STEENKAMP J

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Reportable
Case No: C1025/09

In the matter between:

VALUE LOGISTICS LIMITED	Applicant
and	
PETRUS JOSEPHUS WILHELMUS BASSON	First Respondent
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY	Second Respondent
GAIL McEWAN N.O.	Third Respondent

Date of hearing: 17 May 2011

Date of judgment: 26 May 2011

JUDGMENT

STEENKAMP J

Introduction

1. This application for review raises the question when an employee can be held to be constructively dismissed, and when an employer can be said to have made continued employed "intolerable" as envisaged by section 186(1) (e) of the Labour Relations Act[1] ("the LRA").

2. The applicant, Value Logistics Ltd, seeks to have an arbitration award ("the award") handed down by the third respondent, Commissioner Gail McEwan ("the Commissioner") under the auspices of the second respondent, the National Bargaining Council for the Road Freight Industry ("the Bargaining Council") on 7 November 2009 reviewed and set aside in terms of the provisions of section 145 of the LRA.

Synopsis of material facts

3. The Applicant conducts the business of logistics and warehousing for its customers.

4. The First Respondent, Mr Pieter Basson ("Basson") commenced employment with the Applicant on 4 September 2006 as its Regional Human Resources Manager for the coastal regions of Western Cape, Eastern Cape and Kwa-Zulu Natal. At the time of his dismissal, Basson

1 66 of 1995.

reported directly to Ms Ruth Sibisi ("Sibisi"), the Applicant's Senior Human Resources Manager. Before Sibisi's appointment, Basson reported to Ms Vanessa Morais ("Morais"), the Applicant's Divisional Director: Human Resources. Sibisi and Morais were based in Johannesburg and Basson was based in Blackheath, Cape Town.

5. Basson was not coping with his workload. For example, when he returned from leave on 29 January 2009, he was told that 40 drivers had to be hired by 6 February 2009. He found this impossible to do.

6. On 14 April 2009, Morais removed the Kwa-Zulu Natal coastal region from his responsibilities. The applicant submitted that the intention behind this was to enable Basson to focus on the Western and Eastern Cape coastal regions, as he was not coping with his workload. Notwithstanding the reduction in his workload, Basson failed to meet his required deliverables. Morais and Sibisi addressed Basson's poor performance with him informally. It is common cause that no formal performance counseling sessions culminating in a written record were held. Conflict ensued between Basson on the one hand and Sibisi and Morais on the other hand.

7. On 13 May 2009, an unprotected strike commenced at the Applicant's premises in Cape Town. Sibisi flew to Cape Town to assist Basson with

the handling of the strike. Employees of the Applicant (including Basson) were all called upon to work long and difficult hours during the strike.

8. Following the strike, Basson was booked off work for medical reasons for the period 18 May 2009 to 29 May 2009. He faxed a medical certificate to the Applicant on Sunday 17 May 2009. The nature of his illness was indicated as "uitputting, spanning" [exhaustion, stress].

9. Basson did not contact either Morais or Sibisi to do a telephonic handover of the urgent work he was responsible for. He denied that there was any obligation on him to do so and submitted that, due to his stress and exhaustion, he was unable to do so.

10. Because Basson had not contacted Morais or Sibisi, they did not know what work needed to be attended to during his absence. On Monday 18 May 2009, Morais made several attempts to contact Basson telephonically. Morais finally managed to speak to Basson's wife who informed her that Basson had gone to the family farm outside Robertson to rest and that cellphone reception was patchy and intermittent. Morais then sent Basson a sms message requesting that he contact her urgently. Basson received Morais's sms message at approximately 15h30. He phoned her at approximately 17h00. At this time Morais informed him

that she had already taken steps to oversee his functions. She explained that, as she was unable to contact Basson during the course of the day on Monday 18 May 2009 to ascertain what work needed to be attended to, she had arranged for Basson's office to be opened and all the documentation therein to be couriered to her in Johannesburg so that she could attend to Basson's unresolved work and oversee his functions.

