Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 1449/2017

In the matter between:

BILLION GROUP (PTY) LTD **Applicant**

and

LONDIZWI NTSHANGASE **First Respondent**

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

SILAS RAMUSHAWANA (*N.O.*) **Third Respondent**

Heard: 5 and 7 June 2018

Delivered: 20 June 2018

Summary: (review-constructive dismissal-objective test-and- dissatisfaction with the employee's performance addressed by a verbal warning and discussion and not by a disciplinary hearing followed by dismissal as originally anticipated or intended - disciplinary and corrective measures actually adopted not a sham-employee acknowledging clear option of continuing to work but working harder or of working hard while looking for alternative employment-continued sense of foreboding about continued employment prospects insufficient to justify a resignation, in light of an acknowledged choice of

alternatives going forward and absence of pressure from employer to compel employee to resign – resignation on notice a factor but not a decisive consideration in constructive dismissal)

JUDGMENT

LAGRANGE J

Background

[1] This is an application to review an arbitration award in which the arbitrator found that the third respondent had successfully established that he had been constructively dismissed and awarded him five months' salary as compensation. There is also an unopposed condonation application.

[2] The first respondent, Mr L Ntshangase ('Ntshangase') did not file opposing papers. On the first day the matter was set down, it could not proceed because the record had been mislaid. Ntshangase appeared at that hearing and was asked if he wished to oppose the application but indicated that he was merely there to hear what happened in court. At the postponed hearing, two days later Ntshangase said he did wish to oppose the application. After it was explained that a cost award might have to be considered if the matter was postponed to yet another date in order for an answering affidavit and condonation application to be filed, Ntshangase chose to make representations on the applicant's papers and was also given an opportunity to file heads of argument by 12 June 2016. Instead of filing heads of argument, Ntshangase filed a 'responding affidavit'.

[3] Since these are review proceedings, and the record the court considers is the record before the arbitrator, whereas the affidavits filed by the parties are generally more important in asessing the grounds of review, unless they deal with issues which were not on record in the arbitration, Ntshangase's responding affidavit has been treated as the written submissions, which he was given leave to file.

Condonation application

[4] The applicant has applied for condonation for the late filing of notices under rule 7A 6 and rule 7A (8) of the Labour Court rules. The filing was delayed by about a month because of the need to reconstruct the incomplete record filed by the CCMA and by the annual shutdown of the applicant's attorneys' offices. The delay is not inconsiderable, but the explanation is a reasonable one and in the absence of any opposition on this issue there is no evidence of any material prejudice suffered by the first respondent, apart from the obvious one of delaying the relief he obtained in the award slightly longer. In any event, the larger part of that delay is owing to the time taken for the review application to be enrolled.

The award

[5] The arbitrator found that the main reason why Ntshangase felt the applicant had made continued employment intolerable was that his supervisor had indicated in an email to other management staff that when he returned from the leave, he should be suspended, and afforded a disciplinary hearing with a view to his dismissal. The chairperson of the company had indicated that it was long overdue in a replying email. Further, the arbitrator found that when Ntshangase raised a serious concern about these emails and attended a meeting on 19 September which he had requested, his grievance about the letter was not addressed. Instead his work performance was questioned and it was suggested that he should work hard while looking for another job.

[6] The arbitrator found that the supposed justification for the email suggesting that steps will be put in place with a view to dismissing him, was only done because it was realised that he wanted to resign, was absurd.

[7] In addition, the arbitrator found that the failure to attend to Ntshangase's grievance only reinforced the impression that the applicant was intent on getting rid of him.

[8] The arbitrator did not separately consider the question of the fairness of the dismissal but clearly was of the view that the applicant had continued

to create an intolerable situation for the Ntshangase by not allaying his concerns about the content of the email but rather reinforced his expectation that his employment would be terminated.

Grounds of review

[9] The essential grounds of review are that -

9.1 If the arbitrator considered certain evidence he would not have been able to justify his conclusion that the third respondent's resignation was not voluntary. The evidence it identifies in this regard is that:

9.1.1 despite the ominous content of the email of five September indicating that disciplinary action would be taken against him with a view to dismissing Ntshangase, by 12 September no steps in anticipation of disciplinary action had been taken;

9.1.2 at the meeting of 19 September Ntshangase was given two options of either changing the way he worked or of looking for alternative work;

9.1.3 Ntshangase conceded in evidence that he had agreed at the meeting that he would notify the applicant whether he wanted to resign or whether he would stay; and

9.1.4 the arbitrator did not take account of the fact that Ntshangase's own email of the same date confirmed the existence of two options.

