IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

REPORTABLE

CASE NO: P 380/08

In the matter between:

EASTERN CAPE TOURISIM BOARD	Applicant
AND	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	1st Respondent
MANGISI MRWEBI N.O	2nd Respondent
HING, R	3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the commissioner) under case number ECEL 2/08 dated 21 July 2008. In terms of the award the commissioner found the resignation of the third respondent to have amounted to constructive dismissal which was unfair.

[2] The applicant has also applied for condonation for the late filling of its review application, which has not been opposed. There is no reason why the

condonation should not be granted regard being had to the fact that it was not opposed and the explanation tendered was reasonable and acceptable?

Background Facts

[3] The third respondent (hereinafter referred to as the respondent) who was prior to her resignation employed by the applicant as Chief Financial Officer resigned and thereafter claimed constructive dismissal. Initially before June in the application the respondent was seconded to the applicant by Deloitte and Touch, a firm of auditors. She subsequently was appointed as Chief Financial Officer by the applicant

[4] The respondent testified during the arbitration hearing that on joining the applicant she developed policies to address some of the problems which caused the applicant not have a clean audit. According to the respondent most of the staff members were not happy with the new policies and procedures she introduced. The unhappiness about the policies was apparently due to the fact that the power of the Chief Executive Officer (the CEO) was reduced in as far as financial matters were concerned. The power of the CEO in authorising Financial transactions was reduced from R 1 million to R 100 000, 00 and those of other manager were reduced from R10 000, 00 to R5000, 00.

[5] The respondent testified about the tension between her and the CEO who at that stage was Mr de Kock. The problem between the two of them arose apparently because he (Mr de Kock) had singed a contract with KPMG Auditors in the amount of R1 million without bringing to the attention of the board. The other

problem which the respondent had with the CEO was that she was not allowed to attend the board meeting where the issue was discussed and her view was that the CEO was misleading the board in as far as the matter was concerned. The relationship between Mr de Kock and the applicant deteriorated to the extent that at some stage he took the respondent's lap- top and was not allowed to talk to the board members.

[6] Because of the problems she had with Mr Kock the respondent left the applicant during June 2006. Another CFO was apparently appointed to replace her but worked for only one month and left. After the departure of the other CFO the respondent was approached by the Chairperson of the Board who invited her to rejoin the applicant. It seems the respondent was only willing to return on condition she did not report to the CEO. However, the letter of appointment seems not to have been in accordance with her demands. The relevant point of the letter reads as follows:

> *"1 You are appointed by the Eastern Cape Tourism Board as CEO with effect from 2 January 2007 reporting to Mrs Muvanga or the Chairperson of the Board of the Eastern Cape Tourism Board."*

[7] At the time of the appointment of the respondent Mrs Muvanga was the HR manager of the applicant and also acting CEO. The CEO was suspended as of September/October 2007. The employment of the CEO, Mr de Kock, was subsequently terminated by mutual agreement between the parties.

[8] At the time the respondent rejoined, the applicant was undergoing transformation as a result thereof the MEC had placed a moratoriums on the employment of permanent staff. For a period of 15 (fifteen) months the respondent and other manager had to do with temporary employees. The moratorium was removed during March 2010.

[9] One of the employees who were appointed upon the removal of the moratorium was the accountant who was according to the applicant recommended by the HR manager.

[10] The other temporary employee who applied after the removal of the moratorium was a certain Zodwa. Her application was unsuccessful because the respondent had received information from the Auditor General that she was previously dismissed at Fort Hare University because of an act of dishonesty related to fraud. Zodwa left the applicant and apparently found employment with the police. She was however reapplied to the applicant after the removal of moratorium in December 2006. Because of the information she had about her (Zodwa), the respondent did not short list her for interview. She was however invited for the interviews by the HR manager a matter the respondent was clearly unhappy with.

[11] During the interview one of the panel members who seats in the audit committee and was from the office of the Auditor General raised with Zodwa the issue of fraud which she had allegedly committed whilst employed by Fort Hare University. She initially disputed this but conceded once confronted with

information that was confirmed by Fort Hare University. Thereafter Zodwa did not pursue her application after this revelation.