11. On 25 May 2009 (a week earlier than initially indicated), Basson returned to work. He contacted Morais to inform her of his return and that there was no paperwork in his office. Morais explained that she had been overseeing his work in his absence and therefore she was in possession of his paperwork. As Basson had been booked off work for two weeks, Morais requested that Basson consult with his doctor before returning to work to ensure that he was fit to resume his duties. Basson agreed to do so. Thereafter Basson remained off work until 1 June 2009.

12. On 1 June 2009, Basson finally returned to work. On his return, Morais gave him a letter setting out the implications and consequences of his failure to conduct a telephonic handover. Morais explained that, while the company respected his entitlement to sick leave, she was concerned that he had not contacted her or Sibisi; and that matters that were unresolved or unattended as a result, had caused her as divisional HR manager a great deal of stress and embarrassment.

13. One of Basson's duties was to provide Sibisi with monthly reports pertaining to his duties. According to the applicant, Basson was consistently late with such reports and when reports were submitted on time the reports were incorrect and/or incomplete. However, it appears from Basson's answering affidavit that the report was only late twice. Basson further alleged that reports were in fact handed in on time, but the format kept changing; however, the emails he relied on to prove this allegation which were attached to his answering affidavit, were not submitted at arbitration and did not form part of the evidence before the Commissioner.

14. On 11 July 2009, Sibisi telephoned Basson. She says that she addressed his poor performance with him on this occasion. He denies it, and says that she phoned him and made "certain cryptic remarks about my family and my health". At the arbitration, he testified that Sibisi told him that his family needed him and that he was "more important alive than not being there at all." He said that he did not know what to make of that at the time. Sibisi testified at the arbitration that she telephoned Basson on 11 July 2009 as she was getting very frustrated about the late submission of monthly reports; that his work was deteriorating to a point that was becoming embarrassing for her; and that he had to improve, especially since the pressure of the KwaZulu-Natal region had been taken away

from him. Basson did not cross-examine her on that evidence.

15. On 15 July 2009, while Basson was on his way from a meeting in Killarney Gardens, Sibisi phoned him again. According to him, she was shouting and screaming at him and called him a "stupid idiot". She complained about delays in an interviewing process and certain appointments. Sibisi confirmed the telephone call and her complaints; she explained that she was getting very frustrated and that Basson was not managing the region properly. She denied calling him a "stupid idiot" or swearing at him. Instead, she said that she informed him that she felt he was not working with her and that she was concerned that he was not giving her any feedback. According to her, Basson failed to provide any satisfactory explanation for his poor performance, his failure to meet deadlines or his failure to communicate with her.

16. On the same day, 15 July 2009, Basson handed in a letter of resignation, effective 31 August 2009. His resignation letter stated, *inter alia*, that his resignation was "due to continuous unfair and extreme pressure" which allegedly caused his health to deteriorate and also had a negative impact on his personal and family life. He simultaneously applied for leave for the period 17-31 August 2009. He submitted his leave form, pension fund withdrawal notification and exit interview questionnaire with the resignation letter.

17. Later on 15 July 2009, Sibisi contacted Basson telephonically to discuss his progress on recruitment and the HR Monthly report that was due on 25 April 2009 but which Basson had failed to complete properly. During this telephone conversation, Sibisi asked Basson why he had resigned and stated that she did not like having to constantly "fight with him" due to his failure to meet his deliverables. Basson testified that she apologised for the way she had spoken to him earlier in the day, adding that "we are all under stress and under pressure." Basson was meant to go to Johannesburg the next day, but Sibisi told him not to go, as he had already handed in his resignation. Basson also telephoned Morais that evening. According to Basson, Morais said to him, "your family needs you more now and that is ultimately why I resigned".

18. The applicant formally accepted Basson's resignation on 16 July 2009 and acceded to his request that he be granted leave from 18 to 31 August 2009, despite the fact that it was part of his notice period.

