



# ARBITRATION AWARD

Case no: **PSHS306-22/23**

Commissioner: **Isaiah Nyathi**

Date of award: **13 April 2023**

In the matter between:

**RAMAHLALERWA WITNESS MATHUME**

Applicant

and

**DEPARTMENT OF HEALTH- LIMPOPO**

Respondent

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The matter was scheduled for a series of dates up until it was set down on the 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> March 2023 as an Arbitration at 18 College Street, Dept of Health, Polokwane, Limpopo Province.
2. The Applicants represented himself.
3. The Respondent was represented by, Mrs Mashudu Shiburi, an official of the department.
4. The proceedings were held in English and recorded.

## **BACKGROUND TO THE ISSUES**

5. The Applicant is a Dentist employed by the Respondent and commenced work on the 1<sup>st</sup> of January 2015 with a salary level 11 notch 821205.
6. The Applicant resigned on the 29<sup>th</sup> of June 2022.

7. There was no disciplinary hearing as the Applicant resigned claiming constructive dismissal and the onus is with the Applicant to prove his claim.
8. The Applicant's prayer in this matter is for maximum compensation.
9. There were bundles which were submitted, Bundle A, C and D were from the Respondent and Bundle B was by the Applicant.

### **ISSUE TO BE DECIDED**

10. I must determine whether the Applicant's resignation amounted to constructive dismissal in terms of section 186(1) (e). And if it is so, to determine the appropriate remedy thereof.

### **SUBMISSIONS BY THE APPLICANT**

**Dr Ramahlalerwa Witness Mathume (Applicant)** testified under oath as follows:

11. He was employed as a Community Servicer in January 2015. Upon his arrival everything was ok at work, he spoke to Dr Maleka and the late Dr Pole, who told him that there was no accommodation, and he was advised to speak to one Dr Maloka, who unfortunately did not assist him.
12. As a result, Dr Pole accommodated him for about two weeks and he had told him that Dr Mampane, who was the Clinical Manager, had informed him that he should not accommodate him in his house. He was surprised and thought that was unfair, so during January 2015, Dr Mampane instructed the HR department not to pay him for his overtime work.
13. This was followed by a suspension based on the allegation that his prescriptions were not visible enough to the pharmacy and was not complying with the regulations, the suspension was for five (5) weeks.
14. He then wrote letters to the CEO of the District which was under one Dr Molefe, challenging the reason why Dr Mampane had instructed the HR department not to pay him his overtime, and this issue took them about two years to resolve and Mrs Magagane, who was the CEO, instructed HR to pay the Applicant and this was in 2017, from then onwards, he encountered threats and problems from Dr Mampane who was very much unhappy about the said developments.
15. Amongst her threats, she made an example that two dentists have been fired because of her, then the Applicant referred to page 18 of Bundle B, the contents were a narration of allegations of harassment by Dr Mampane and that she was belittling him. He then referred to a protection order dated 26/01/2022.

16. During 2021, he claimed that the harassment of belittling him became more intense and particularly in front of patients and colleagues. He tried to reason with her and at times she seemed to understand but unfortunately, this conduct persisted.
17. This caused him to approach Dr Machacha, who was the acting head of the institution, who promised him that he will look into the matter and this commitment was made during January 2021.
18. Realising that there was no improvement by March 2021, he wrote another letter to the CEO requesting a transfer, he then referred to Bundle B page 45, which was a letter titled "*a request of a transfer because of an intolerable situation*".
19. A meeting was then held with Dr Mampane, Dr Machacha and the HR one Phasha was a PA of Dr Machacha, his request was declined based on the reasons that they did not have enough staff, he accepted the situation then he later, after three (3) days, and requested that due to the circumstance, he better be rotated.
20. Rotation means that he would go to a bigger hospital to gain skills and/or experience, a process which can take about 6 months. He pleaded to rotate in Polokwane so that the situation can subside, as that time was very hard for him, and this request was refused without any explanation and/or reasons advanced.
21. After the refusal, a week later, Dr Mampane went to Polokwane for rotation, it was probably a communication between Dr Mahasha and Dr Mampane but if there was a meeting to deal with that, he was not informed.
22. After that, he approached Dr Machacha as he first agreed, and the response was that there are things which he could control and there are other things which were out of his control. Dr Machacha warned him to be careful of his Manager, Dr Mampane and mentioned that two dentists were expelled from the institution because of Dr Mampane.
23. So in April 2021, when he submitted his performance assessment agreement, he then referred the proceedings to Bundle C, on the 15<sup>th</sup> of April 2021, as indicated on page five (5) until eight (8), it was meant to come back in September. They were having departmental arrangements where they would agree, initiated by Dr Mampane as a Manager, that they would relieve each other.
24. Dr Machacha was aware of this, so on certain days that he was working, she would come, and they would work together due to the arrangement and Dr Maloka would give her off, but when Dr Maloka was working, he will be off, so that Dr Mampane would relief Dr Maloka and she will work alone.

