PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS1207-16/17**

Commissioner: **Luyanda Olota**

Date of award: **05 September 2018**

In the matter between:

HOSPERSA obo Tamuka Chivonivoni **Applicant**

and

Department of Health- Gauteng **Respondent**

DETAILS OF THE HEARING AND REPRESENTATION

[1] The matter was set down for arbitration on 07 November 2017 at the Department of Health, Bank of Lisbon, Johannesburg.

[2] The Applicant was represented by Advocate Shumba whereas the Respondent, Department of Health- Gauteng was represented by Mr Shange, a Manager Labour Relations.

ISSUES TO BE DECIDED

[3] Whether the Applicant was constructively dismissed or resigned.

[4] In an event I find the dismissal existed, I have to determine its fairness and if found to be unfair, order an appropriate relief.

BACKGROUND

[5] The Applicant declared a dispute to Public Health and Social Development Sectoral Bargaining Council (herewith under referred as the Council) alleging constructive dismissal. The matter came before me on 26 June 2017. Parties were granted time to compile Pre-Arbitration minutes.

[6] The arbitration proceeded on 27 February, 09-10 May, 07 June and it was finalized on 06 August 2018. Parties submitted written closing arguments on 13 August 2018 as agreed.

Common cause issues

[7] The Applicant was employed permanently by the Respondent in a capacity as a Medical Practitioner from 2011 to January 2017. The Applicant submitted two resignation letters, on 09 January 2017 stating that he will serve a notice until 28 February 2017 and the second resignation letter was tendered on 10 January 2017 stating that he was resigning with immediate effect. In his resignation he cited amongst other things grievances and harassment.

[8] Parties agreed that he Respondent had instituted an investigation on allegation of misconduct against the Applicant and the Labour Relations Officer, Mr. Shange have two meetings with the Applicant towards the end of December 2016 and 10 January 2017 in order to collect information.

Issues in dispute

[9]
* Whether the CEO harassed, disrespected and insulted the Applicant alleging rubbish, and interjected him whilst taking;
* Whether the CEO altered commuted overtime contract;
* whether the Applicant was coerced by the CEO to perform on calls duties;

* Whether complaints lodged by the Applicant were attended to and resolved;
* whether the Respondent made working environment unbearable to the Applicant.

SURVERY OF ARGUMENTS AND EVIDENCE

Documentary Evidence

[10] The Applicant submitted bundle of documents marked Annexure A (pages 1-59) and Annexure E (pages 1-5) and the Respondent submitted Annexure B pages 1-43 and Annexure. Annexure C (Pages 1-3) is the Pre-Arb minutes signed by both parties. Parties agreed to add documents during the proceedings and/or they agreed to introduced documents before leading evidence on it. All the documents were accepted as they purport to be.

Oral Evidence

[11] The Applicant, **Dr Tamuka Chivonivoni** in his sworn testimony stated that he worked for the Respondent and serve as a Medical Practitioner. He obtained his degree in medicine and surgery in Zimbabwe and further obtained a Diploma in HIV from College of Medicine of SA. He has Masters in Public Health from University of Western Cape. He has been practicing since 1997. He worked as a Medical Practitioner in Zimbabwe; Zambia; Mozambique and in South Africa before he became an employee of the Respondent.

[12] He worked for a non-governmental organization dealing with HIV Patients and seconded at Pholosong hospital. Due to shortage of doctors he was asked by the then CEO, Dr. Maseko to assist in the emergency section, which he had done so. In May 2011 he was appointed at the same hospital and continued working at HIV section.

[13] The Applicant testified that on 29 August 2016 he was called in the office of the CEO, Dr Lingham and Dr Lobo, the Clinical Manager was also present. When he arrived in the CEO office he attempted to greet him, but he told him he has an injury in his hand, but when he was leaving the office the same person offered a hand shake. Dr Lingham questioned him about his qualifications and he felt somehow undermined the way questions were asked questioned him about the university he obtained his medicine and he asked which masters he has and when did he joined the Pholosong Hospital.

[14] He was then confronted about a patient he consulted the previous day and prescription he gave that patient. The heat confrontation continued and he tried to respond but he was not allowed even to finish answering the questions as he was interjected and emotions went up. Dr Lingham told him he was talking rubbish. The words did not go well and to him that was not the correct way to deal with subordinates and it was unprofessional; and did not expect to be treated in that fashion.