[10] The applicant contends that the arbitrator failed to give any weight to the meeting held on 30 September, which took place after the third respondent had expressed his view that he had felt compelled to hand in his resignation on 27 September. The applicant submits that evidence of that meeting shows that it tried to persuade Ntshangase to reconsider his resignation. It submits that further support for the contention that the arbitrator ignored what transpired at that meeting can be seen in content of Ntshangase's email of 4 October. In that email, Ntshangase confirmed his resignation as per his letter and its acceptance by the applicant with his last working day being 31st October.

Legal principles

[11] Before evaluating the grounds of review, it is worthwhile to reiterate the high threshold which an employee, who claims constructive dismissal, must meet. In ***Solid Doors (Pty) Ltd v Commissioner Theron & others***[1], the Labour Appeal Court repeated the basic requirements for proving constructive dismissal as well as describing the nature of a review of an arbitration award which concerns a constructive dismissal:

> [27] ln CEPPAWU & another v Glass & Aluminium 2000 CC (2002) 23 ILJ 695 (LAC); [2002] 5 BLLR 399 (LAC) this court had occasion to consider and define the meaning of the section. Writing for the court Nicholson JA said at para 30:
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> > 'Constructive dismissal involves a resignation because the work environment has become intolerable for the employee as a result of conduct on the part of the employer (see s 186(1)(c)).'
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> [28] It should be clear from the above that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the C employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.
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> [29] Having established what the requirements are for a constructive dismissal, it is necessary to make the observation at this stage of the judgment that the question whether the employee was constructively dismissed or not is a jurisdictional fact that - even on review - must be established objectively. That is so because if there was no constructive

[1] (2004) 25 ILJ 2337 (LAC) at 2345

dismissal - the CCMA would not have the jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist. Accordingly, the enquiry is not really whether the commissioner's finding that the employee was constructively dismissed was unjustifiable. The question in a case such as this one - even on review - is simply whether or not the employee was constructively dismissed. If I find that he was constructively dismissed, it will be necessary to consider other issues. However, if I find that he was not constructively dismissed, that will be the end of the matter and the commissioner's award will stand to be reviewed and set aside.

[12] Further in ***National Health Laboratory Service v Yona & Others***, the LAC repeated some of the principles governing constructive dismissals:

> [28] Section 186(1)(e) of the LRA provides that a (constructive) dismissal occurs when 'an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee'. On constructive dismissal, this court, in *Jooste v Transnet Ltd t/a SA Airways* stated the following:
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> > 'In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasized that a "constructive dismissal" is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer. As Lord Denning said in Woods v WM Car Services (Peterborough) (1982) IRLR 413 (CA) at 415: "The circumstances [of constructive dismissal] are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact. ..."'
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> [29] In *Murray v Minister of Defence*, 8 the Supreme Court of Appeal said:
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> > '[11] That substance, as was pointed before the 1995 LRA, is that the law and the constitution impose "a continuing obligation of fairness towards the employee on ... the employer when he makes decisions affecting the employee in his work". The obligation has both a formal procedural and substantive dimension; it is now encapsulated in the constitutional right to fair treatment in the workplace.

> [12] …These cases have established that the onus rests on the employee to prove that the resignation constitutes a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the enquiry 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 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.' [2]
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> [30] In other words, a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer towards the employee, which rendered continued employment intolerable for the employee.

In passing, it should be mentioned that in *Yona,* the LAC evidently did not consider that a resignation on one month's notice could not be construed as a constructive dismissal. Consequently, the dictum in ***Volschenk v Prima Africa (Pty) Ltd*** [3] in which the Labour Court found on the facts before it that it was inconceivable an employee would resign on two months' notice if the employer had made conditions intolerable, should not be interpreted as establishing a general principle that resignation on notice is a bar to a claim of constructive dismissal. That said, resignation on notice can have a bearing on whether a resignation will be construed as constructive dismissal having regard to the factors the employee claims made their employment intolerable.

[13] In *Pretoria Society for the Care of the Retarded v Loots* the LAC characterised the substantive requirements of the second part of the test thus:

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[2] (2015) 36 *ILJ* 2259 (LAC) at 2268-9

[3] 2015 *ILJ* 494 (LC) at para [26].

> '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. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.
>
> Where she proves the creation of the unbearable work environment she is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end; …

(emphasis added)

[14] Lastly, in ***Murray v Minister of Defence*** the SCA stressed, amongst other things, the importance of the employer wrongfully creating the intolerable conditions.

> [13] It deserves emphasis 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 circumstances '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 may 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 (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.[4]

(emphasis added)

[4] 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA) at 1376-7.

