respondent was asked for her version of events to ensure that she was given a voice and to ensure a fair recommendation on the way forward.

[28] Ms Mothusi stated in her email that her recommendations are that it would be fair for the Respondent to be reimbursed for the expenses she had incurred for copying court files, that the Respondent and her line manager agree on the payment of the fine for the impounded car and that they follow up on the Respondent's claims for expenses.

[29] Ms Mothusi explained that after she had sent the email, she was of the view that the matter was closed and that the issues regarding the payment of the Respondent's claims would be sorted out.

[30] The next morning (4 May 2018) at 10:00, she however received a response from the Respondent, who stated that she was very disappointed to receive such a nonchalant response from HR and that the email should be considered the Respondent's notice to terminate her employment as she could not

continue to work for the Applicant for a list of reasons, *inter alia,* because she could not keep up to use her money for company related expenses and be reimbursed only when it suited managers, that male employees are treated differently, that she had been asked to file for Times Live, Times Select and Sunday Times without formal training and being paid for the other two titles, that the Applicant does not care for its black female employees and that white employees get preferential treatment.

[31] To this email, Ms Mothusi responded at 10:45 on 4 May 2018 and stated that the allegations made towards the Applicant and the Respondent's managers are very personal and serious and she asked whether those issues had been raised prior to the incident of the previous day. Ms Mothusi recorded that if not, *"please find attached a formal grievance form to enable us to address this".* Ms Mothusi invited the Respondent to formally address her concerns, without her resigning.

[32] To this, the Respondent replied at 10:47 with the question *"What will change now?".*

[33] This version of events was not disputed by the Respondent.

[34] Ms Mothusi explained that claims are paid a week after they get submitted as the Applicant pays claims once a week.

[35] Ms Mothusi referred to an email that the Respondent had sent to Mr Monare at 16:00 on 3 May 2018, wherein she referred to a claim she had put in the previous week and the fact that she had used her money on 3 May 2018 for work related expenses, which money was set aside for her child's nappies and formula. She stated that she did not have a cent and was going home without milk for her child and she asked him to treat this urgently as she needed to have something for her child.

[36] At 17:00 Mr Monare responded *"Apologies for the inconvenience and that you have to resort to this email in desperation. As long as you understand that no one is sitting idling and deliberately refuses or fail to sign invoices."*

[37] At 17:17 the Respondent replied and stated that she urgently needed money for nappies and formula milk and asked if there was petty cash that she could get for what she had spent on the day. She stated that she would suffer

"tonight and tomorrow at school as the school does not take learners without nappies to use during the day."

[38] At 17:19 Mr Monare responded: *"I do understand and apologies again. I have just signed your invoices."*

[39] The Respondent replied to this on 4 May at 13:58 *"I have been told that you are yet to sign my invoice, I am now confused. As said I really need that money at least today."* Mr Monare responded and asked the Respondent to stop it as he signs dozens of invoices every day and he could not continue to respond to such emails.

[40] After this, the Respondent took up the issue regarding the money with Ms Mothusi. Ms Mothusi called her and asked for her receipts as she was going to handle the issue of the outstanding claims for the Respondent. Ms Mothusi explained that she was under the impression that the Respondent had the receipts or copies of the receipts which she could bring to her to handle the issue, but instead she went to Mr Monare's office to collect it. This was when the alleged 'voetsek' incident happened.

[41] After the aforesaid incident, the Respondent came to Ms Mothusi and she told her what had happened, where after Ms Mothusi took her into a room and asked her to calm down and to allow her to deal with the matter. She asked the Respondent to stop with her emails and to stop upsetting people.

[42] Ms Mothusi explained that the Respondent was given seven days of to think about her resignation and even after the Applicant tried to give her time off, to allow her time to calm down and to resolve her issues, she persisted with her decision to resign.

[43] This version was also not disputed by the Respondent. She confirmed that had Mr Monare apologised to her during the seven-day period, she would have withdrawn her resignation.

[44] Ms Mothusi submitted that the Respondent's resignation was not a constructive dismissal because she (Ms Mothusi) was willing to address the issues, the Applicant afforded the Respondent an opportunity to think about her decision, after tempers cooled down, she was given an opportunity to file a grievance, but she declined, she served 30 days' notice and the environment was not intolerable to justify a claim for constructive dismissal. Furthermore, if

the environment was intolerable, an apology could not have resulted in the withdrawal of a resignation.