25. This conduct implied that she was giving Dr Maloka more off days than him, he then spoke to Dr Maloka, who then indicated that he could not refuse, so he then approached Dr Mampane and complained that this situation was not fair, and he was told in response that it was her prerogative. He then moved on aggrieved by these developments.
26. By September when they received back their performance assessment agreement, he noticed that his date of submission was cancelled and a new date was appended by Dr Mampane and this was in Bundle C pages 5-8. He took up the issue with Dr Machacha who agreed that this was a deliberate sabotage and harassment of his work. Dr Machacha told him that he will look into the issue, but he never got back to him nor did they explain why there was a cancellation on his agreement and that cancellation deprived him of benefits which is an incentive that they receive at the end of the year.
27. The witness on the third bundle stated that he had to do another submission where he rated himself and Dr Mampane was supposed to rate him but never showed any interest, she would always have an excuse either that she was working in Polokwane or that she did not have time, she just did not care.
28. He then reported the issue to HR, and he was advised to wait till the closing date, he then escalated the matter to Dr Machacha who promised to attend to the issue but nothing was done until the closing date had passed and as a result thereof, he lost his grade progression incentive.
29. He became frustrated, hurt, humiliated and aggrieved because of this ill-treatment; the Head of the institution was not doing anything at all. So in December 2021, he wrote a letter to the Acting Head of the institution, to raise all issues relating to the abuse and highlighted the issue that the Head of the institution did nothing and he has no option to escalate the matter further even after that he did not get any response from Dr Machacha, he just ignored him and showed no interest whatsoever.
30. He still did not give up and continued to write another letter, he referred the proceedings to Bundle B, page 3, which was addressed to the Department, to inform them about the challenges and ask them to intervene.
31. The department, that is the district, took some time to respond, with all the treatment, nothing was done to remedy the situation, so by the beginning of 2022, he applied for relief on the 5<sup>th</sup> of January 2022 and was referred to Bundle B.
32. By that time, Dr Machacha had decided to centralise everything i.e leave applications, registrar and leave book were centralised in his office, so everything was supposed to be approved by him.
33. They were signing the attendance register in the morning, in his office. So by the 5<sup>th</sup> of January 2022, he applied for leave, and the Applicant referred to Bundle C page 23. He got the recommendation from

Dr Maloka and as a result, Dr Machacha approved the leave form in which he was supposed to take leave from the 6<sup>th</sup> to the 7<sup>th</sup> of January 2022, this can also be seen on Bundle C page 25, register.