Evaluation

[15] The salient chain of events which emerges from the evidence before the arbitrator is set out below. I do not intend to summarise all the evidence that was before the arbitrator. I must also emphasise that any additional evidence contained in the founding affidavits or Ntshangase's evidence contained in his'responding affidavit' cannot be considered as the matter must be decided on the evidence presented to the arbitrator alone. In so far as submissions are contained in Ntshangase's responding affidavit are concerned, these have been considered together with the oral submissions made in court and the applicant's heads of argument.

[16] At the end of August 2016, an inspection was conducted of certain shopping mall premises which the applicant company was intending to sell and was going to show to the prospective buyer on 9 September. It was a matter of dispute whether or not Ntshangase was present on this inspection.

[17] In any event, it appears to be common cause that he was instructed by email on 31 August to remove certain signage of previous tenants from the building. He does not dispute this but claims to have been unaware of when the prospective buyer was going to view the premises.

[18] On 1 September, Ntshangase went on leave and returned on 6 September. The applicant claimed that he went on leave before it had been authorised. It appeared that he had submitted the application on the system but had not received a response, but he told his superior, Ms A Monamela (the acting centre manager) before leaving that he had applied online but had not yet got a response.

[19] Further, it appears that during his leave some of the signage was removed but other signage was still there on 5 September. Ntshangase maintains that he instructed his team to remove the signage he was told to remove. The team certain signage by 2 September but could not remove other signage which required access to the premises in question because the signs were inside the former tenants' premises.

[20] Whatever the truth of Ntshangase's claims about what he was responsible for in relation to the signage, his manager, Mr Vipond ('Vipond'), became

exasperated because Ntshangase appeared to have gone on leave without getting proper authorisation and the signage work which he expected him to have done was still incomplete.

[21] This prompted Vipond to send an email to the CEO on 5 September, which read:

> [Ntshangase] was instructed to remove the Bidvest signs post my walkabout with Annah [PG's supervisor] last Tuesday 30 August. He has not complied, and in addition, has gone on leave without authorisation from Friday last week. We are attending to the outstanding issues contained in the email trail today. [Ntshangase], on his return tomorrow, will be suspended and put through a disciplinary hearing with a view to firing to firing him.

The CEO responded simply by stating:

> It's long overdue, thanks Gary.

Ntshangase only became aware of this email exchange on 12 September.

[22] Notwithstanding the emails above, Ntshangase was neither suspended nor given notice of a disciplinary enquiry on his return to work on 6 September.

[23] However, on Tuesday 13 September, the day after Ntshangase learnt of the ominous email exchange, he was issued with a verbal warning for non-adherence to staff leave provisions in the company's policy and procedures by taking leave without obtaining the correct approvals.

[24] It was only on 16 September that Ntshangase expressed his concerns arising from the emails of 5 September in a letter, part of which reads:

> My concern is that, after receiving the attached email and the subsequent verbal warning, I am now in constant fear of being fired, I fear that I am no longer wanted in the company and whatever I do from now on may be viewed as wrong and subsequently get me fired. I am traumatised and I find it hard to work focus under this condition, I have a family to look after, responsibilities as a father and the sole breadwinner at home. I cannot afford to lose my job like this.
>
> I would like to request that we have a meeting to talk this through with you at your earliest convenience time and place. It would be of great help to me

> to understand if my fears are unfounded and I can be free to execute my duties without fear of being fired or taken through a disciplinary hearing it will lead to me being fired as I feel like I am no longer wanted in the company.

Ntshangase did not specifically identify the letter as a formal grievance, but it clearly constituted a complaint about the implications of the emails of 5 September.

[25] A meeting then took place on Monday 19 September attended by Ntshangase, Ms A Moremela, Vipond and Mr C Rossouw, the head of facilities. According to Vipond, the purpose of the meeting was to discuss Ntshangase's performance in light of the complaint about his alleged failure to complete work before going on leave.

[26] Vipond claims that it was only in the meeting that he and Rossouw learned of the letter which Ntshangase had handed to Moremela the previous Friday. According to Vipond, the upshot of the discussion in the meeting was that Ntshangase had to work harder and the company would look at assisting him with additional resources to do his work. Ntshangase had also expressed his intention of resigning and had been told that, if that was the case, he should continue to work hard while he was looking for another job. In essence, Vipond testified that there were two alternatives open to Ntshangase, to continue working with the company but to work harder with additional resources, or to continue to work hard while looking for other employment. The understanding at the end of the meeting was that Ntshangase would revert to the company on his intentions.

