REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 798/12

In the matter between:

MALEBO MAJATLADI **Applicant**

and

METROPOLITAN HEALTH RISK MANAGEMENT **First Respondent**

KAREN KLEINOT, N.O. **Second Respondent**

CCMA **Third Respondent**

Heard: **28 May 2013**
Delivered: **5 June 2013**
Summary: Constructive dismissal – LRA s 186(1)(e) – review.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Dr Malebo Majatladi, resigned. She claims that it was a constructive dismissal. The commissioner (the second respondent) disagreed. The applicant asks this court to review and set aside the commissioner's decision.

Background facts

[2] The applicant, a medical doctor, was employed by the first respondent (Metropolitan) as a medical adviser in 2008. She was highly regarded and valued as a senior staff member. In November 2011 a senior manager in another business unit, Dr Katlego Mothudi, resigned. That business unit is known as the GEMS[1] Business Unit (GEMS BU) and is housed in a different building in Cape Town than the one where the applicant was working, known as the Metropolitan Health Risk Management Business Unit. The GEMS BU had to recruit a new senior manager as a matter of urgency. That business unit is Metropolitan's biggest unit and earned revenue of some R22 million annually. The post vacated by Dr Mothudi was a much bigger one with far greater responsibilities than that held by the applicant.

[3] Metropolitan was nevertheless keen to consider the applicant to succeed Dr Mothudi. In the interim, and whilst a recruitment process to fill Dr Mothudi's post was underway, Metropolitan asked the applicant to act in that position. She agreed and she was seconded to that acting post with effect from 15 November 2011. She signed a contract dated 16 November 2011 on 20 December 2011. It read as follows:

> "Dear Malebo
>
> We hereby confirm your temporary appointment to the position of Head of Advisory Services in the Clinical Services Department, Admin Business Unit from 15 November 2011 to 31 January 2012.

[1] GEMS is an acronym for the Government Employees' Medical Scheme, administered by Metropolitan Health.

> In recognition of the additional responsibilities you will assume in this capacity, you will be paid a taxable acting allowance of R 10,000 per month which will be incorporated into your monthly salary.
>
> Your willingness to undertake these additional responsibilities is much appreciated and we wish you success in taking up this challenge.
>
> Please sign in the space provided below indicating your acceptance and understanding of the offer and conditions associated with it."

[4] The applicant signed the contract. It was also signed by the senior human resources business partner, Nathan Pillay.

[5] Before the temporary contract expired, the applicant informed Metropolitan that she would not continue acting in the temporary post after its expiry. On 28 January 2012 she sent Metropolitan an email advising it of her intention to return to her previous position of medical adviser in the Metropolitan Health Risk Management business unit with effect from 1 February 2012. She also obtained approval from her superior in that business unit to take annual leave from 1 February.

[6] On 1 February 2012 the applicant was called to a meeting with her superiors in the GEMS BU, Drs Safwaan Desai (HR manager for the GEMS BU) and Kaya Gobinca. The applicant reiterated that she was not willing to continue acting in the post. On 3 February 2012 – while the applicant was on approved annual leave -- Nathan Pillay sent her an email retracting her leave for February 2012 and telling her to report to Dr Desai in the GEMS business unit on Monday 6 February 2012. The applicant reiterated in an email to Pillay that:

> "As you are aware my period in the GEMS business unit ended on 31 January 2012 and I have not extended my acting period contract."

[7] On 6 February 2012 the applicant was summoned to a meeting with Drs Desai and Pillay. She also met with Bongi Sofile, another HR manager; and then with Sofile and Pillay. They tried to persuade her to continue in the acting position; she experienced it as "coercion". Sofile told her that, if she did not sign a new temporary contract, she would be fired. Another HR manager, Rizwaan Salasa, told her that it would not be in her interests to get into conflict with the company as it could affect her career and it is a

small industry. She reiterated that she was not willing to act beyond the three month period to which she had agreed in terms of the contract. On the same day, Pillay suspended the applicant. He addressed a letter to her informing her of her immediate suspension; and that she would be called to a disciplinary inquiry at a date "that will be communicated to you at a later time". The letter continued:

> "This suspension is based on your refusal to obey a reasonable instruction relating to your acting role as HOD: Advisory Services within the GEMS BU."