Analysis of the arbitrator's findings and grounds for review

[45] In his analysis of the evidence, the arbitrator recorded that the onus was on an applicant in a constructive dismissal dispute to show that he or she was constructively dismissed and that this was not an easy task. He also referred to the relevant authorities and the three requirements that must be present before it could be said that a constructive dismissal has been established.

[46] The arbitrator found that the Respondent was able to prove that the conduct of the Applicant's management on 3 May 2018 made continued employment intolerable and that she was constructively dismissed.

[47] The gist of the Applicant's grounds for review is that the arbitrator failed to apply his mind to the evidence, that he had considered the evidence in an irrational manner and as such committed a gross irregularity which resulted in him reaching an incorrect decision.

[48] Before considering the merits of the Applicant's case, it is necessary to set out the principles and the legal test to be considered and applied in constructive dismissal cases.

Constructive dismissal: the legal principles

[49] Section 186(1)(e) of the Labour Relations Act[3] (LRA) 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.

[50] Where an employee claims constructive dismissal, the onus is on the employee to prove that the resignation was not voluntary and that 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.

[3] Act 66 of 1995, as amended.

[51] This Court has previously considered what an employee must prove to claim constructive dismissal namely that[4]:

51.1 He or she terminated the contract of employment;

51.2 Continued employment became intolerable for the employee;

51.3 The employer must have made continued employment intolerable.

[52] I will deal with these requirements in turn.

The employee terminated the contract of employment

[53] The Labour Appeal Court (LAC)[5] made it clear that employees claiming constructive dismissal must prove that they, and not their employer, terminated the contract of employment.

[54] 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.

[55] In *Pretoria Society for the Care of the Retarded v Loots*[6] *(Pretoria Society),* the LAC 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.

[56] In *Strategic Liquor Services v Mvumbi N O and Others*[7] 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.

[4] *Eagleton and Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) at para 22.
[5] *Solid Doors (Pty) Ltd v Theron* (2004) 25 ILJ 2337 (LAC).
[6] (1997) 18 ILJ 981 (LAC).
[7] (2009) 30 ILJ 1526 (CC) at para 4.

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

[58] In *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others*[8] the Court expressed the view that it was doubtful that the strict test namely that the 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*[9].

[59] In *Asara*[10] 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.

[60] In my view, the position is this: the employee needs not to 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

[61] In *Pretoria Society*[11] the Court 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.

[62] The operative word is *'intolerable'*.

[63] 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[12].

[64] The test remains that the conduct of the employer must be judged objectively[13]. The subjective apprehensions of an employee cannot be a final determinant of the issue. In *Smithkline Beecham (Pty) Ltd v CCMA and*

[8] (2012) 33 ILJ 363 (LC).
[9] Id n 7.
[10] Id n 8.
[11] *Supra* n 6.
[12] Law @ Work, Van Niekerk et al, 2008, p 213.
[13] *Smithkline Beecham (Pty) Ltd v CCMA and Others* (2000) 21 ILJ 988 (LC).

Others[14] 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 LRA.

The employer must have made continued employment intolerable

[65] 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.

[66] In *Pretoria Society*[15] the LAC 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.

[67] In *Murray v Minister of Defence*[16] 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:

> '[13]…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.'

[14] (2000) 21 ILJ 988 (LC).
[15] *Supra* n 6.
[16] 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA).

[68] In *Jordaan v CCMA and Others*[17] the LAC 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.'

[69] In *Murray*[18] 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.

[70] 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.

[71] In my view, this touches on another important and relevant aspect namely whether the employer was aware of the alleged intolerable conditions and was afforded an opportunity to address and rectify it.

[72] In *Smithkline*[19] the 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.

[73] In *Kruger v CCMA and Others*[20] the employee did not follow a grievance procedure as she believed that the grievance procedure was no longer an option. 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

[17] (2010) 31 ILJ 2331 (LAC) at page 9 of the judgment.
[18] Id n 16.
[19] *Supra* n 14.
[20](2002) 23 ILJ 2069 (LC), (2002) 11 BLLR 1081 (LC) at para 28.

> 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.