19. On 20 July 2009, Basson sent an e-mail to the applicant stating that he wished to withdraw his resignation. The attached letter, in the form of a memorandum on a Value Logistics letterhead and addressed to Morais and copied to three others, reads as follows:

"Dear Vanessa,

My resignation dated 15th July 2009 refers and I would like to withdraw such resignation with immediate effect and I would like to bring the following under [*sic*] your attention as support to such withdrawal, re:

1. During my employment period at the Company, I have given my best and total commitment to my roles and responsibilities and have in several instances went [*sic*] beyond the call of duty to put the Companies [*sic*] interest first and as a priority.
2. I have been under tremendous pressure lately due to the workload and I have realized that because of the workload that I could not get through everything on time as I previously were [*sic*] able to do so, and this is the reason my performance and service delivery to you and the Company has been compromised.
3. On Wednesday 15th July 2009 I got a telephone call from Ruth Sibisi where again I was humiliated, belittled and made to feel worthless which resulted in the irrational decision to rather resign.
4. After given [*sic*] a lot of thought to the matter and discussing such resignation with some of my colleagues, and coming across the following quote, re: 'The

spirited horse, which will try to win the race of its own accord, will run even faster if encouraged.'

5. I realized that I am not worthless and cannot just give up my responsibilities. I have previously added Value to the Group and I know I still can be of further value to the team and the Group and therefore wish to withdraw my resignation and possibly be afforded the opportunity, with some form of support and assistance, to again be able to make a sustainable difference.
6. I will accept whatever decision you make, however should it be appositive [*sic*] decision also be afforded the opportunity to meet with you in person to discuss my responsibilities and how I can/should reach such goals.

I am looking forward to your soonest response and should there be any further questions and or uncertainties, please contact the writer.

Thank you & kind regards,

Pieter JW Basson

Regional HR Manager

(Western Cape; Eastern Cape)."

20. During the arbitration, Basson testified that he had said to his wife, "Maybe I just reacted a little too quick as a last resort, maybe I must go

back and maybe we must try and sit and talk around the table about it" – hence his attempt to withdraw the resignation. However, Morais informed Basson that the Applicant was not prepared to consider the withdrawal of his resignation.

21. On 27 July 2009, Basson was booked off work on sick leave for the duration of his notice period. The nature of illness on the medical certificate was indicated as "persoonlik" ["personal"]. On 28 July 2009, Morais requested that Basson specify the nature of his illness. Basson refused to do so. Notwithstanding this, his sick leave was processed.[2]

22. On 1 August 2009 Basson referred a dispute to the CCMA for conciliation. Basson's referral form stated that the nature of the dispute was an unfair labour practice, unilateral change to the terms and conditions of his employment, unfair discrimination, and automatically unfair dismissal. Basson summarised the dispute as "[u]nfair working conditions that lead to humiliation, belittlement and unfair victimisation which led to forced dismissal without any corrective measures taken by the company".

23. The matter was unresolved at conciliation and a certificate of outcome to

2 In any event, as the Labour Appeal Court held in *Mgobhozi v Naidoo NO and Others* (2006) 27 *ILJ* 786 (LAC); [2006] 3 BLLR 242 (LAC), the mere submission of a 'medical certificate' is not conclusive evidence regarding the absence. The certificate, in the absence of an additional statement by the medical doctor, will be regarded as a form of hearsay evidence within the context of the Law of Evidence Amendment Act 45 of 1988. The employer is legally justified to scrutinize the 'wide and vague symptoms/reason' contained in the medical certificate.

this effect, dated 15 September 2009, was issued. Basson abandoned his claim that he was victimised and confirmed that the only dispute he was pursuing was in terms of section 186(e) of the LRA. Basson claimed that he was left with "no choice but to resign."

The arbitration

24. The arbitration was held on 3 November 2009. Sibisi represented the Applicant and Basson represented himself.

25. At the conclusion of the arbitration, Basson handed a bundle of documents to the Commissioner. She accepted such documents into evidence without providing Sibisi with a copy thereof. No evidence was led on the documents.

The arbitration award

26. The Commissioner found that Basson was constructively dismissed due to the "oppressive and unreasonable work environment" created by the Applicant which left Basson with "no alternative" other than to resign. She awarded Basson compensation equivalent to five months' remuneration, amounting to R180 739, 45.

27. The applicant submitted that the Commissioner's finding that Basson had "no alternative but to resign" in the face of:

27.1 Basson's attempt to withdraw his resignation;

27.2 Basson's evidence that he did not pursue a grievance because he felt it was unnecessary; and

27.3 Basson's evidence that he felt that he and Morais could discuss his employment if he were allowed to withdraw his resignation;

was not a finding that a reasonable Commissioner could or would have made.