[8] On 9 February 2012 the applicant lodged a grievance pertaining to her suspension and the pending disciplinary action with her immediate superior, Dr Thoko Potelwa. By 16 February she had not received any feedback and she wrote to Dr Potelwa again. Potelwa responded as follows:

> "We acknowledge receipt of the grievance letter lodged on the 9th and the 16th of February 2012. In terms of the MHG grievance procedure you will be invited to attend a formal grievance discussion, in an attempt to resolve your grievance.
>
> Kindly note, you will be contacted by no later than Monday the 20th of February, to notify you of the date of the above-mentioned meeting."

[9] Potelwa and Trevor Damons ("senior HR business partner") met with the applicant on 21 February and told her that her concerns would be addressed in the disciplinary hearing. In a letter to the applicant on 22 February 2012, Dr Potelwa stated:

> "In relation to your suspension, our labour laws allow an employer to suspend an employee. In your instance, the aforementioned suspension precedes a formal disciplinary hearing which my opinion is in fact a formal process which should be conducted fairly, and which will provide you with an opportunity to respond to the allegations made against you. This process should, after taking its course satisfy you of the need or reason for the actual suspension.
>
> In relation to the pending disciplinary enquiry, this was initiated by the GEMS business unit, for reasons known to the unit. As your previous line manager I do not have the full facts pertaining to this matter. The presiding

> chairperson will need to assess the evidence presented at the enquiry and make a finding based thereon. As discussed yesterday, the disciplinary process is separate from the grievance process and I suggest that it be treated as such. The disciplinary enquiry will be the appropriate forum to state your case and to refute the facts presented by the initiator."

[10] The applicant noted her dissatisfaction in an email response dated 23 February 2012. She stated:

> "I appreciate that the disciplinary hearing and the grievance procedure are two separate processes and therefore they should be treated as such. As per the company policy my line manager has the responsibility of investigating the grievance submitted comprehensively. Your recommendation has deferred the responsibility of the investigation of my grievance to the chairperson of the disciplinary hearing.
>
> As the grievance has not been resolved, I am requesting that the grievance case be escalated to your next line manager for further investigation as per the company policy."

[11] The disciplinary hearing took place on 24 February 2012. The chairperson, Willem van Deventer, considered the following charges:

> "1. *Gross insubordination*
>
> In that you refused to obey a reasonable instruction from the company to continue acting in the capacity of HOD: Clinical Advisory Services in the GEMS BU as of 1 February 2012.
>
> 2. *Conduct unbecoming*
>
> The company takes a dim view of the manner in which you have conducted yourself in respect of the above matter and views your conduct as unbecoming of a person with your status and position within the company."

[12] The chairperson found that the applicant had not committed the misconduct complaint of in charge 1 ("gross insubordination"). He took into account that the acting agreement "had a specific timeframe attached to it, with a specific start and end date". He nevertheless found her "guilty"[2] of charge 2 ("conduct unbecoming"). After considering aggravating and

[2] The company and chairperson used the inappropriate criminal law language of referring to the employee as "the accused" and to "charges" and a "verdict" throughout.

mitigating factors, he upheld the "verdict" and imposed a sanction of a final written warning. Despite Potelwa's indication that the applicant's grievance would be dealt with at the disciplinary hearing, the chairperson of that hearing made it clear that it was not the proper forum to deal with the grievance.

[13] On 1 March 2012 the applicant appealed against the outcome of the disciplinary hearing and the final written warning. On 5 March Trevor Damons met the applicant to discuss her appeals. They resolved that she would escalate her grievance to the Chief Executive Officer, Blum Kahn.