[74] The judgment in *Kruger*[21] supports the notion that an employee cannot resign and claim constructive dismissal while other options are available. As I have already alluded to, the test is whether a reasonable alternative existed.

[75] In *Albany Bakeries Ltd v Van Wyk and Others*[22] the LAC 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.'

[76] It is within this context that the arbitrator's findings stand to be determined.

The arbitrator's findings

[77] The arbitrator recorded the correspondence exchanged on 3 May 2018 between the Applicant's management and the Respondent, which preceded her letter of resignation on 4 May 2018.

[78] The arbitrator also recorded the reasons for the Respondent's resignation, as contained in her letter of 4 May 2018.

---

[21] Ibid.
[22] (2005) 26 ILJ 2142 (LAC) at para 14.

[79] He found that despite Mr Monare's apologies for the fact that the Respondent was not reimbursed for her previous expenses for which she had submitted a claim, there was no response from him with regard to the financial crisis faced by her on that day (3 May 2018). The arbitrator found that appealing to Mr Monare for help was the Respondent's last resort as she had not received any assistance from her line manager or HR. He did not respond to her legitimate question of whether there was petty cash that could be used to assist her on that day. The arbitrator found that the Respondent was not asking for charity, but just to be reimbursed on that day for the expenses she had incurred on the day as part of work related expenses. Her plea fell on deaf ears and she went home without any money to feed her child and to buy nappies.

[80] The arbitrator found that in addition to failing to respond to her immediate financial plight, management added to the Respondent's burden by informing her that she would have to pay the fine imposed by the authorities for parking the Applicant's car illegally.

[81] The arbitrator further found that the Respondent had good cause to be of the view that management did not care about her, based on the way she was treated on 3 May 2018 and that it was not surprising that she had tendered her resignation the next day. He found that the Respondent's lack of confidence in the Applicant's management was objectively justified as her legitimate needs and objections were not taken seriously.

[82] The arbitrator rejected the Applicant's argument that there was no constructive dismissal because the Respondent continued to work her months' notice period and because she declined to follow a grievance process. He accepted that the Respondent is a single mother and that she had to work her notice period for financial reasons.

[83] The arbitrator found that although no evidence was adduced by the Respondent to show that she had submitted previous grievances and that nothing was done about it, he accepted that she was justified in her belief that the Applicant's management would not reform in the way that they treated her. If the Applicant could not come to the Respondent's assistance in such dire circumstances as those that she had experienced on 3 May 2018, why would they do so if she had lodged a grievance and in any event, her immediate problem would not have been solved by lodging a grievance. He found that the Respondent did not have the option of lodging a grievance.

[84] The arbitrator found that the Respondent was able to prove that the conduct of the Applicant's management on 3 May 2018 made continued employment intolerable and that she was constructively dismissed.

Applying the law to the facts

[85] The Applicant's case on review is that in light of all the evidence that was before the arbitrator, the only decision that he could have reached was that the Respondent had failed to prove that the Applicant had rendered continued employment intolerable and that she was constructively dismissed. The arbitrator was wrong in finding that the Respondent was constructively dismissed, notwithstanding clear evidence to the contrary.

[86] The Respondent bore the onus to prove all the elements of constructive dismissal to succeed with her claim. She had to prove that she terminated the contract of employment, that continued employment became intolerable and that it was the employer that made continued employment intolerable.

[87] It is common cause that the Respondent had resigned and what remained for the arbitrator to consider, was whether the employment relationship was made intolerable by the Applicant.

[88] The arbitrator found that the Respondent was able to prove that the conduct of the Applicant's management on 3 May 2018 made continued employment intolerable and that as a result thereof, she was constructively dismissed.

[89] This finding automatically limits the facts to be relied upon and which could be considered to prove the intolerability of employment to the events of 3 May 2018.

[90] The events of 3 and 4 May 2018 are common cause to a large extent and it is evident that the events that led to the Respondent's resignation, were kicked into motion after the Respondent parked the Applicant's car illegally in Pretoria and it was impounded by the traffic police. This caused the Respondent to incur unplanned expenses to pay for a bus, taxi and the Gautrain to get back from Pretoria to the Applicant's offices in Johannesburg.