[15] Dr. Lobo was present throughout the conversation. The CEO conceded that he used the word rubbish however it was used in a different context. He told the Applicant '*that the response he gave on how the patient was treated if it was presented to judges or lawyers they may say it was rubbish'*. The Applicant alleged he was unhappy and informed Dr Lingam. After the incident he was harassed; Dr Lobo was instructed to book him for calls more than the other doctors and he was even booked whilst he was he was booked off sick.

[16] He was unhappy about what was allegedly said to him (rubbish) and he shared his dissatisfaction to his direct Manager Dr Mogale whom in his response regarded the utterances as harassment and victimization and abuse of authority by the CEO. Subsequent to that incident there was another issue related to a commuted overtime agreement he signed with the Respondent. He chose option 'C', meaning he agreed to work up 48 hours overtime. He later discovered that his contract was

tampered with and the option he chosen was altered. He referred to(Annexure B page 14-16) to prove the signed contract. He alleged that the Dr Lingham tampered the contract on page 15 by put a cross in option 'D'. He has no knowledge of the changes, but only find out when he was telephoned by HR informing him that two options were marked in his contract. He was asked which option was he working because the Dr Lingham made changed in the contract and countersigned for the changes he made.

[17] Dr Lingham confirmed that he wrote the Applicant's name 'Dr. Chivonivoni' to identify the document in the commuted overtime contract. He argued that the Dr Lingham had in deed succeeded to destroy his career because he was investigated on allegation of fraud. Initially the Respondent claimed he was earning money for the hours he did not work and later changed and claimed that he defrauded the contract. He was invited into a meeting by Mr. Shange, an investigator without any prior notification about the investigation and he was denied opportunity to look into the documents allegedly defrauded by him.

[18] The fact that he opted for option 'C' was disputed by Dr Lingham and Dr. Lobo. Dr. Lobo's explanation was that the Applicant in previous years he used to choose option 'C' and in 2016 he opted for option 'C' after an instruction issued by CEO instructing all the doctors to sign for option 'D'.

[19] The Applicant claimed he was harassed and substantiated his view by referring to the period where he was booked off sick and Dr Lingham issued an instruction that he be booked on call. This version was corroborated by Dr. Lobo in material respect, he added that he told Dr Lingham that it is impossible to put somebody who has been booked off sick on call because the patient would suffer if the Applicant did not turn up. Dr. Lobo confirmed that the Applicant was booked on call more than the other doctors by instruction from Dr Lingham.

[20] He said all his grievances were not attended to and submitted it to the Labour Relations Officer: Mr. Dladla; Director Nursing; MEC and HOD. He said a grievance meeting was arranged but it could not materialize because the CEO wanted to chair the meeting and his trade union refused alleging the CEO was conflicted.

[21] On October 2016, he wrote a complaint reporting the ill treatment and harassment to Dr. Mazamisa, he worked at Head Office and copied the HOD: Dr. Selebano and the then MEC. The response he received from the HOD was that he must talk to his CEO, eventually Dr. Mazamisa and HOD visited the hospital but he is not certain of the reason because he was not engaged for anything. During that period there was a petition written by the staff of Pholosong Hospital and it was signed by 45 doctors; 204 nurses; 36 porters alleging ill treatment by the CEO.

[22] He stated that another investigation was conducted by Mr. Shange alleging that he was performing work and received remuneration outside public service without authorization. He felt the employer was trying to find something wrong form him because he had declared that he was a director of his company called Rupungudge Fresh Produce, but the business is not trading they farm for food and his family normally sell the remains. On 09 January 2017, his house was visited by inspectors from Ekurhuleni Municipality alleged they were sent by HOD. They were inspecting his small holding where he was ploughing vegetables and they harassed his family bullying them and claim the place was tidy. At that time, he felt that he cannot take any more and decided to resign with immediate effect because the harassment was now extended to his family.

[23] After he left the employment, the Respondent sent him a dismissal letter alleging he was dismissed in absentia. He believes the Respondent was persisting to illtreat him because he cannot be dismissed without being charged and he was never notified of any allegation/s of misconduct.

[24] Under cross-examination, he explained that he had followed the grievance procedure and Mr. Dladla received the grievance form, the employer invited him to a grievance meeting but the meeting could not materialized. After the grievance was not resolved he escalated the matter to Head Office: Labour Relations Unit; HOD and MEC. His grievance was not resolved and he only resigned after he could not find a solution. He believes that there was no attempt to resolve the issues and due to that victimization persisted.