[14] On 7 March 2012 Odette Ramsingh, Metropolitan's Group HR Executive, issued an instruction to the applicant to report for duty to Dr Safwaan Desai at the GEMS BU and to continue acting in the position of HOD: Clinical Advisory Services "until the position has been filled and the required hand-over period has been successfully completed." Ramsingh concluded:

> "Should you not adhere to this reasonable and lawful instruction, the company reserves its rights to take disciplinary action against you."

[15] The applicant responded on 12 March 2012 in a lengthy letter spanning six typewritten pages and 18 paragraphs. She pointed out that:

- Her grievance had not been resolved;
- "...the acting position was never a request or an instruction but rather an offer which was made to me which I accepted, with reservations, and only for the period 15 November 2011 to 31 January 2012";
- There was never a meeting of the minds that the contract would be extended;
- She had been found not guilty of insubordination;
- The company could not force her to continue acting in the position;
- The company had had five months to recruit a new person for the position;
- She had been suspended unfairly before the first disciplinary hearing;

- The company's conduct amounts to harassment and victimisation; and
- The company is creating an intolerable working environment.

[16] Ramsingh was unmoved. On 14 March she stated that the instruction "remains in force" and reiterated that:

> "Should you persist to ignore said [*sic*] instruction, the Company will have no alternative but to institute disciplinary proceedings against you."

[17] The applicant was booked off sick from 8 to 30 March 2012. At the end of March 2012 Metropolitan appointed Dr Anuschka Coovadia to the vacant post of HOD: Clinical Advisory Services with effect from 1 April 2012. The applicant was not aware of this appointment until she arrived at work on 2 April 2012. On that day, she reported for duty in her permanent post at the DRM unit (and not at the GEMS BU). On the same day, she was suspended again and told to attend a second disciplinary hearing three days later, on 5 April 2012. The suspension letter read:

> "The suspension is due to you intentionally and deliberately refusing to obey a reasonable and lawful instruction, issued to you by the head of Human Resources on 7 March 2012, duly mandated by the CEO of Metropolitan Health, that you report for duty in the position of HOD: Clinical Advisory Services in the Managed Care (GEMS) Department on 2nd April 2012 at 08h00."

[18] Of course, that position had already been filled by 2 April 2012. Nevertheless, the company forged ahead. On the same day, Trevor Damons issued the applicant with a notice to appear at a disciplinary hearing on 5 April 2012 on a charge of "gross insubordination" and repeating the complaint contained in the suspension letter. On 3 April 2012 the applicant wrote to Damons. Under the heading "continued harassment and victimisation", she set out the following concerns:

- The company was making her working conditions intolerable.
- She was instructed to report in the acting post on 19 March 2012, while she was on sick leave.

- The company informed the rest of the staff on 26 March 2012 that the vacant position had been filled. In those circumstances, instructing her to report to that position and being disciplined for insubordination led her to believe that the company is deliberately creating this intolerable state of affairs.
- She was again suspended (for a second time) without having been given the opportunity to make representations why she should not be suspended. There was no basis for believing that she could jeopardise any investigation or constitute a threat to the company's employees or property.
- It appeared from the wording of the suspension letter that the company had already decided that she had "intentionally and wilfully refused to obey" the instruction to report for duty in the position of HOD: Advisory Services. Any disciplinary hearing would thus be a sham.

[19] The applicant urged the company to reconsider its actions "otherwise I will be left with no choice but to resign". She concluded:

> "I remain available for a rational and constructive engagement with you to resolve this issue once and for all. I however cannot tolerate the destructive path you appear to have chosen. Please reconsider your actions!"