34. So all this was in the hands of Dr Machacha, he further referred to Bundle B page 10, he then received a letter dated 4<sup>th</sup> January 2022, and referred to Bundle C page 24, where he showed the words that were written by Dr Mampane stating that awol from the 3<sup>rd</sup> January to the 7<sup>th</sup> January, which was not correct.
35. So the attendance registrar which was supposed to be in the hands of Dr Machacha and for one to get a hold of this must be obtained from Dr Machaca's office, the Applicant then pointed out page 25 of Bundle C, which showed that from 6<sup>th</sup> January 2022 to the 7<sup>th</sup> January 2022, he was supposed to be on leave as applied for, which was done on the 5<sup>th</sup> January 2022 but unfortunately the said leave was mysteriously disapproved. Then on the 10<sup>th</sup> January 2022, he applied and filed a grievance, referred to Bundle B, pages 4-8. He also pleaded for a transfer to runaway from this problem.
36. Again, the other issue was that by the 17<sup>th</sup> of January 2022, he received a call from Dr Machacha telling him that Dr Mampane will assess him on that day, he agreed and involved his union representative, the Applicant then referred the proceeding to Bundle C, page 11. So that was the day that Dr Mampane agreed to assess him after a very long struggle.
37. She assessed him and he did not agree with her ratings, so unfortunately by then, he had already suffered damage. On the same day, 17/01/2022 whilst playing football, he was arrested by Police for alleged intimidation and Dr Mampane and Dr Machacha were at the Police station.
38. He had parked his car closer to her car, and so when the matter was dismissed, the Police cautioned him to be careful as he could be arrested. After his arrest, the Applicant wrote a letter to Dr Machacha which can be found on Bundle B page 12, informing him that he will be applying for a protection order against Dr Mampane to protect himself and referred to pages 14-24 because of threats of GBV.
39. On the morning of 26/01/2022, when he went to give Dr Machacha his letter which was to inform him that he will be opening a protection order, the Applicant referred us to Bundle B, page 12. Whilst he was at the Police station, he was called by Dr Machacha and was issued with a final written warning, he referred to page 25 of Bundle B.
40. On that day, the Applicant got a response from the Department of Health informing him that his matter was being transferred to the district and a certain Dr Molefe, came in after interviewing him requested that he should put his issues in writing in a chronological order, this was referred to in page 28-32 of Bundle B.

41. On 26/01/2022, Dr Mampane threatened him again and stated that if he continues with this madness, she said, it's either he will follow the late Dr Pole who is deceased, or he must resign. After this encounter, the Applicant again wrote a letter to Dr Machacha, which can be found on page 26 Bundle B.
42. Dr Machacha refused to take the letter in the presence of Dr Maloka. By mid-February, he received a letter from the HR department, Mr Coetzee, telling him about the fact that there were allegations of absenteeism thus referring to the days in which he was on leave and the other days he was working.
43. He received a final warning and responded to it, referred to Bundle B, page 27. During May 2022 he realised that his salary was short-paid and when he made a follow-up by calling Mr Coetzee, he was told that he received instructions from Dr Machacha that they should deduct.
44. He then approached Dr Machacha, who confirmed and stated that he cannot do anything about it whilst he was in his office, he threatened him with arrest and dismissal when he was demanding his money and on that same day, he was arrested in view of everyone, patients, colleagues and the public, the allegations he was facing were of intimidation. As a result, he stayed in a police cell for the day.
45. The following day, Dr Machacha came to the cells and came with Mr Mtebele and a prosecutor. So, whilst he was in the cells, he was made to sign a document, i.e. page 46, Bundle B, which was a precautionary transfer and thereafter he got bail and was transferred to Dilokong Hospital.
46. When he got to Dilokong Hospital, the CEO of the Hospital said that he was not welcoming him, he then went to Boshoff from the 19<sup>th</sup> of May 2022 until his day of resignation.
47. They continued to deduct about R7 000.00 from his salary. The criminal case was withdrawn after three attendances and he resigned by the end of July 2022, he was supposed to serve for a month but Dr Machacha called him and forced him to backdate the letter to 29 June 2022 and that they will continue to deduct money, he asked Dr Machacha that if he had intimidated him, why was he not subjected to a disciplinary hearing.
48. After the arrest, the department appointed three people to investigate the matter, The Applicant made a chronological order of the events which is in Bundle B, pages 50-57.
49. The Applicant further testified that he never received any response from the CEO, the district and/or the provincial department, he was then physiologically and emotionally damaged, and financially ruined, it was a traumatic experience, everywhere he went to seek remedy he could not get any help and the continuous deductions of his salary made things even worse and the best and only option for him was to resign hence the constructive dismissal claim.
50. The Applicant's case was closed.