[91] The expenses so incurred for transport, resulted in the Respondent being without money and being unable to buy nappies and formula milk for her child, as she had used the money she kept aside to pay for transport. This obviously caused a feeling of desperation and frustration on the part of the Respondent.

[92] It was not disputed that the Applicant has a process in place to reimburse employees for expenses they incur as part of their job in that the employees submit claims, which are paid the next week. It was also not disputed that the Respondent was waiting for payment of a claim from the previous week.

[93] The Applicant was desperate for money on 3 May 2018 and because it was not paid to her immediately as per her request, the arbitrator found that it was not surprising that she tendered her resignation the next day.

[94] The question that the arbitrator had to ask and consider, was whether the events of 3 May 2018 rendered continued employment intolerable and whether it was the Applicant that made continued employment intolerable.

[95] It is evident from the arbitration award that the arbitrator attached great weight to the urgency and seriousness of the Respondent's financial plight on 3 May 2018, but he had lost sight of the issues he had to determine and the test he had to apply. He had to consider whether continued employment became intolerable, not whether the desperation and plight of not having money on a particular date was intolerable.

[96] Intolerability is not established by the employee's say-so, perception or state of mind, but it is the conduct of the employer viewed in an objective sense.

[97] Although I accept that the situation which the Respondent found herself in on 3 May 2018, was desperate and frustrating, the arbitrator had to take a step back and consider, in an objective sense, whether it caused her continued employment with the Applicant intolerable.

[98] The arbitrator also had to consider whether the Applicant caused continued employment intolerable. It is evident that the events of 3 May 2018 were not caused by the conduct of the Applicant, but that they were triggered by the fact that the Respondent parked the Applicant's car illegally, that the car was impounded and that she had to incur unplanned expenses on transport to get back to the office. The fact that she was told that she had to submit her claim and wait for the claim to be processed and paid or the fact that she would be required to pay the fine for the impounded car, did not cause her to be without money on 3 May 2018 and cannot objectively be regarded as 'intolerable'. Even the fact that the Respondent was waiting for a claim from the previous week to be paid to her, was not the cause of her desperation or the reason

why she had to spend the money she had put aside to buy nappies and formula milk for her son.

[99] The Respondent found herself in a desperate situation because of the fact that the car was impounded and she had to make use of alternative transport to get back to the office. These circumstances were not caused by the Applicant and it certainly did not render continued employment intolerable.

[100] The arbitrator further lost sight of the fact that when the Respondent tendered her resignation, she listed a number of issues, unrelated to the events of 3 May 2018 and which she never brought to the Applicant's attention.

[101] It is evident from the transcript that the Applicant was willing to assist the Respondent, Ms Mothusi undertook to sort out the payment of her claims and the Respondent was invited to lodge a grievance. Instead of affording the Applicant an opportunity to address the issues, the Respondent resigned.

[102] The Courts have 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 have already alluded to the test that this Court has to apply, which 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.

[103] The arbitrator was well aware of the fact that this is the position, as he had mentioned it is his award, but he found that because the Applicant would not come to the Respondent's assistance in dire circumstances, they would also not do so when she lodged a grievance. This finding is based on nothing but an unfounded assumption and a misguided speculation. It was not a reasonable assumption and was not substantiated by any facts.

[104] The LAC made it clear that an employee should make use of alternative remedies which include an internal grievance procedure. It was not for the arbitrator to jump to the conclusion that because the Respondent was not given money on 3 May 2018, the Applicant would not come to her assistance if she lodged a formal grievance.

[105] The Applicant undertook to resolve the Respondent's issues and invited her to file a grievance, which she should have done and wherefore she had a reasonable alternative.

[106] In *Pretoria Society*[23] the LAC 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.

[107] The transcribed record placed before me shows that the Applicant was unaware of the Respondent's issues and when she raised it in her letter of resignation, made an effort to address her issues. In respect of the reimbursement of her expenses, the Applicant has a procedure for claiming and reimbursing employees and the mere fact that the Respondent was not reimbursed on the same day and incurred the expenses, does not render the employment relationship intolerable. *In casu,* the Respondent resigned before affording the Applicant an opportunity to address her issues.