[20] On the same day the CEO, Blum Khan, wrote to the applicant, in "response to your grievance". He said:

> "The grievance communication received via email on the 14th March 2012 refers. Your grievance relates to your unhappiness with the outcome of a formal grievance process which Dr Thoko Potelwa communicated to you on 22 February 2012.
>
> Upon the perusal of all the documentation it is my view that the Company has conducted itself fairly in relation to suspension and subsequent disciplinary enquiry.
>
> In the light of the above, I uphold the decision as communicated to you on 22 February 2012 by Dr Thoko Potelwa."

[21] On 4 April 2012 Metropolitan advised the applicant that the disciplinary enquiry would proceed the next day. She resigned on the same day.

The applicable test

[22] Where an employee alleges constructive dismissal in terms of s 186(1)(e) of the Labour Relations Act[3], the question is whether she was dismissed. That question goes to jurisdiction. Therefore, the reasonableness test set out in *Sidumo*[4] does not apply. This court has to decide whether the commissioner was right or wrong in finding that there was no dismissal.[5]

[23] As Mr *Van Zyl,* for Metropolitan, pointed out, this court recently summarised the case law pertaining to the test of intolerability in *Asara.*[6] The test for determining whether or not an employee was constructively dismissed remains that set out in *Pretoria Society for the Care of the Retarded v Loots*[7]*.* 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 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".

[24] The court held[8] 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 her duties. The employee is in effect saying that she would have

[3] Act 66 of 1995 (the LRA).

[4] *Sidumo & another v |Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

[5] *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* [2008] 9 BLLR 845 (LAC); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC).

[6] *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* (2012) 33 *ILJ* 363 (LC).

[7] (1997) 18 *ILJ* 981 (LAC) at page 985.

[8] *Loots (supra)* at page 984.

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.

[25] The Constitutional Court recently remarked in *Strategic Liquor Services v Mvumbi NO & others*[9] 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.

Evaluation / Analysis

[26] In most cases, the fact that an employee resigned on the eve of a disciplinary hearing would make it very difficult for that employee to prove constructive dismissal, as this court pointed out in *Asara.*[10]

[27] In the current case, the applicant argues that the company had made their continued employment relationship intolerable, and that the pattern of coercion and victimisation culminated in the second disciplinary hearing.

[28] It is certainly noteworthy that the company purported to charge the applicant with the very same allegation of misconduct on which she had been found "not guilty" previously, i.e. "gross insubordination". The substance of the charge is the same, albeit arising from a second instruction to continue acting in the vacant position. The first charge (for the hearing on 24 February 2012) was formulated as follows:

> "*Gross insubordination* in that you refused to obey a reasonable instruction from the company to continue acting in the capacity of HOD: Clinical Advisory Services in the GEMS BU as of 1 February 2012."

The second charge – pertaining to the hearing for 5 April 2012 – read:

> "*Gross insubordination* in that you intentionally and deliberately refused to obey a reasonable and lawful instruction, issued to you by the head of

[9] (2009) 30 *ILJ* 1526 (CC); [2009] 9 BLLR 847 (CC) at para [4].

[10] *Supra.*

> Human Resources on 7 March 2012, duly mandated by the CEO of Metropolitan Health, that you report for duty in the position of HOD: Clinical Advisory Services in the Managed Care (GEMS) Department on 2nd April 2012 at 08h00."

[29] The substance of the two charges is the same. Having been found "not guilty" in the first instance, the ineluctable conclusion is that the company was indeed harassing the applicant. It was common cause that she had only agreed to act in that capacity until 31 January 2012. It is also telling that the company thought it necessary to seek her consent and to embody that agreement in a written contract; yet, when it expired, it sought to instruct her unilaterally to extend the acting period when she would not consent.

Breach of contract?

[30] Although it is not necessary for an employee who alleges constructive dismissal to prove breach of contract, such a breach must be a significant factor in teh evaluation of whether a constructive dismissal took place. As the court held in *Loots*[11]*:*

> "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".