Applicable legal framework

The Law on constructive dismissal

28. Section 186(1) (e) of the LRA defines a constructive dismissal. The section states that:

> "Dismissal means that –
> an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".

29. The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots*[3]. Although that case was decided under the 1956 LRA, the principles remain the same. In *Loots,* the court held that:

> "…the enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer

3 (1997) 18 *ILJ* 981 (LAC) at 985 A-B. See also *Woods v WM Car Services (Peterborough)* (1981) ILR 347 at 350.

> 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".

30. The court held further that when an employee resigns or terminates the contract of employment as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties.[4] The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves that his/her fears were unfounded, then he has not been constructively dismissed and his/her conduct proves that he has in fact resigned.

31. The Constitutional Court recently remarked in *Strategic Liquor Services v Mvumbi NO and Others*[5] 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 Id at 984 D-E
5 (2009) 30 *ILJ* 1526 (CC); [2009] 9 BLLR 847 (CC) at para 4.

32. In *Eagleton and Others v You Asked Services (Pty) Ltd*[6] this Court considered the three requirements that an employee must prove in order to claim constructive dismissal. These requirements are that:

32.1 the employee terminated the contract of employment;

32.2 continued employment had become intolerable for the employee; and

32.3 the employer must have made continued employment intolerable.

33. In *Chabeli v Commission for Conciliation, Mediation and Arbitration and Others*[7] the court held that in order to prove a constructive dismissal, the employee has to show that the employer had made the continued employment relationship intolerable and that, objectively assessed, the conditions at the workplace has become so intolerable that he had no option but to terminate the employment relationship.[8] I doubt that this strict test survives the formulation by the Constitutional Court in *Strategic Liquor Services (supra).*

34. In *Murray v Minister of Defence*[9] cited with approval by the Constitutional Court in *Strategic Liquor* Services, the Supreme Court of

6 (2009) 30 ILJ 320 (LC) at para 22.
7 (2010) 31 ILJ 1343 (LC).
8 Id at para 17. See also *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO and Others* (1998) 19 ILJ 1240 (LC) and *Secunda Supermarket CC t/a Secunda Spar and Another v Dreyer NO and Others* (1998) 19 ILJ 1584 (LC); [1998] 10 BLLR 1062 (LC).
9 (2008) 29 ILJ 1369 (SCA) at para 13. The position of the SCA was confirmed in the case of *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 575 (LC) at paras 27 and 40.

Appeal emphasised that

> "...the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonable 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'".

35. The Labour Court in *Eagleton and Others v You Asked Services (Pty) Ltd,* noted that in terms of section 192(1) of the LRA, the employee bears the onus to prove a 'dismissal'.[10] Only once this is done does the employer bear the onus to prove that the dismissal was fair.[11] In particular, in a constructive dismissal, the court held that it was essential that the employee should make a factual allegation that he had resigned.[12] Thus, a constructive dismissal is a two stage enquiry.

36. In the same case, the court considered whether an employee was automatically entitled to the relief provided for in the LRA once

10 (2009) 30 ILJ 320 (LC) at para 25. See also *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at page 983; *Halgreen v Natal Building Society* (1986) 7 ILJ 769 (IC) at 775D-776I; Grogan *Riekert's Basic Employment Law* 2 ed (Juta, 1993) at 69; PAK le Roux & Andre van Niekerk *The SA Law of Unfair Dismissal* (Juta & Co, 1994) at 84; *Khonjelwayo and Nura Powering Opportunity* (2009) 30 ILJ 2186 (CCMA) at para 19.
11 Id at para 25.
12 Id at para 25.

constructive dismissal had been proved. The court held that "proving a constructive dismissal merely proves that there has been a 'dismissal' as contemplated by s 186 of the LRA. Once a dismissal has been proven the enquiry will proceed to the second stage which is a consideration of the 'fairness' of the dismissal."[13] As such, the court found that an applicant is not entitled to claim compensation once he has established the existence of a 'dismissal'.[14] Rather, an employee will only be entitled to compensation once it is found that the constructive dismissal was also unfair.[15] Resignation in the face of poor performance management does not give rise to a constructive dismissal claim.