[25] He said there is no rule in medicine mandating him to write in the patient file the date and time. The Applicant confirmed that he received an e-mail on 24 January 2017 advising him that he was required to serve a notice; and reminded him of the pending investigations against him and the employer advised him that he was still regarded as an employee. He said he realized that he was harassed on 29 August 2016 in the meeting he was told he talked rubbish, but he did not resign, but due to cumulative false allegations followed after and harassment of his family members he could not continue working and he resigned and the fact hat the employer was not willing to intervene or attend his grievance he then decided to resign and claim constructive dismissal.

[26] He knew when he resigned that there was pending investigations, but he felt the allegations were malicious and he would never get justice or fair hearing. It was put to him that the employer attempted to resolve the grievance, but his trade union chose not to participate. He responded that the CEO could not be a player and referee at the same time, and that meeting was not properly constituted.

[27] He said the investigation was unfair, he was not formally notified of the allegations against him; the investigator refused to give him the information related to allegations; the investigator just called him to the office without making appointment with him. He did not run away from the allegations, the working environment was not conducive for him, he was verbally abused; CEO only monitored his work and he lost trust and confidence to himself.

[28] Under re-examination, he explained that his direct Supervisor was Dr. Mogale; and Dr Lobo was responsible and managing for all doctors.

Respondent's Evidence

[29] The Respondent's first witness, **Dr Lingham**, the CEO of Pholosong Hospital in his sworn testimony stated that he had vast experience in the health sector. He worked at Baragwanarth Hospital; Head Office of the Department of Health and he joined Pholosong Hospital in 2014. When he joined the hospital there were challenges at Patient Care Unit and he had to strategies. His role was to ensure that he deliver up to standard. The casualty department was his first priority and by scrutinizing patient files was his responsibility after the clinical manager failed to conduct audit on patient files.

[30] He conceded to the fact that he told the doctor that he should not have issued a patient with antibiotic. He did not dispute the usage of the word 'rubbish', however he used it in a different context. He said he told the Applicant that *if lawyer or judges would be faced with same facts they will say this is rubbish.* He was referring to a conversation they had regarding the prescription that was given by the Applicant to the patient.

[31] Regarding the alteration made in the commuted overtime, he confirmed that he wrote the Applicant's name (Annexure B page 15) in order to identify the owner document. He does not know who made changes in the options. According to him all medical doctors were instructed to choose option "D" those who applied for a different option their application was turned down. He is certain that at the time he approved the document it was not altered. All contracts are kept in the HR Office and is possible for the staff to liaise with personnel without his involvement.

[32] The Applicant lodged a lot of grievances and he sent them to Head Office, but same were sent back to his office. He remembers that a grievance meeting was

held and the Applicant's trade union representative insisted that the matter should be handled at Head Office since the CEO was conflicted.

[33] Under cross-examination, he conceded that he approved the contract before the Head of Department recommends and there is nothing illegal about that. Possibly the person was not available and he wanted to ensure the contracts are signed. Regarding insertion and changes made in the commuted overtime contract he explained that HR picked up that in the Applicant's contract, two option were chosen. Human Resources enquired from Dr Lobo, the Clinical Manager who referred the issue to the Applicant. The Applicant told HR that he chose option 'C'.

[34] He stated that he department has a policy dealing with overtime. As the CEO of the institution he is vested with powers to decide on the overtime after taking into consideration institutional needs. He referred to Annexure B page 18 clause 8.5 that says *"in order to accommodate the Department's specific need regarding overtime hours needed and with due regard to the fact that it is the prerogative of the department to determine the conditions attached to employment within the parameters of the regulatory framework the opinion is held that institutional needs chosen should be based on operational requirements determined before the advertisement and filling of posts whether or not it will be required of the successful candidate to perform overtime duties on an organized basis".*

[35] Regarding the atmosphere in the meeting he had with the Applicant in the presence of Dr. Lobo, he said the Applicant never raised the fact that he felt undermined and insulted to him. However, the Applicant told him he took exception to the usage of the word rubbish. He then explained to him that lawyers and judges would say your response is rubbish. He was referring to the question why he issued an antibiotic to the patient. He does not believe the Applicant was offended because after the conversation they both shake hands.

[36] He alleged that he did not harassed the Applicant. The Applicant was put on a rooster by a clinical manager, not him. The same clinical manager testified that he acted at the instruction of Dr Lingham. Dr Lobo conceded to the fact that the Applicant was asked to work the hours he did not work at the time he was on sick leave.