[27] For his part, Ntshangase had been under the impression that because he had hande his letter of concerns to Moremela the previous Friday, that the meeting on Monday had been specifically been convened to address his letter. Hence, he was taken aback when issues of his performance were discussed and not his concerns about the emails of 5 September. When he was asked why he thought he had not been suspended by the time the meeting took place on 19 September, contrary to what the emails of 5 September seemed to anticipate, he attributed the company's failure to follow through on those intentions to the fact that he had handed in his letter of complaint on 16 September.

[28] Under cross-examination, Ntshangase agreed that he had undertaken to address the concerns about his performance and that he would be provided with additional resources to perform his duties.

[29] In the afternoon of the same day when the meeting took place, Ntshangase sent the following email to Moremela, which encapsulates his view of the meeting:

> Unfortunately, matters raised in my letter of grievance were not addressed in the meeting we had this morning.
>
> My concerns in my letter of grievance were mainly based on me coming across a discussion about my dismissal being imminent due to me having taken an authorised leave. The discussion we had this morning caught me off guard as it was about my performance and this is never been an issue before. In our meeting, I was given two options, one being to change the way I work or work hard while looking for another job.
>
> The discussion in our meeting confirms my fears of being fired and that the company low along requires my services. Being advised that they are company is willing to have me around for a short time while I'm looking for another job is a clear way of confirming that I'm no longer needed in the company. For such a statement to be raised when it is for the first time we're having a meeting in relation to my performance is clear that my fears of dismissal are becoming a reality.
>
> As discussed in our meeting I am reflecting and thinking about the options you have given me, I love my job and will not do anything to jeopardise it.

(Emphasis added)

[30] It was over a week later, on 27 September 2016, that Ntshangase submitted a resignation letter. In his letter, he expressed the view that he was left with no choice but to resign because he was "…being subjected to undue, disproportionate and harsh treatment", despite raising his concerns that he feared been fired. He claims to have been shocked at the fact that the meeting held on 19 September discussed his performance and not his grievance and the fact that the email was not discussed confirmed his fear of being fired. His letter contained various expressions of his sadness at having to resign.

[31] The following day, 28 September, Moremela acknowledged the resignation letter with regret and stated, amongst other things, that:

> The content of the reasons for your resignation is noted with regret, as, during subsequent meetings with you, the Company's concerns were addressed and we believed that consensus was reached on the way forward: in that you committed to address these concerns and the company committed to assist you with additional resources.

(Emphasis added)

[32] Ntshangase responded on 29 September, complaining that his grievance had still not been attended to in a meeting that was supposed to address it and that being told to look for another job in the context of having raised a concern about the emails of 5 September "…clearly showed an intention of an anticipated breach of my employment contract and that left me with no other choice but to resign". He continued to record that he disputed that a consensus had been reached in a meeting that was meant to look into his grievance and that the consequence of the meeting was that undue pressure was exerted on him and he was threatened with dismissal.

[33] A further meeting was convened between Vipond, Moremela and Ntshangase on 30 October. According to Vipond, Ntshangase was asked to reconsider his resignation and he undertook to revert to them.

[34] Following that meeting, on 4 October, Ntshangase sent an email to the managers concerned, which simply read:

> Hi Everyone,
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> I confirm that as per my resignation letter which was duly accepted, my last day of employment will be 31 October 2016.

[35] The last correspondence from the company was a few days later on 7 October. In that letter, the company accepted his decision but recorded that "… it was carefully explained to you that we requested you to withdraw your resignation and move forward with us." The letter also recorded, amongst other things, that in the meeting of 30 September, it had been agreed that the warning he had received regarding unauthorised leave had nothing to do with the emails which led to his grievance, and that the company had repeatedly confirmed that it was not its intention to

dismiss him, which he had acknowledged. Ntshangase did not respond to this letter

Evaluation

[36] Clearly Ntshangase resigned and the first leg of the test for constructive dismissal was met.

[37] It is also true that Ntshangase claimed that he had to resign because the continued relationship had become intolerable. A recurrent refrain in Ntshangase's evidence was that he never got reassurance from the chairperson whose email had implied his dismissal was overdue and the company never dispelled his suspicions about implications of the emails of 5 September. Was he justified in believing there was no reason to believe he would not be dismissed based on those emails alone? I think not, for the reasons which follow.

[38] Firstly, whatever might have been said in the heat of the moment between the CEO and the chairperson when it was believed that Ntshangase had let the company down by taking unauthorised leave and leaving important work undone, that heat had dissipated by the time Ntshangase returned from leave on 6 September. When he returned he was not suspended. The only overt disciplinary step taken against him was a week later when he was issued with the verbal warning relating to the unauthorised leave. If the applicant had intended to follow through on what was stated in Vipond's email, it does not make sense why the leave issue would not simply have been included as one of the charges in a wider disciplinary enquiry in which dismissal was a prospective outcome.