[12] The other problem raised by the respondent concerns a person who had been employed as the permanent buyer. In this instance there seems to have been no problem with the recruitment or appoint of that employee. The version of the respondent is that this employee was a highly skilled individual with a good understanding of the working of the public entity like the applicant. She however in time became insolent according to the respondent. The problem with her started with her allocating lap-tops without the approval of the respondent. When confronted by the respondent as to why she did that she is alleged to have screamed at the respondent.

[13] The problem or grievance which the respondent had relating to the accountant is that the respondent did not receive co-operation or assistance from the HR manager in ensuring that disciplinary steps were taken against her. After lodging a compliant against the accountant the respondent was informed by the HR department that they would not proceed with investigating the claim because the accountant had lodged the grievance against her.

Appointment of the new CEO

[14] The new CEO commenced her employment with the applicant on the 1st of June 2007. Prior to her commencing with her duties the board had according to the respondent agreed that all financial misconduct, fruitless and wasteful expenditure should be reported to the audit committee. It was expected that

managers would attend to those meetings and respond to the issues raised in the reports.

[15] On the 21st of June 2007 the respondent receive an email from the CEO informing her that her contract was extended until the end of March 2008. The third respondent accepted the extension of the contract but the issue that arose thereafter related to the failure by the HR manager to furnish her with the contract of employment. She testified that at one stage when she enquired about the contract the HR manager started swearing at her for no apparent reason.

[16] The third respondent received her contract on the 16th October 2008, signed by the HR manager. She objected to this and indicated that her contract can only be singed by the CEO. It would appear that the CEO singed the contract on the same day but it was issued to the respondent on the 21st October 2008.

[17] The relationship between the respondent and the new CEO was also not cordial. The problem in the relationship seems to have started with the issue of the respondent's contract. It would appear on the respondents version that the CEO was not happy with the fact that she (the respondent) was directly accountable to the board. The issue of the contract arose at the board meeting in October and that is when the board enquired as to why the contract had not been issued when it was authorised already in June.

[18] The other issue between the CEO and the respondent arose when the CEO took away the buyer from the respondent's department and placed her in the marketing department. Another instance that brought tension between the CEO

and the respondent concerns the trip which the CEO and the Chairperson undertook to Germany. The two were initially booked on an economy class but changed to a business class which the respondent' viewed as a wasteful expenditure.

[19] The respondent complained that the CEO had spread rumours that the respondent had said that the accountant had an affair with one of the board members. The other allegation was that the respondent had accused the accountant of being a fraud.

[20] Because of this rumours the husband of the accountant issued summons against the respondent. According to her the board agreed that the applicant should assist her in defending the claim but the CEO and the HR manager reversed that decision through a teleconference with the board when she was away from work.

[21] The other incident which the respondent refers to concerns payment of the amount into an incorrect account number of one of the service providers. The error seems to have arisen from the side of the bank. Instead of paying the amount into Salome Lodge, the bank paid the amount into Buxton Range. The respondent successfully resolved the matter in having the amount deposited into the correct account. In fact at some stage the CEO told the respondent that she was happy with the manner in which the matter was resolved. The CEO however changed her attitude, according to the respondent, when someone from the Buxton Range contacted her and complained about the manner in which the respondent spoke to them regarding this problem. The respondent testified that

the CEO said: *"this incident will never again occur in the future."* She further testified in this respect that she was not sure whether the statement meant that in future monies paid into incorrect account will not be recovered.

[22] The transcript of the arbitration proceedings reflects that on conclusion of narrating the above incidents, the respondent immediately testified as follows:

> *"So in November what happened I was very stressed. I then was booked off by the – I went to see the doctor who booked me off for about a week. And I went to see (indistinct) going on at work and I tendered my resignation and launched a grievance. But on Friday I tendered my resignation …. 30 of November I tendered my resignation."*

The letter of resignation which was read into the record reads as follows:

> *"It is with regret that I feel compelled to tender my resignation as Chief Financial Officer (CFO) of the Eastern Cape Tourism Board (ECTB). My notice period will be effective from 03 December to 31 December 2007.*
>
> *I have attached the grievance which I am launching simultaneously against the Chief Executive Officer (CEO), Advocate Naledi Burwana – Bisiwe. I am bound by the PFA to assist the Accounting Authority in the discharge of the duties prescribed in Section 51 of the Act (Treasury Regulations for Public Entities Part 83.1.2-3.1.3), and, as is set out in the attached grievance, I am unable to reconcile my position as CFO with the manner in which the ECTB is conducting its business. My previous correspondence and memorandum in this regard have simply been ignored.*

In all the circumstances, I found it intolerable to work for ECTB. I am prepared to work my notice period, but I am not prepared to tolerate any form of victimisation or undue pressure from the CEO. My right to refer the matter to the CCMA for Constructive Dismissal remain fully reserved

Yours Faithfully."