[37] He knew about the petition but he was told by some of the staff that they signed the petition without a content. He disputed the allegation that the staff at Pholosong Hospital were aggrieved about his management style. He also disputed that other medical doctors resigned due to ill-treatment.

[38] Under re-examination, Dr.Lingham stated that at the time he approved overtime contract, the Applicant chose option 'D'. He stated that the Applicant resigned before the charges were proven and the fact that he was charged does not amount to victimization. Dr. Lingham stated that only Head of Department are allowed to choose option 'C'.

[39] The second witness of the Respondent, **Dr. Piema Shimm Lobo** in his sworn statement testified that he is employed by the Respondent as a Clinical Manager in Pholosong Hospital. He responsibilities include overseeing the proper functioning of casualty; surgery gynecology and orthopedic. He started working at the institution in 2011 and he has a good professional relationship with the Applicant. He corroborated the testimony led by the Applicant with regard to what transpired in the meeting with Dr Lingham. He stated that the Applicant was on call a night before and Dr Lingham withdrew the file he was working on.

[40] He said after Dr Ligham CEO uttered the word rubbish the mood of the meeting changed and the voice went high and the Applicant was raising his discomfort about what was said. He referred to (Annexure E page 1), he explained that he wrote the communique to the CEO's attention explaining why the Applicant was not doing calls. He said when he signed the overtime contract the Applicant had

chosen option ‘D’. He substantiated his view and stated that medical doctors were given instruction by the CEO to choose option ‘D’ and at the time he signed the contract was not altered. He said the Applicant never complained about alteration until the matter was brought to his attention by the CEO.

[41] The Applicant at some stage refused to do calls and claimed he was persecuted. He was in deed given more calls as compared to other doctors but the reason for allocating him more calls was to circumvent the period he refused to do the calls. Dr Lingham instructed him to book calls for the Applicant whilst he was booked off sick. He said the Applicant was disciplined for not doing calls whilst he was booked off sick. His view was that the Applicant should not have been given warning for not doing calls because he had a valid reason for not been at work. He said discipline can be used as a form of harassment if it is affected for wrong reasons.

[42] Under cross-examination, Dr Lobo testified that the overtime is optional and doctors should be allowed to exercise their choice. However, he said the department had a policy dealing with commuted overtime and doctors were instructed to choose option ‘D’. He was convinced that tempering of the contract might have been done by the CEO because HR has no interest in the option chosen by doctors. He stated that atmosphere between the Applicant and CEO was not good; the CEO continued to audit the Applicant’s files.

[43] He said he never attend to the Applicant grievance nor management did and other personnel raised their dissatisfaction about ill treatment by Dr Lingham. The staff raised complaint about unprofessional conduct and the incident that happened to the Applicant was one of the issues that was reflected in their complaint. He became aware of the petition when Head of Department from Head Office visited the hospital. He said the atmosphere was not good in the hospital. Other staff members were made to collect information about patient files. His view was that all the issues happened to the Applicant led to his resignation.

[44] Under re-examination, he explained that he Applicant used to do option ‘C’ before Dr Lingham issued an instruction to all doctors to choose option ‘D’. He stated that doctors are compelled to work overtime due to operational requirement of the job.

[45] He said nothing odd when the CEO audit files but it should have done that through his office since he is responsible for operations. He disputed the view that the CEO and the Applicant shack their hands after the said meeting, his view was that the CEO wanted to shack hand, but the Applicant ignored him. He said the refusal to do calls may amount to disciplinary steps been taken if the employee signed a contract binding him/her to work overtime.

[46] He said two doctors resigned due to ill treatment by the CEO another one resigned after he was forced to leave option ‘A. That medical doctor was given an option either to take option ‘D’ or to resign and he chose to resign.

ANALYSIS OF SUBMISSIONS AND EVIDENCE

[47] Constructive dismissal is defined in the LRA in section 186(1)(e) as termination of employment by the employee because the employer made continued employment intolerable. Precedent has established that the onus rests on the employee to prove that the resignation constituted 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 inquiry 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.

[48] Parties have signed pre-arbitration minutes and agreed on the issues in disputes. The following are the issues to be determined:

(1) whether the CEO harassed, disrespected and insulted the Applicant alleging the Applicant was talking rubbish, interjection whilst he was talking.

(2) Whether the CEO altered commuted overtime contract.

(3) Whether the Applicant was coerced by the CEO to perform on calls duties.

(4) Whether the complaints were attended to and resolved.