## **SUBMISSIONS BY RESPONDENT**

**PHALE PHILEMON MACHACHA** testified under oath as follows:

51. He was appointed as CEO of Mecklenburg Hospital and some of his responsibilities were:-
1. service delivery to the population;
  2. to make sure employees do what they are supposed to do;
  3. that they do not do wasteful and fruitless expenditures;
  4. manage HR in general.
52. He testified that he knew the Applicant, who used to work as a dentist, he knows him personally because he loves football and professionally, he knew that he was reporting to Doctor Mampane. He later got to know him more due to several letters which he used to receive from the Applicant.
53. He further testified that even though he did not recall the dates, the first letter was a request to be transferred based on personal reasons. After consultations with unions, Applicant, exco and HR, it was not approved because they had a shortage of staff and it was against their policy.
54. The Applicant was advised about cross-transfer, especially since he was a member of PSA which facilitates cross-transfers. The problem was that the money was going to come from their pockets to process such. As far as he recalls, the Applicant did not come back about the same issue again.
55. He was referred to bundle A page 4 which was a complaint letter dated 02 December 2021, headlined "abusive and unfair work environment". The Witness stated that the Applicant had never approached him verbally and further stated that when that letter was sent, he was on sick leave on the 21st of December 2021, for almost 3 weeks. At that time there was someone who was acting.
56. He further testified that in the second letter dated 14 December 2021, he had just come back from leave, it was the first week of January 2022. The Applicant's union representative also contacted him about his PMDS. He wrote a letter to the Applicant, the HR dental department and the union seeking an urgent meeting, which was scheduled for the 07th January 2022, and referred to the letter which was on bundle A page 10.
57. On the day before the meeting, the Applicant surprisingly submitted a leave form, which was taken to his office. The meeting was supposed to be the following day and the leave was meant for the 6th -7th of January 2022. It was what was called unplanned two days leave. His manager Doctor Maluka

approached him with the leave form and they discussed, reached a consensus and disapproved of the leave because the meeting which was scheduled was meant to discuss some of the complaints that the Applicant raised.

58. At that time the Applicant was within the vicinity of the hospital, so the Witness called him telephonically and told him that his leave was not approved. The Applicant did not say anything. He also told the Applicant that he could be granted the leave if he commits to attend the meeting on the 7th of January 2022, he also specifically told the Applicant that his issues were going to be discussed in that meeting.
59. He said the meeting on the 07th January 2022 proceeded, and the invitees all came except the Applicant. Amongst the issues which were supposed to be discussed were his issues, and in those issues, they also wanted to correct the claim in his letter that there were verbal interactions with Machacha and that was not correct.
60. They also wanted to deal with three other things, namely:<sup>8</sup>
  1. His alleged unfair treatment;
  2. His PMDS evaluation process;
  3. The dental challenges in general.
61. The Witness referred to bundle A page 15 which related to the evaluation, what emerged was that he obtained a report which was corroborated that on the date which the Applicant was supposed to be evaluated, he just sat in his car. When he was called to come and attend, he completely ignored his colleagues and did not come, despite that, the Witness issued an instruction that the Applicant was supposed to be evaluated and that was noted in bundle A page 13. This evaluation was scheduled for the 17th of January 2020 under the instruction of the Witness and the Witness can also confirm that the Applicant attended albeit the fact that the evaluation appears to have been forced on him.
62. It was during this time that he also received a complaint from Doctor Mampane, who alleged that the Applicant was following her all over the hospital and he was also having a stick in his possession. She had also complained that there was a time that the Applicant followed her, and gave chase and she ran to her room to an extent that security and himself, the Witness, were called. When he arrived at the scene, he saw the Applicant getting into his house as they live in adjacent areas next to each other. Due to the seriousness of this situation, police were involved and eventually protection orders against each other, i.e Doctor Mampane and the Applicant, were issued.