The test for review of arbitration awards

37. Section 145 of the LRA provides that an arbitration award is reviewable if:

37.1 The Commissioner committed misconduct in relation to his/her duties as an arbitrator; or

37.2 The Commissioner committed a gross irregularity in the conduct of the arbitration proceedings; or

37.3 The Commissioner exceeded his/her powers; or

37.4 The award was improperly obtained.

13 Id at para 34.
14 Id at para 35.
15 Id at para 35.

38. The Constitutional Court, in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[16] has now held that the review grounds set out in section 145 have been suffused by the standard of reasonableness, and that an award is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not have reached.

Unreasonableness

39. The court in *Sidumo* confirmed that an award which is being reviewed under section 145 of the LRA would also have to meet the standard of reasonableness as set out in section 33 of the Constitution.[17]

40. Section 33 of the Constitution[18] substituted the formula of justifiability contained in the Interim Constitution[19] with a right to reasonable administrative action. The Constitutional Court, in *Minister of Health v New Clicks South Africa (Pty) Ltd,*[20] has said that this requires a more thorough scrutiny than would have been competent under the Interim Constitution. As such, the threshold of reasonableness incorporates and expands upon rationality. In doing so, it sets on the one hand a lower threshold for review and on the other hand, a higher standard for administrative action than was the case under the Interim Constitution.

16 2008 (2) SA 24 (CC); also reported at (2007) 28 ILJ 2405 (CC) and [2007] 12 BLLR 1097 (CC) at paras 106-110 and 119.
17 Id at paras 111-2.
18 The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).
19 The Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution).
20 2006 (2) SA 311 (CC) at para 108.

41. Cora Hoexter, *Administrative Law in South Africa*[21], remarks that "in administrative law it is now uncontroversial that the first element promised by 'reasonable' administrative action in s 33(1) is rationality".

42. The Constitutional Court, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,*[22] uses the formula of "reasonableness or rationality", equating the two in application. The Court nonetheless held that while the test of reasonableness incorporates a much wider range of possible standards for review, it is, at the very least, no less than a rationality standard.[23]

43. In *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism and Others,*[24] the Supreme Court of Appeal set out the test for a review based on reasonableness.[25] In determining what decision a reasonable decision-maker could make the Court held as follows:[26]

> "One does not need to understand the complex process, mathematical or otherwise … to realise that at least some of

21 1st ed (Juta & Co, Cape Town 2007) at 306-7.
22 2004 (4) SA 490 (CC) at para 43.
23 Id at para 45.
24 2006 (2) SA 191 (SCA) at para 12.
25 "… whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reacted. (See the authorities quoted by the Court below in paras [60] – [64] to which must be added *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490b (CC) at paras [42] – [50], *Associate Institutions Pension Fund and Others v Van Zyl* [2004] 4 All SA 133 (SCA) at para [36] and the unreported *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* (CC) (case no CCT 73/03 delivered on 15 October 2004) at paras [99] – [103])".
26 Id at paras 18 and 19.

> the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable.
>
> A reasonable decision-maker would, in my judgment, have used a formula to make a provisional allocation but would have considered the output as a result of the application of the formula and then have considered whether the output gives reasonable justifiable results bearing in mind the facts".

44. Having regard to the manner in which reasonableness has been interpreted under the common law, the meanings given in certain instances to the justifiability test under the Interim Constitution, and the decisions by the Appellate Division and the Constitutional Court under the present regime, it is clear that reasonableness, whilst not limited thereto, incorporates the standard of rationality applied under the Interim Constitution.

Failure to apply one's mind

45. Corbett JA explained this concept of a failure to apply one's mind in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* as:[27]

> "Proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the [commissioner] misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the [commissioner] was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."

46. The concept of a failure to apply one's mind includes the following:

46.1 A failure to consider, *alternatively* to decide, an issue.[28]

46.2 The misconstruing of evidence, taking into account facts that are not relevant to the issues to be considered and a failure to take into account relevant facts such that it renders the result of the entire process inappropriate and unreasonable.[29]

46.3 Arbitrary and capricious decision making, i.e. an award which is senseless, without foundation or apparent purpose.[30]

47. In the present case, the applicant submitted that the Commissioner:

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27 1988 (3) SA 132 (AD) at 152C-D.
28 *Lynch v Union Government (Minister of Justice)* 1929 AD 281 at 285.
29 *Hira and Another v Booysen and Another* 1992 (4) SA 61 (A); *Cash Paymaster Services (Pty) Ltd v Mogwe & Others* (1999) 20 ILJ 610 (LC).
30Above n:30 at 152A-C.