[23] The respondent had attached to the above letter a list of grievances that she had against the CEO.

[24] Earlier, the CEO had addressed a letter to the respondent dated the 21st November 2007, which reads as follows:

"***UNDERMINING OF AUTHORITY OF CEO: YOUSELF***

1. *As you are aware, the practice with regard to formulating the agenda for board committees is that the relevant manager is required to prepare a draft agenda and obtain agreement with the office of the CEO regarding the final agenda.*
2. *As you are also aware, the agenda is rectified by my office prior to convening the board committee meeting and prior to the board committee facts are complied and distributed.*
3. *On and about the 20th November 2007 at the Finance Committee meeting of the Board, I noticed with concern that you presented the meeting with additional set of agenda items that we had not agreed to include in the agenda, despite the fact that you had submitted to my office a proposed agenda for the committee.*

4. *I found this extremely inappropriate as this has the potential of creating a negative impression of the management and operations of the ECTB of which I am the CEO.*

5. *You will recall I have in the past cautioned you about taking issues to the board subcommittee meetings that have not been raised with me as per our normal internal practice in this regard.*

6. *You're hereby with requested to make a representations to my office with regards to the above allegations in which you should indicate why I should not regard the above as follows:*

   (a) Misconduct in that my authority as the ECTB CEO and that is my office was undermined and called into question; and

   (b) That you have deliberately undermined the protocol of the ECTB with regard to the above;

7. *You are here requested to avail yourself for this purpose in my office on the 23rd November 2007 at 09h30. Please note that you may have an employee representative present should you so desire.*

Kind Regards."

[25] According to the respondent the essence of the compliant regarding the letter of the CEO was that she should not have raised the issues she had, including the irregular payment to Spar for marquee and the renovation of the offices.

[26] The respondent testified that the issues she raised are the same as those she had raised prior to her departure in 2006. The respondent testified that on her return to work on the 3rd of December, to serve her notice period. She was served with

a notice of suspension by the CEO through a letter dated the 3rd December 2007. The letter reads as follows:

"***PLACEMENT ON PRECAUTIONARY SUSPENSION: YOURSELF***

1. *You are herby advised that the Eastern Cape Tourism Board (ECTB) intends to investigate allegations of serious misconduct against you.*

2.

   2.2 Providing misleading information in the execution of your duties, thus jeopardising the integrity of the ECTB; and

   2.3 Bringing the ECTB, its leadership and management into ill depute.

3. *The above matters referrers mainly to your recent conduct within the organisation, details of which were outlined in a letter inviting you to a meeting for the 23rd November 2007, and especially to your submission made to the board on the 30th November 2007.*

4. *It is further hereby advised that due to the serious nature of this allegations and the possibility that you may interfere with the investigation the ECTB intendeds placing you at the precautionary suspension in terms of clause 6.4.6.2 of the ECTB Disciplinary Code and Private Procedure.*

5. *Your are therefore hereby called upon to make representations to me as to why you should not be placed on precautionary suspension as outline above. Your representation must be in*

writing and must be submitted to me not later than 16h00 (close of business) to date, 03 December 2007.

Yours Sincerely."

Grounds for review

[27] The applicant contends that the commissioner in arriving at the conclusion that the resignation of the respondent amounted to constructive dismissal committed gross irregularity, exceeded his powers as an arbitrator and failed to act as a reasonable decision-maker. In this respect the commissioner is criticised for the following:

"20.1 Failing to properly consider the fact that the employee resigned in the face of pending and serious disciplinary action;

20.2 Failing to consider the fact that the Human Resources Manager, who as the focus of a great deal of the employee's complaints, was no longer in the employ of the applicant at the time of the employee's resignation.

20.3 Failing to consider the fact that the employee resigned after being absent from the workplace for 11 days.

20.4 Finding that the applicant was left with no alternative but to resign under circumstances where she had never lodged a formal grievance."