[31] In this case, the parties did enter into a valid and binding contract. As the applicant pointed out in her email to Ramsingh, there was a meeting of the minds – albeit with reservations on her part – with regard to the temporary contract from 15 November 2011 to 31 January 2011. At no time did she agree to extend the agreement beyond that time period; and when asked to, she made it clear that she would not. It is only then that the company "instructed" her to do so; and when she refused, it accused her of gross insubordination.

[32] Mr *Ackermann*, for the applicant, submitted that this instruction – contrary to the terms of the initial agreement – amounted to a unilateral variation of

[11] *Supra*

the contract. He correctly submitted that it is a question of fact to determine whether there has been a unilateral variation that amounts to a breach. With reference to *Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU*[12] he pointed out that a unilateral change would be illegitimate where it amounts to a breach of contract as opposed to a mere change in work practices.

[33] In this case, the duties pertaining to the HOD position were very different to those the applicant carried out in her permanent position. In requiring her to fulfil those duties, Metropolitan did not merely introduce a change in a work practice; it required of her to do a different job, albeit for a limited time. It (properly) sought and obtained her consent to do so until 31 January 2012. Beyond that, requiring of her to continue in the acting position amounted to a breach of contract.

[34] The terms of the contract were clear. It expired on 31 January 2012. The arbitrator correctly records that fact: "The sequence of events shows that clearly an initial contract was entered into and performance was concluded when the period expired." And yet, in the same paragraph, the arbitrator makes a u-turn and finds that the applicant had to obey the instruction to continue acting in that position because of the "operational requirements" of the business. That finding is irrational.

A 'reasonable and lawful instruction'?

[35] On the employee's side of the contractual agreement, the failure to carry out an instruction must amount to a breach of contract. Refusing to sign a new contract that amounts to a unilateral change is not misconduct.[13] An unreasonable demand, even if lawful, can lead to a constructive dismissal.[14]

[36] In this case, the instruction to carry on acting in the HOD position after 31 January 2012 was neither reasonable nor lawful. Firstly, it was in breach of the earlier, written agreement. Secondly, it was contrary to the

[12] [2011] 3 BLLR 231 (LC); (2011) 32 *ILJ* 1107 (LC).

[13] *SACCAWU & others v Mahawane Country Club* [2002] 1 BLLR 20 (LAC).

[14] *Howell v International Bank of Johannesburg Ltd* (1990) 11 *ILJ* 191 (IC).

applicant's existing job description and job functions. Thirdly, in circumstances where the applicant had repeatedly reiterated that she would only agree to act for the initial 2 ½ months; where her refusal to continue doing so had already led to a disciplinary hearing where that was held not to constitute 'gross insubordination'; and where a new incumbent had already been appointed, the instruction to report to that job on 2 April 2012 was unreasonable.

[37] The company in fact conceded that it needed the applicant's consensus to extend the temporary contract. . It even presented her with a further contract to sign. As Mr *Van Zyl* said to the applicant in cross-examination: "They needed to get your consent and they were under pressure"; and, later on: "They didn't instruct you, they actually said to you it's your choice, if you want to sign a contract." It is only when that did not succeed that Metropolitan purported to issue an instruction to the applicant.

[38] It was a precondition of the contract that Metropolitan had to obtain the applicant's consensus to extend it. That is what it initially attempted to do. Having failed, the instruction to continue acting in the position (absent her consent) was unreasonable.[15]

The second disciplinary hearing

[39] As discussed above, the charge in the second hearing was the same as that in the first. The chairperson in the first hearing held that the applicant was not guilty of 'gross insubordination' when she refused to carry on in the acting HOD position. To submit her to the same process, arising from the same alleged misconduct, was manifestly unfair and contrary to the principles set out in *BMW South Africa (Pty) Ltd v Van der Walt.*[16]

[40] Although it would have been advisable for the applicant, *ex abundante cautela,* to have participated in the second hearing and to have raised her concerns there once more, I am persuaded that this is one of those exceptional cases where the hearing was so obviously unfair that it

[15] Cf *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO* [2008] 4 BLLR 1261 (LC).