47.1 took into consideration irrelevant and inadmissible evidence;

47.2 failed to consider relevant and admissible evidence;

47.3 failed to act reasonably;

47.4 failed to identify and appreciate the true issues which she was called upon to determine; and

47.5 failed to apply her mind to the applicable legal principles.

Consequently, the applicant argued, the Commissioner failed to properly reason her way to a conclusion that falls within the band of conclusions which a reasonable decision-maker could reach.

Grounds of review

48. The Applicant submitted that the award is reviewable by virtue of the fact that the Commissioner committed a number of gross irregularities in the conduct of the proceedings and/or misconducted herself in relation to her duties as a commissioner, and the award was not one that a reasonable decision maker would have arrived at.

49. The first ground of review is that the Commissioner admitted into evidence undisclosed documentary evidence handed to her by Basson without:

49.1.1 providing the applicant with a copy of the

documents; and

49.1.2 affording the applicant an opportunity to lead evidence on the documents.

50. The Applicant argued that the Commissioner, in reaching her decision, took into consideration such improperly submitted documentary evidence. It submitted that the Commissioner's conduct in this regard constituted a gross irregularity in the conduct of the arbitration and prevented the Applicant from having a fair trial on the issues.

51. From a perusal of the documents, though, it appears to me that they were not contentious, Basson gave oral evidence on the substance of the documents and the contents were undisputed. The Commissioner's conduct in this regard, while irregular, did not prevent a fair trial of the issues.

52. The most pertinent review ground is that the Commissioner failed to consider the common cause evidence that Basson sought to withdraw his resignation. Notwithstanding this evidence (which clearly indicated that the employment relationship was not intolerable), she concluded that Basson was constructively dismissed as he "had no option but to resign." The Applicant submitted that her conclusion in the face of such evidence is not a conclusion that a reasonable commissioner would have reached.

I shall return to this aspect.

53. The Commissioner further found that Morais stated that she would get rid of Basson. There was no evidence to support this conclusion. The Commissioner based her finding on this statement in Basson's evidence: "I hear from my colleagues that they said that she doesn't like me and she will do whatever in her power to get rid of me. She's made it public to several colleagues in JHB who has said this to me." In taking into consideration uncorroborated hearsay evidence (which refers to unnamed colleagues), the Commissioner committed a gross irregularity in the conduct of the proceedings.

54. The Commissioner found that Basson had been constructively dismissed and from this concluded that his dismissal was unfair. The Applicant further submitted that the Commissioner failed to embark on the second leg of the constructive dismissal enquiry, namely whether or not the dismissal was fair. I agree that, only once the second leg of the enquiry had been determined – ie whether the dismissal was nevertheless fair -- could compensation be awarded. To this extent, the Commissioner committed a gross irregularity in the conduct of the proceedings. However, in my view, the award falls to be reviewed and set aside on the basis of the first ground, and that is that a reasonable commissioner could not have found that there was a constructive dismissal at all.

55. The Commissioner failed to deal with possibly the most important consideration in deciding whether the employer had made continued employment intolerable, and that is the common cause fact that Basson wished to retract his resignation. From his evidence and from his letter of resignation, it is clear that, even subjectively, Basson did not feel that it would be impossible for him to continue working at Value Logistics. But the test is an objective one; and I cannot see how any reasonable commissioner could have come to the conclusion that, objectively speaking, the employer had made continued employment intolerable when, on his own admission, the employee wished to reconsider his decision to resign.

56. In his evidence, Basson said that he "maybe reacted just a little bit too quickly" when he resigned. Even more significantly, five days after his resignation, and once he had had time to reflect, his considered sentiments were not those of an employee who found the conduct of the employer to have made a continued employment intolerable.