[28] The other grounds upon which the applicant relies on in seeking to review and have the commissioner's award be set aside are the following:

- The commissioner failed to take into account that the respondent resigned in the face of a pending disciplinary action against her.
- The commissioner failed to take into account the fact that the HR manager against whom the respondent complained about had already left the employ of the applicant at the time of her resignation.

The arbitration award

[29] In his arbitration award the commissioner correctly categorized the issue before him as concerning whether the resignation of the respondent constituted a constructive dismissal. He then set out in details the background and the evidence presented by the respondent.

[30] In his analysis of the evidence and argument presented by the parties the commissioner correctly set out the legislative provisions jurisprudence governing the constructive dismissal. In this respect the commissioner deals in some details with the case and the academic authorities dealing with the approach to be adopted when dealing with the issue of constructive dismissal.

[31] In dealing with the facts before him the commissioner found that HR manager failed to assist the respondent in instituting disciplinary proceedings against her subordinates. An example given in this regard is the case of Ms Agnes Peard in which the respondent had requested that disciplinary proceedings be instituted against the employee for insolence. Another example was the case of Ms Tshiki against whom the HR manager again failed to carry out the request to institute disciplinary action.

[32] In considering the above instances of the alleged failure to institute disciplinary action against the subordinates of the respondent the commissioner concluded that the respondent was face with a tense situation in which she could not discipline her subordinates. The commissioner further found that the situation continued even after brining the problem to the attention of the CEO.

[33] After dealing with the other complaints of respondent the commissioner observed as follows:

> *"In the present case it is clear that the applicant was alone in her noble crusade of wanting the respondent to have an unqualified audit, it is clear from her evidence that she never had the support from the echelons of the respondent. I do not have doubts in my mind that this was a frustrating and stressing environment. This was more so where a person held such a high position of CFO and her reasonable instructions are flouted by her subordinates wilfully. The very subordinates in turn had a full support of her colleagues."*

[34] The commissioner rejected the contention of the applicant that the grievances attached to the respondent's letter were nothing but a mere list of complaints. He found in this respect that the respondent was faced with a futile exercise if he was to report the grievance to the relevant structures. The commissioner went further to say that:

> *"The picture that the applicant presented in her evidence was that she had lost confidence in the CEO and the respondent's board. Objectively, any reasonable person in the applicant's position would have tendered her resignation."*

[35] The commissioner also rejected the contention of the applicant that the resignation of the respondent was triggered by the fact that the applicant was about to take disciplinary actions against her.

The law relating to constructive dismissal

[36] Constructive dismissal is defined in terms of section 186 (1) (e) of the LRA as follows:

> *"An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."*

[37] Grogan in the Workplace Law (9th Edition) in discussion the concept of constructive dismissal states as follows:

"It seems that on this view any form of serious and continuing misconduct constitutes 'repudiation in the wide sense' by the employee or employer. In either case, the employment relationship is rendered 'intolerable.' An employer can also repudiate in this sense by making it impossible for an employee to render the employment, a situation now recognised by the concept of 'constructive dismissal."

A fundamental point made by the learned author is that:

"Mere unhappiness at work is not enough. Managers in particular are expected to be able to put up with ambiguity, conflict in relationships, power struggles, office politics and the demand for performance where if not delivered no payment is made."

[38] In *Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC),* (at 985A-C*)*, the case also relied on by the commissioner, *the Court* framed the test for determining the existence of constructive dismissal in the following terms:

"The enquiry [is] whether the appellant, 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 employer and employee. It is not necessary to show that the employer intended any repudiation of the 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."

The Court went further at 984D-F to say:

> *"When an employee resigns or terminates the contract as a result of constructive dismissal such an 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 on 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."*

[39] The onus in a constructive claim rests rest with the employee who has to show that the working environment has been made "intolerable" and could therefore not be expected to continue with the employment relationship. The use of the word "intolerable" in the LRA has been interpreted to have introduced a much stricter test than the one which was applied under the previous 1956 Labour Relations Act. The word "intolerable" according to Grogan in Employment Law observes further (9th Ed) page 114 suggest that constructive dismissal should be confined to situations in which the employer behaved in a deliberate oppressive manner and left the employee with no option but to resign in order to protect his

or her interests. There are various situations in which the employer can be said to have behaved in such a manner that that left the employee was with no option but to resign.