[16] [2000] 2 BLLR 121 (LAC) para [12]. See also *MEC for Finance, KwaZulu-Natal v Dorkin NO* [2008] 6 BLLR 540 (LAC).

amounted to the proverbial straw that broke the camel's back. The situation had already become intolerable over the previous month when the employer repeatedly tried to pressurise the applicant to continue in a position where she was not comfortable and where she felt coerced and victimised; it culminated in a predetermined hearing on a charge of which she had already been acquitted, to use the company's criminal law parlance.

The handover process

[41] Mr *Van Zyl* submitted that the applicant had, at the least, a duty to ensure a proper handover of "intellectual property" (IP) to the new incumbent, Dr Coovadia. He also submitted that the applicant conceded in the arbitration that she had an obligation to assist Coovadia. The arbitrator also found that the applicant "acknowledged" that she "would be bound to assist a colleague". That led the arbitrator to conclude that the instruction to continue acting in the HOD position was "valid, lawful and reasonable".

[42] That conclusion is a *non sequitur.* The applicant did acknowledge that she may be expected to fulfil duties outside of what is expressly stated in her contract of employment, in response to a series of hypothetical scenarios put to her in cross-examination. She did not concede that that would include continuing to act in the HOD post. When it was put to her that her input was "desperately required" and that she was under an obligation to perform the task, she replied: "That is incorrect".

[43] The applicant also testified that she did not have the necessary IP to hand over to Dr Coovadia in any event. She had only had three meetings with the previous incumbent, Dr Mothudi. Those meetings dealt with monthly reports, quarterly reports and contracts, respectively. It did not clothe her with sufficient IP to hand over to the new appointee, Dr Coovadia. The arbitrator did not take this evidence into account; she merely found that the applicant "would be bound to assist a colleague".

An intolerable situation? The employer's role and responsibility

[44] The situation had indeed become intolerable, as set out in the sequence of events above. It is clear that this was mainly of the employer's making. The applicant did, at least initially, attempt to come to the assistance of her employer. She reluctantly agreed to act in the HOD position, even though it was a much bigger job with far greater responsibilities, and she had reservations about doing it. But this was meant to be a short-term solution; the employer was meant to go on an urgent recruitment drive and to appoint someone else. It took almost five months to do so. And even then, it still instructed the applicant to report in a position that had already been filled.

[45] The employer went further. Its human resources personnel attempted to pressurise the applicant – they came very close to threatening her. She was told to consider her career; the clear message being that she was in danger of losing her job and that she would find it difficult to find similar employment in what is a small industry.

[46] The facts of this case are akin to those in *Murray v Minister of Defence*[17] where the Supreme Court of Appeal dealt with constructive dismissal.[18] In that case, after having regard to the way that the SA Navy had dealt with the employee, Cameron JA came to the following conclusion[19]:

> "But one must counter the sense that the Navy has been found wanting against an intangible and unpredictable standard by positing that it is hard to avoid the impression, at the end of all the evidence and memoranda and letters and pleadings, that the [employee] was hard done by."

[47] In the case before me, it is also hard to avoid that impression. The applicant fulfilled her duties in terms of the initial temporary contract. She made it clear that she was not willing to continue in that position after the contract had expired. In attempting to force her to do otherwise, Metropolitan acted unfairly.

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[17] [2008] 6 BLLR (SCA).

[18] Although that case was decided with reference to the common law, as soldiers are excluded from the LRA, the SCA imported labour law principles – as guaranteed in the Constitution and codified in the LRA – in its reasoning.

[19] At para [64].

[48] I am persuaded that, on the facts of this case, the employer was responsible for making the continued working relationship intolerable; and that it was culpably responsible. In coming to the contrary conclusion, the arbitrator, in my view, misapplied the law to the facts of this case.