57. Basson was a senior human resources manager. The memorandum he addressed to Morais, five days after his resignation, was evidently well thought through. It is written in a considered and measured tone. He concedes that his resignation was "irrational". He also concedes that his

performance and service delivery had been "compromised". Nevertheless, he seeks to continue his employment and expresses the view that, "with some form of support and assistance", he would be able to fulfill his duties.

58. As Nicholson JA put it in *Loots*:[31]

> "When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment."

59. In the present case, Basson was clearly of the view that the employer could or might improve the work environment. He was willing to continue working and, in his words, to "...meet with [Morais] in person to discuss my responsibilities and how I can/should reach such goals". Or, as he told his wife, he was willing to sit around a table and talk. `These are not the sentiments of a person whose continued employment has been made intolerable.

31 Above n:3at 724 F-G

60. When does the relationship become intolerable? As the authors point out in *South African Labour Law*:[32]

> "The word 'intolerable' indicates a significant level of breakdown in the employment relationship.... It means that the employee could not continue to endure the employment relationship."

61. The facts in *Oelofse v New Africa Publications Ltd*[33] were very similar to those before me. In that case, the employee also resigned subsequently attempted to withdraw his resignation. In considering his claim for constructive dismissal, the arbitrator found that the attempted withdrawal of his resignation was inconsistent with a claim that the employment relationship had become intolerable. In my view, the arbitrator was correct. The same principle applies in the case before me.

62. Furthermore, once the Commissioner had found that Basson had been dismissed, she failed to consider whether the dismissal was nevertheless fair. As this Court explained in *Mafomane v Rustenburg Platinum Mines Ltd*[34]:

> "A claim of unfair dismissal, whether of the actual or constructive kind, usually requires an enquiry in two stages. In the first, the question is whether there was a dismissal. In

32 Taylor, Steenkamp & Kantor: "Unfair dismissal: misconduct, incapacity and automatically unfair dismissals" in Thompson & Benjamin, *South African Labour Law* Vol 1 (Juta, 2010) at AA1-408.
33 [2001] 10 BALR 1098 (CCMA).
34 [2003] 10 BLLR 999 (LC) at para 52. See also *Eagleton and Oothers v You Asked Services (Pty) Ltd* [2008] 10 BLLR 1040 (LC) at para 34.

> the second, the question is whether the dismissal was unfair."

63. Basson J put it succinctly in *You Asked Services*:[35]

> "...I am thus not in agreement with the submission that a claim of constructive dismissal will as a matter of course entitle the applicants to claim compensation. An applicant is not entitled to claim compensation once he or she has established the existence of a 'dismissal'; an employee may only be entitled to compensation once it is found that the constructive dismissal was also unfair."

64. In the present case, the Commissioner did exactly the opposite. She awarded compensation once she had decided that there was a constructive dismissal, without considering the fairness or otherwise of the dismissal at all. Even if she had acted reasonably in finding that there was a dismissal, the award stands to be reviewed on the grounds that she exceeded her powers by awarding compensation without embarking on the second leg of the test for constructive dismissal, ie the fairness enquiry.

Conclusion

65. The award is not one that a reasonable commissioner could have reached.[36] The commissioner had no regard whatsoever to the crucial common cause fact that Basson attempted to withdraw his resignation.

35 Above n:11 at para 35.
36 Above n:18 at para 109; *above n:24* at para 44.

In doing so, she failed to apply her mind to the evidence before her and committed a gross irregularity in the conduct of the proceedings. As Van Niekerk J put it in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*[37]*:*

> "In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a range of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If the commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner committed some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification."

66. Regarding costs, I take into account that Basson is an individual who had to incur legal costs of his own to defend an arbitration award in his favour. In law and fairness, I do not consider it appropriate to order him to pay the applicant's costs.

Order

67. The arbitration award of the third respondent under case number WCRFBC 8722 is reviewed and set aside. It is replaced with an award

37 [2009] 11 BLLR 1128 (LC) at para14.

that the employee (Basson, the first respondent) was not dismissed.

68. There is no order as to costs.

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STEENKAMP J

For the applicant:	Adv NL Badenhorst
Instructed by:	Mr E Abrahams, Bowman Gilfillan Inc
For the first respondent:	Adv R Abrahams
Instructed by:	Mr J Blignaut, CK Friedlander Shandling Volks