[40] An objective test is used in the determination of the existence or otherwise of a constructive dismissal claim. Thus the subjective state of mind of the employee is not a critical factor in the assessment of the existence or otherwise of constructive dismissal. In general in order to succeed with a constructive dismissal claim the employee must show that he or she resigned because of coercion, duress or undue influence. Failure by the employee to use the internal grievance procedure, although not a determinative factor, is an important aspect in the objective assessment of whether or not the employee was left with option but to resign.

[41] The application of the objective test means that the employee's perception of the events that establish “intolerability,” due to the employer's conduct, must be viewed in an objective sense. Van Niekerk et al in Law@work (2008) at page 213 states that:

> *"The courts have endorsed the principle that that the remedy of constructive dismissal, being one in which the employee seeks to obtain resignation, should be narrowly interpreted as against the employee. This implies not only that the test should be objective but that it should be set at a high standard, and that the act of resignation should be an act of final resort when no alternatives remain.”*

Evaluation

[42] The commissioner's award in this matter, in my view, does not pass the scrutiny of the review test set out in *Sidumo and Another v Rustenburg Platinum Mine (Pty) Ltd and Others [2007]* *12 BLLR 1097 (CC).*

[43] The duty of a commissioner in considering whether the dismissal of an employee was for a fair reason or otherwise is set out in *Sidumo* in the following terms:

> *"[78] In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list"*

[44] As indicated earlier the commissioner cannot be faulted in as far as his understanding of the law and the authorities related thereto are concerned. However his reasoning and conclusion is unreasonable if regard is had to the facts and the circumstances of this case. In his reasoning the commissioner

failed to take into account the totality of the facts which were properly before him.

[45] In my view the commissioner failed to appreciate, in the first instance that he was dealing with a case of a senior manager which largely involved the contestation about authority and accountability. It is apparent from the facts that the respondent did not believe that she should account to the CEO or any other person. She had the same difficulty with the first CEO. In seeking to address her problem about accountability she sought to have included in her contract when she rejoin the applicant that a provision be made that she would be accountable to the board. It is clear that on rejoining the applicant the respondent sought an assurance that she would not be subjected to the same problems she encountered previously. This means the respondent knew the challenges she was likely to face when she rejoined the applicant.

[46] Although in her testimony she seemed to down play her accountability and reporting line to the CEO on her rejoining the applicant, she was structurally and in terms of her letter of appointment still accountable to the CEO.

[47] Even the complaints which the respondents had against the Human Resource Manager had little to do with the refusal to assist in the disciplinary action against the subordinates but more to do with the management and the accounting politics of managers in the respondent's workplace. Whilst she clothe the complaint as failure to assist in the disciplinary proceedings, it would seem to me that in essence what she sought to achieve was to have the HR manager do

as she was told by her. The respondent was as indicated earlier a senior manager who had some courses in labour law. She surely could have, as a manager, formulated the charges that she wished to proffer against the individuals concerned. It was not her case, as I understand it, that in terms of the applicants policy disciplinary action has to be instituted by the HR manager or that she could not institute such actions without the approval of the HR manager.

[48] Even, assuming that there was a duty on the HR manager to assist the respondent in formulating the charges against the subordinates, this would not assist the case of the respondent for what appears to be an obvious reason. It was not the case of the respondent, as I understood it, that in terms of the applicant's policy any disciplinary action has to be instituted by the HR manager. There seems to be no policy that required disciplinary action to be instituted only with the approval of the HR manager. And more importantly the respondent has not denied the averment of the applicant in its papers that at the point of submitting her resignation the HR manager had already left the applicant. In other words if it was to be accepted that the "intolerability" of the working conditions of the respondent had been created by the failure of the HR to assist with disciplining the respondent's subordinates, that cause of the complaint, going forward, had been removed. It could therefore not have been part of the reasons for resigning.

[49] In the same way the issue of Zodwa does not assist the case of the respondent. The essence of the problem with regard to Zodwa was that the respondent did not wish her to be appointed as an employee because of the history of defrauding her previous employer. In the final analysis her problem with

whoever sought to impose Zodwa on her was resolved through the interview process. Her objection to Zodwa was raised in the interview. Zodwa was confronted with the issue of fraud and after confirmation by her previous employer, she abandoned her application. Zodwa was never appointed subsequent to that interview.