The question of fairness

[49] Even if the employee was constructively dismissed, the question remains whether it was fair.[20]

[50] I conclude that it was not. It arises from her refusal to continue in the acting in the HOD position. She was not contractually bound to do so. When she first refused, the chairperson of an internal disciplinary hearing found that it did not amount to gross misconduct. Undeterred, the company charged her with the same misconduct. That was unfair in itself. So was the dismissal. The company attempted to pursue allegations of misconduct in circumstances where it would have amounted to double jeopardy and would have been procedurally unfair. It was also not for a fair reason, as it was the company, and not the employee, who was in breach of contract.

Conclusion

[51] Taking into account all of these facts, I conclude that the employer had made the continued employment relationship intolerable. The applicant's resignation amounts to a constructive dismissal. That dismissal was unfair. The contrary ruling of the arbitrator cannot, in my view, be upheld.

Remit or substitute?

[52] It would serve little purpose to remit this matter for re-hearing. A full transcript of the arbitration proceedings served before Court, together with extensive supplementary affidavits. The Court was greatly assisted by comprehensive heads of argument and oral argument by both parties'

[20] *Asara (supra)* para [37]; *Eagleton v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) para [35].

legal representatives. It is in a position to substitute its own finding for that of the commissioner.

[53] The applicant, unsurprisingly, does not seek reinstatement. Indeed, it would only be in the most unusual circumstances – e.g. where the *dramatis personae* or the working environment has changed substantially – where that would be appropriate when the very reason for resignation was that the employer had made continued employment intolerable. I therefore have to consider the amount of compensation, if any, that would be appropriate.

[54] The applicant resigned just over 12 months ago. There is no evidence before me whether she has secured another job. (She states in her founding affidavit, signed on 4 October 2012, that she was still unemployed at that stage). The maximum amount of 12 months' compensation contemplated by the LRA could be considered. However, I take into account that the applicant did act prematurely to an extent. In my view, she should have participated in the second disciplinary hearing, even though it was patently unfair. Even though I have found that, despite that omission, her resignation amounted to a constructive dismissal, she shares a small part of the blame for bringing the employment relationship to a premature end. I also take into account that the applicant is a highly educated, relatively young medical doctor who should not struggle to find alternative employment.

[55] Taking those factors into account, I consider an award of six months' compensation to be just and equitable.

The share scheme

[56] There is one further aspect to this case. The applicant seeks, in her notice of motion, a declaratory order that she is entitled to participate in the Metropolitan Long-term Incentive Replacement Scheme ("the share scheme").

[57] Mr *Van Zyl* submitted that this court does not have jurisdiction to entertain that dispute. I disagree. The dispute about the share scheme is one that arises from the contract of employment. Therefore, this court does have

jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act.[21]

[58] However, there is simply not enough evidence before this Court in the context of this review application to deal with this ancillary dispute. No evidence was led before the arbitrator on this issue, although the applicant did raise the issue at arbitration. For example, evidence and argument would have to be led on the question whether the applicant qualifies because her dismissal was "based on the operational requirements of the company" as set out in clause 9.2.2 of the share scheme. I decline to deal with this ancillary dispute as part of the review application.

Costs

[59] Both parties submitted that costs should follow the result. I agree.

Order

[60] I therefore make the following order:

60.1 The arbitration award of the second respondent (the commissioner) dated 24 August 2012 under the auspices of the third respondent (the CCMA) under case number WECT 6697-12 is reviewed and set aside.

60.2 The award is replaced with an award that the employee, Dr Malebo Majatladi, was constructively dismissed and that the dismissal was unfair.

60.3 The employer party, Metropolitan Health Risk Management (the first respondent), is ordered to pay the applicant compensation equivalent to six months' remuneration.

60.4 The first respondent is ordered to pay the applicant's costs.

[21] Act 75 of 1997.

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AJ Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	LW Ackermann Instructed by Bowman Gilfillan.
FIRST RESPONDENT:	Neil van Zyl (attorney).