63. As the head of the institution, he was compelled to separate them. At that time, Doctor Mampane was deployed to Polokwane to ensure that they are not next to each other.
64. The Witness referred to bundle A page 23 which contained a written warning to the Applicant which was issued by Doctor Mampane for the Applicant's failure to report on duty or to report to the supervisor and for taking an unauthorised leave. The letter was issued on the same date as the incident which was 26 January 2022. He then, later on, received another letter from the Applicant about the claim of alleged ill-treatment which the Applicant claimed was continuing. On that same day, the Witness arranged a meeting.
65. The Witness further testified that the problem with the Applicant was that he would write letters and whenever a meeting is arranged, he would not pitch. So he did not understand the motive or reason for that kind of conduct. The letter was received by his secretary at 08:10 a.m and the meeting was arranged for the following day. The Applicant did not show up.
66. There was a time when Doctor Mampane issued the Applicant with a warning and the Applicant came fuming into his office to have a man-to-man talk. It was at this stage that he decided to have the Applicant report to him directly and not to Doctor Mampane any longer, to avoid problems.
67. He further testified that there were a lot of incidents which were occurring, for example:-
1. On the 04th May 2022, the Applicant left the dental office wide open exposed to possibly thuggery n theft.
  2. On the 13th of May 2022 when the leave without pay was implemented and he had complained because of a shortage of salary, HR was contacted, and they invited him to come to the office. These shortages were a result of issues of 15 May 2022 which resulted in no work no pay.
  3. On the 17th May 2022, he came to his office at 16H05, furious because of the no work no pay which had been implemented. When he received his salary on the 15th of May, his salary was deducted. He walked into the office without knocking, the Applicant wanted to know if he was the one that authorised no work and no pay and when the Witness confirmed so, the Applicant threatened him and said his kids will not suffer because of him and that he will repay it whether he liked it or not and insulted the Witness. The Applicant went to the extent of prodding him with a finger. The Witness was shocked, he could not believe what he was seeing. He called security and they accompanied him to the police station. He opened a case against the Applicant for crimen injuria n intimidation and police arrested the Applicant on the 23rd May 2022. The Applicant did a countercharge and was

released on the morning of 24th May 2022. This is contained in bundle A pages 24-26. Investigations were initiated and there were meetings in court.

68. On 30 March 2023, the Respondent introduced its second and last witness.
69. **PAULINE DIKELEDI MAMPANE** testified under oath as follows:
70. She testified that she was working at Mecklenberg Hospital as a clinical manager: in dental and also Polokwane under the orthodontist department for specialization.
71. She stated that she has been working for more than 17 years as a dentist and as a clinical manager since 01 July 2016. There was no clinical manager at that time as she was the acting manager and started the department. Doctor Selwane was reporting to her, then later Mr Pholoto and Mrs Tema, who was the oral hygienist.
72. She further stated that the Applicant joined them in 2015 whilst she was acting in the position.
73. She further testified that she had normal relations with her colleagues, and the relationship with the Applicant was well until there was an incident at the pharmacy. Doctor Paule came in October 2014, then joined Doctor Maduka in November 2014 and the Applicant joined them in January 2015.
74. She stated that she received a telephone complaint from a Mrs Sehopela, Vicky, between January - February 2015. The complaint was regarding prescriptions issued by the Applicant, the main being that he was not following the regulations of writing scripts of prescriptions. For example, his prescription dosages were not correct and his credentials were also not accurate. She further complained that he liked to augment too much in terms of antibiotics and his profile was not in line. She arranged a meeting for herself, the Applicant and Mrs Sehopela from the dental department.
75. The Applicant was very rude towards Mrs Seopela and displayed arrogance. Mrs Seopela was very angry. She adopted the position that whenever he issued prescriptions it had to be checked and monitored. They were specifically concerned about after-hours, during his committed overtime. This meant that there had to be someone after hours every time.
76. Doctor Paule refused and stated that the Applicant must do the right thing, the same with Doctor Maloka, who was not willing to do overtime because of the Applicant's deeds which should be corrected and be in line with the regulations. She conveyed the message to the Applicant, who became very rude.
77. She further testified that she decided to stop his overtime and suspended him from his overtime duties. The Applicant wrote a letter stating that he will comply, the Witness then immediately put him back on

the calls and he indeed complied. All they wanted was for him to commit, and when she checked the scripts thereafter, she found them to be proper.