[50] The same applies to the issue of the respondent's contract of employment. There was clearly a delay in finalising the written contract of the respondent. In my view there is insufficient evidence to show that this was done with the view of putting pressure on the respondent. The evidence point out that the issue was attended to as soon as it came to the attention of the relevant structure of the applicant. Although the contract was given to the respondent some time later, the problem was addressed on the same day that she objected to the contract being singed by the HR manager.

[51] In my view there is nothing in the letters of the respondent dated 2 November 2007 that suggest that the respondent was of the view that her working conditions had been made unbearable. There is however no doubt that the respondent complained quiet strongly about the withdrawal of the decision of the board not to support her defending the defamation action which had been brought by one of her subordinates. The picture presented by the contents of that letter is far from that of an employee whose conditions of employment had been made unbearable and was about to "abandon ship." The relevant part of that letter in as far as the picture of the view and the conditions that existed as a result of the decision of the board to withdraw the support in the defamation

case comes out quiet clearly at paragraph 3 of the second page of the letter which reads as follows:

> *"In my view the above, I am most dissatisfied with the decision taken by the Board on the 31st October 2007, where I was not allowed to provide input. I am of the opinion that the summons and the allegations arose within the boundaries of an employer- employee relationship and that Board has an obligation to defend the case, for which I shall seek legal advice."*

The letter further reads as follows:

> *"I would like the Board to take cognisance of the fact that I have never, during my career which spends over30 years, had my integrity or in the personal skills challenged, bearing in mind that I have also previously being employed as the CFO of two other Public Entities.*
>
> *May I remind the Board that the unqualified Audit Report for 2006/07which the Organisation received recently was mostly through my unrelenting effort and determination to achieve that objective as the Chief Financial Officer of the Eastern Cape Tourism Board, which is solely being over looked at the present. Whit due respect, how I am expected to support the Accounting Authority who so obviously by their actions, do not appear to support me."*

[52] As concerning the finding that the resignation was not because of the anticipated disciplinary action against the respondent, there seems be with due respect to have been a fundamental misconception of the facts by the commissioner. The

respondent did not in her answering affidavit dispute that although her resignation letter is dated 30 November 2007, she only resigned on the 3rd December 2007 after receiving the letter advising her make submissions as to why she should not be suspended.

[53] The other factor which a reasonable decision maker would have taken into account in the assessment of whether the resignation of the respondent amounted to constructive dismissal is the contents of the letter of resignation, in particular what the objectively represent or project. The use of the word “intolerable” in the letter of resignation does not mean that constructive dismissal has been established. In the present instance the respondent uses the word “intolerable” in her letter of resignation but however, what is strange is that she indicates in the same letter that she was prepared to serve her notice period.

[54] Turning to failure to lodge a grievance prior to resigning. I have already indicated that this is not a decisive factor but its a consideration and depends on the circumstances of a given case. The case of the respondent in the present instance is not that she was not aware that she could lodge a grievance against those who were allegedly making her working environment intolerable. The answer she gave during evidence in chief, when asked as to why she did not follow the procedure of lodging a grievance is unsatisfactory and indicates very clearly that she had the opinion of seeking to resolve her problems with the applicant through the grievance procedure before resorting to resignation.

[55] In the light of the above discussion I am of the view that the applicant's application stand to succeed. I do not however belief that the law and fairness would support the view that costs should follow the results.

[56] In the premises I make the following order:

1. The arbitration award issued by the second respondent under case number ECEL 2/08 dated 21 July 2008 is reviewed and set aside.

2. The arbitration award is substituted with the following award:

"a. The applicant has failed to show that her resignation was a constructive dismissal.

b. The termination of the employment of the applicant was due to resignation.

c. The applicant's claim is dismissed for lack of jurisdiction."

3. There is no order as to costs.

Molahlehi J

Date of hearing: 16th February 2010

Date of Judgment**:** 27th May 2010

Representation:

For the applicant:	Mr C Kirchmann of Kirchmann Inc.
For the respondent:	Adv B Hartle
Instructed by**:**	Boosen Rossouw Attorneys.