[39] It is true that the meeting on 19 August did not directly address his grievance. On the evidence, I am satisfied that only Moremela and Ntshangase were aware of his letter of 16 August when the meeting was convened and that the meeting had been convened independently with the aim of addressing his performance. That is why his grievance was not the subject matter of the meeting, though it came to light during the meeting. Ntshangase assumed the meeting had been convened only because of his grievance.

[40] Further, it is important that the applicant did not initiate any disciplinary measures against him regarding his failure to perform duties, and there was no evidence of any preliminary steps being taken by the company that would have indicated that any further disciplinary process was imminent by the time he submitted his complaint on16 September, which was ten days after his return.

[41] If, as Ntshangase believes, it was his grievance letter that prevented his dismissal, it raises the question why the company convened the meeting on 19 September at all. There was no need to call such a meeting if it was intent on covering up what Ntshangase believed were its real intentions.

[42] Quite apart from the absence of any evidence that the company took steps to follow through on the emails of 5 September in the sense of convening a disciplinary enquiry as a precursor to his dismissal, the outcome of the meeting of 19 September gave Ntshangase an unequivocal choice to remain with the company and work harder with additional resources at his disposal or work hard while looking for alternative employment. Ntshangase was naturally reluctant to concede that the first option did not require his dismissal but the existence of two courses of action open to him is undeniable.

[43] What Ntshangase then fell back on was his continued sense of suspicion and unease that he would nonetheless be dismissed based on the emails of 5 September. This supposedly sustained his subjective belief that his dismissal was still on the cards. Nevertheless, despite expressing these fears, he still confirmed he would consider the options discussed at the meeting.

[44] When he expressed his choice to resign on 27 September, the company again met with him and again he agreed to consider whether he was going to proceed with his resignation. He tried to downplay this meeting even to the point of suggesting it did not occur. However, if the meeting did not occur, his letter of 4 October ‘confirming’ his resignation is inexplicable. There was no reason to ‘confirm’ his resignation if there was not an alternative still on the table.

[45] Ntshangase's ongoing anxiety relating to the emails of 5 September was not objectively justified by subsequent events and he acknowledged he was given a choice of options. It cannot be said by any stretch of the imagination that he had no choice but to resign or to follow through with the resignation after he had submitted it. The company's conduct was not that of an employer that had made a decision and could not wait to see the back of Ntshangase. It was clearly unhappy with aspects of his work, but had revised its original spur of the moment response and was willing to allow him an opportunity to demonstrate his worth and was even prepared to provide him with more resources to perform better. The situation he was faced with from mid-September 2016 was not that of an employee with no alternative but to leave. Nor was he placed under undue pressure in being told he should work hard and would be assisted with additional resources. The prospect that at some stage in the future an enquiry might be convened does not constitute undue pressure.[5]

[46] At the very worst, his position was no more tenuous than someone on a final warning, for whom the possibility of a final disciplinary hearing might loom larger. Ntshangase's insecurity about his long term prospects may have had some basis in the sense that he could not be one hundred percent confident of his future, but his fears that his dismissal was inevitable or that serious disciplinary action was imminent could not be rationally justified by the events which transpired after his return to work, both before and after the emails of 5 September came to his knowledge and he made the company aware that he knew of them. As such, his subjective fears were exaggerated in relation to the objective circumstances. The fact that his long term employment prospects may have become less certain than they were before did not render his continued employment intolerable.

[47] In the circumstances, I am not satisfied that Ntshangase established on a balance of probabilities that his continuous employment with the company was intolerable. It follows that it is not necessary to consider the third leg

[5] See Old Mutual Group Schemes v Dreyer & another (1999) 20 ILJ 2030 (LAC) at 2033-4, para [10] where the LAC found that the mere threat of a disciplinary enquiry could not be interpreted as unfair pressure on an employee to resign.

of the test for constructive dismissal. Consequently, the arbitrator's finding that Ntshangase was constructively dismissed and the consequential relief ordered cannot stand.

[48] I understand why Ntshangase would have wanted to defend the award both because it was in his favour and in view of his subjective appreciation of the merits of his case. Accordingly, I am not inclined to make a cost award against him.

Order

[1] The arbitration of the third respondent issued under case number GATW 16008-16 and dated 3 July 2017 is reviewed and set aside.

[2] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	G Ebersőhn of Gerrie Ebersőhn Attorneys
RESPONDENT:	In person