([5) Whether the Respondent made working environment unbearable for the Applicant.

(6) Did the Respondent acted fairly by not accepting the second resignation on 10 January 2017 and continued with the internal enquiry in the absence of the Applicant.

[49] I will first deal with whether the Respondent acted fairly by continuing with the disciplinary enquiry after the Applicant had resigned. It is trite law that a resignation is a unilateral decision and such requirement is not applicable when an employee claims a constructive dismissal. It is correct that the BCEA requires an employee to serve notice. On the other hand, Section 186(1)(e) of the LRA stated that " *an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee*". It is a common cause that the Applicant filed the first resignation on 09 January 2017 and undertook to serve a notice until 28 February 2017. Subsequently, on 10 January 2017 he filed another resignation on stating that he was resigning with immediate effect. The Respondent signed two different charge sheets, on 09 January 2017 and 02 February 2018, the charge sheet has different charges.

[50] During the cross-examination the Applicant conceded that he resigned after he was charged because he did not believe he will find justice. That proves that he resigned in the face of the disciplinary enquiry. Section 16B(6) of the Public Service Act provides "*if notice of a disciplinary hearing was given to an employee, the relevant executive authority shall not agree to a period of notice of resignation*

which is shorter than the prescribed period of notice of resignation applicable to that employee". Having considered this provision, it is clear that the executive authority has powers to refuse resignation that does not comply with notice period in terms of the Basic Conditions of Employment Act. I therefore find the Respondent acted within the prescribed provision.

[51] It is also a common cause that Dr Lingham the word 'rubbish' was used to the Applicant. However, parties differ on the context in which the word was used. Dr Lingham stated he told the Applicant that anti-biotic must be used at all times when a patient has a wound and after he listen to the response of the Applicant why he did not prescribe anti-biotic for that patient he told him that if he can give such response to the lawyers and judges they would say that response is rubbish. On the other hand, Dr Lobo corroborated the testimony led by the Applicant in material respect and they both said Dr Lingham was angry about how the Applicant handled the patient and uttered the word rubbish after the Applicant explained why he did not give a patient anti-biotic.

[52] Having confronted with mutually destructive evidence, I applied a test in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others [2003] (1) SA 11 SCA**, *the court held that where a commissioner is faced with two conflicting versions before him, the Commissioner must make a finding on the credibility of witnesses and on the probabilities of the two versions, to determine where the truth lies. The question that should be answered is whether the probabilities favour the party that bears the onus of proof. The court further held that the credibility of a witness is in an extricable manner bound to the consideration of the probabilities of the case, the arbitrator should therefore resort to credibility were the probabilities fail to point which version embraces the truth".*

[53] I have considered that Dr Lobo, the Respondent's witness corroborated the Applicant's version that he was told that he was talking rubbish after he explained

why he did not give a patient an anti-biotic. Dr Lobo is a neutral witness and he was present when the alleged utterance was made. I find the explanation by Dr Lingham improbable and lack substance. My reasoning is based on the fact that both parties during evidence in chief have confirmed that the conversation between the Applicant and Dr. Lingham was hot and Dr Lingham was angry. The word rubbish is possibly used by angry person. Dr Lingham's explanation does not make any sense and not convincing. I therefore accepted the Applicant's version as most probable. The question to be asked is whether the fact that the Respondent had insulted the Applicant during the heat of moment in a meeting could cause the intolerable environment? To answer the question, firstly the Applicant can not claim the intolerable environment after five months of the utterances. It is fact that Dr Lingham used insulting word or disrespected the Applicant, however the Applicant was able endure or go through as he continued working for five months.

[54] In so far as the allegation that Dr Lingham altered the contract is concerned, I have considered the submissions by both parties and without any proof that the Respondent was guilty of the conduct complained of, I cannot find that the conduct by the Respondent created unbearable environment.

[55] Dr Lobo corroborated testimony led by the Applicant in material respect that the Applicant was caused to work overtime more than the other doctors. His version was contradicting other version he presented in the same issue, because at some stage he testified that the Applicant was given more work in order to work for the hours he did not work. He also indicated that the Applicant was refusing to work certain hours. On the other hand, the Respondent proved that the commuted overtime agreement if is signed the person has to honour it. Notwithstanding the fact that there was a dispute about the option the Applicant chose, but it was wrong to refuse to do overtime at all since there was no dispute that the applicant had signed the contract. This issue should have been raised in a form of a grievance and if it was not resolved, it have been escalated a dispute level.