[108] I am not convinced that the Applicant had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship with the Respondent. The Applicant's conduct, judged as a whole, was not such that the Respondent could not reasonably be expected to put up with it. The Applicant's dire need for money on 3 May 2018 was an isolated incident, caused by the fact that the Respondent had to use her money for an unplanned transport expense. The Applicant was the very next day (4 May 2018) in the process of assisting the Respondent with her claims and without lodging a grievance and without affording the Applicant an opportunity to assist her and to address her issues, she resigned.

[109] There was a perfectly legitimate avenue open to alleviate the Respondent's distress and to solve her problem, instead she resigned. Her resignation was premature and did not constitute a constructive dismissal.

[110] It is peculiar that in her testimony, a great part of her evidence revolved around her unhappiness with the fact that Mr Monare told her to 'voetsek' and

[23] *Supra* n 6.

even in the arbitration proceedings, she wanted an apology for that. She stated that if Mr Monare apologised in public to her, she would have withdrawn her resignation. This evidence was vital to show that the Respondent was aggrieved by an alleged incident that occurred after her resignation and for which, if an apology was tendered, she would have withdrawn her resignation. This certainly raises questions as to the intolerability of the continued employment relationship, as it appears that the Respondent wanted an apology and had she received an apology for something that was not the cause of her resignation, she would have withdrawn the resignation and the employment relationship would have carried on as a tolerable one. This was indeed a material fact which the arbitrator had not considered.

[111] This is a case where the Respondent found herself in a desperate and frustrated position on 3 May 2018. However, to establish constructive dismissal, it is not sufficient to show that working conditions or the nature of the work are so stressful, unpleasant or untasteful that resignation is justified. More is needed. The unpleasant or challenging nature of a specific industry cannot be considered as the single determining factor. To do so would open the floodgates for every resignation in an unpleasant or challenging industry to be challenged as a constructive dismissal where the employer is not to blame, but rather the inherent nature of the specific industry. The conduct of the employer must be considered objectively and holistically and the employer must be responsible and culpable for creating intolerable circumstances.

[112] In my view, the arbitrator adopted a subjective test when he assessed the Respondent's feelings of desperation and he never assessed whether continued employment would be objectively unbearable.

[113] In applying the applicable principles, I am not persuaded on the objective facts that the Respondent in fact discharged to onus of proving a constructive dismissal and therefore her claim has to fail.

Relief

[114] This leaves the issue of relief.

[115] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that the Respondent was not constructively dismissed, alternatively for the matter to be remitted for a determination *de novo.*

[116] In the event that the arbitration award is set aside on review, this Court has a discretion whether or not to finally determine the matter. The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.

[117] The principles had been set out by the LAC in *Palluci Home Depot (Pty) Ltd v Herskowitz*[24] as follows:

> 'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is "in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination by a court of review of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.'

[118] *In casu,* the Court has the entire record before it and is well-placed to make a decision on the merits and to decide and finally determine the matter on the record as it is before me and where the parties' cases were fully ventilated.

[119] On a consideration of all the facts before the arbitrator at the time, it is evident that the Respondent was not constructively dismissed and the arbitrator was wrong in finding that she was able to prove that she was constructively dismissed.

[120] In the circumstances, it follows that the arbitration award ought to be set aside, and I am satisfied that upon the material that was placed before the arbitrator, this Court is in a position to substitute that award. No purpose would be served by remitting the matter back to the CCMA for reconsideration. It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as that would undermine one of the key objects of the LRA namely expeditious dispute resolution.

Costs

[121] This Court has a wide discretion in respect of costs.

[24] (2015) 36 ILJ 1511 (LAC) at para 58.

[122] This is a matter where ultimately the arbitrator got it wrong and the Respondent was entitled to defend an award issued in her favour by opposing the application and she should not be punished for doing so. In my view, the interest of justice will be best served by making no order as to cost.

[123] In the premises, I make the following order:

Order

1. The arbitration award dated 4 October 2018 and issued under case number GAJB 12666-18 is reviewed and set aside;

2. The arbitration award is substituted with the following:

   'i. The Applicant (First Respondent) was not constructively dismissed;

   ii. The Applicant's case is dismissed.'

3. There is no order as to costs.

_____

Connie Prinsloo

Judge of the Labour Court of South Africa

Representatives:

For the Applicant: Edward Nathan Sonnenbergs Inc Attorneys

For the First Respondent: Narain Attorneys