[56] In **Albany Bakeries LTD v Van Wyk & Others [2011] JOL 27545 (LAC)** the Court held that "*it was critical to consider in constructive dismissal case, whether the employer had made continued employment intolerable for the employee. The Court pointed out that the employer had a grievance procedure, which the employee should have exhausted before his resignation".* In this case, the Applicant has failed to prove this issue was raised as a grievance. Therefore, the Applicant has failed to prove the nexus between the Respondent's conduct and the resignation.

[57] Regarding the allegation that the Respondent did not deal with the grievances that were submitted in trying to find a solution to the issues raised by the Applicant, **Section 35(10(b) of the Public Service Act** states that *'for the purpose of asserting the right to have a grievance concerning an official act or omission investigated and considered by the Commission-*
If that grievance is not resolved to the satisfaction of the employee, the executive authority shall submit the grievance to the Commission in the prescribed manner and within the prescribed period". In terms of PSCBC Resolution 14 of 2002, paragraph F4 read in conjunction with F7 *grievance may be resolved by any person within the relevant structure of authority who has the prerequisite authority to do so.* As for F7 states *that "If a grievance cannot be resolved, the executive authority must inform the aggrieved employee accordingly"*. The above provision is not specific as to who should attempt to resolve the grievance, however it is unlikely that a person who is implicated in the grievance would fairly and appropriately try to resolve the grievance as he/she is conflicted. In my view, the CEO could not be the appropriate person to mediate the grievance as he was expected to give his version with regard to the allegations.

[58] With regard to whether the Applicant's grievance was attempted to be resolved or not, it is a fact that there was a grievance meeting arranged and it could not materialize for reasons given by the parties. The Applicant argued that it was not constituted, on the other hand, the Respondent argued that there was an attempt

to deal with the grievance. Be as it may, paragraph F7 is peremptory the word' 'must 'is used, that clearly mandate the executive authority to inform the aggrieved employee that the matter remained unresolved. In this case, that never happened. The resolution further provides that if there is failure on the part of the department to respond to the grievance within the period referred to, the aggrieved officer may lodge his grievance to the Commission directly. To conclude this issue the omission by both parties is affirmative, but the Respondent is expected to practice what it preaches, by following its own processes to the letter.

[59] Having looked to the totality of evidence and submission, it is a fact that the CEO might have erred by telling the Applicant that he was talking rubbish. I also considered that the Applicant testified that he did wait for the enquiry to be finalized because he did not trust the he will get justice. What the Applicant needed to know is that the Respondent has authority to investigate allegations, if proven, invite an employee to the enquiry. More so, if the Applicant believes what break the camel's neck was the fact that his family was bullied and threatened, in my view, the Applicant has failed to present enough evidence proving that, indeed his family members were under threat. The Applicant should have called a person who was bullied or threatened to testify.

[60] The Respondent has a clear policy (Resolution 14 of 2002) that outline how to deal with grievance in the workplace, in which, I believe an employee has to exhaust it before claiming that there was no reasonable alternative, but to resign. It has been established in **Johnson v Rajah No and Others (JR33/15) [2017] ZALCJHB25 LC** paragraph 50 that "*the courts have confirmed that the use of the word 'intolerable' means that there is an onerous burden on the employee and the employee is required to show that continued employment would be objectively unbearable. Intolerability is not established by the employee's say-so, perception or state of mind".* The Applicant has not passed this hurdle of proving intolerability. The utterance that happened once and the Applicant continued to work thereafter cannot be regarded as intolerable.

[61] IN **Unisa v Ngcingwana and Others (JR2519/14) [2017] (LC)** the Court outlined the relevant steps into an enquiry pertaining to constructive dismissal and held that *"the starting point for the determination of constructive dismissal disputes like any other dismissal disputes, is determination of the existence of a dismissal, if positively determined, the fairness test is to be applied. Fairness is to be determined with reference to the conduct of the employer and the effects thereof on the employee, that is the commissioner ought to seek answers to the following questions*

(a) whether the employer was guilty of the conduct complained of;

(b)whether the conduct of the employer rendered the continued working relationship intolerable; and

(c)whether there were no other alternatives for the employee, but to resigned"

[62] Objectively, I could not find the conduct of the Respondent amounted to a constructive dismissal. It is of no use to determine the fairness if the dismissal is not proven.

AWARD

[63] I find that the Applicant has failed to discharged to onus of proving a constructive dismissal and his claim has to fail.

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L. Olota