78. She testified that there was a dispute which was raised by the Applicant who was adamant that he must be paid for overtime where he was not allocated to work. He fought about this with Mr Mphahlele, who is the maintenance manager, to the extent that he took his belongings, a calculator. They were fighting about the long grass which the Applicant wanted Mr Mphahlele to cut.
79. He also had another dispute with Mrs Herane, who was a horticulturist, he insulted him as “setlatla”. This matter was reported to the Witness, she took the matter up to the acting CEO Doctor Choenyane.
80. Due to the complaints about the house where he was staying, he forcefully accommodated himself in another empty house without any authorisation. She then left the issue because she felt overwhelmed as he had just dealt with a few other issues and decided to let it pass.
81. She further testified that there were issues and complaints with Doctor Debali, Doctor Mohlala and Doctor Masangu. The Applicant fought with everyone.
82. The Applicant had a patient whom he was supposed to insert a drip on, instead of him doing so, he sent the patient to casualty. When the patient arrived and explained to them, the doctors felt offended and refused. As dentists, they are trained on how to insert a drip, in the event of one not being able to do so, one must make an effort to expose himself to know how to do it. The doctors turned the patient back instructing that the patient must go back to him.
83. This made the Applicant very angry, he went to the doctors and insulted Doctor Debali a doctor trained in Cuba, and made bad remarks about Cuban doctors and that she had to study there because of poverty. This doctor wanted nothing to do with the Applicant, whereas the other doctors had mobilised and were waiting for him to just try them or touch them and they had planned to beat him up.
84. There was also another issue with Mrs Phasha, who is an assistant porter, who had written a letter claiming that the Applicant appeared not to know his job. A meeting was arranged between herself, the Applicant and Doctor Machume to try to reconcile the parties. Another issue was that one Doctor Lebea, who was an acting head of the institution fought with the Applicant over accommodation.
85. On her side, the relationship was at first not bad. She had a situation when she lost her father and the Applicant drove to Hammanskraal to attend the funeral with other colleagues, and also made contributions of about R11 000.00. She also had a Covid-19 incident in April and the Applicant supported her and contributed gifts. He has played a role in mobilising support for her. She is raising this to demonstrate that she generally did not have any poor relation with the Applicant.

86. During 2021, she called him about an incomplete referral of a patient, the Applicant was very angry about this and he started to change his behaviour and not come to work or report to her. She referred to bundle D page 2 which showed that the Applicant was a very disrespectful person and did not want to be managed by her. She stated that he had this tendency that whenever she made notes like in the attendance register, will scratch the notes with a pen and make his own comments. He would always delete and write on top, especially if he did not like it. If he did not like something, he would retaliate.
87. She denied the allegation that she abused the Applicant or that she insulted him in the presence of colleagues.
88. In 2002, she was doing a diploma in orthodontistry, which is a speciality in the alignment of teeth through wires. She had a certain patient Batseba Malatji and made a presentation. As a result, she was given a special dispensation to allow her to go to Polokwane to treat her special patients.
89. She referred to bundle A page 4 which contained letters by the Applicant complaining against her. She testified that she was not aware of those letters, she has not seen them before as they were directed to Doctor Mochacha.
90. She further referred to bundle A page 59 where the Applicant was late, she made notes which he scratched. This caused the HR to write a letter contained in bundle C page 9.
91. She also had a difference with him regarding a midterm review score. Although he should have gotten less due to his conduct, she gave him a score of 3, which was a reflection that he was able to do his job.
92. She referred to bundle A page 50 where she wrote and he scratched off and inserted the words "annual leave" and she observed that the Applicant will be in the vicinity of the hospital but not report to work. He was not seeing patients and was not coming to work. She pointed out in bundle D pages 4-6, that a lot of patients were attended to by herself and other dentists without the Applicant treating any of the patients.
93. On the 07th of January 2022, she was surprised to have a meeting called by the CEO to try to resolve issues. The Applicant was notified to attend the meeting but he did not attend and his leave had not been approved. She explained that awol means being absent from work.
94. On the 17th January 2022, on the issue of assessment, she told him that he was not supposed to get the 3 score but that does not mean that he failed but rather that he achieved.
95. The Witness further testified that and referred to bundle A page 21 which was a warning issued to the Applicant for his disrespectful conduct. He was very angry when she gave him the warning, he left and she did not know where he was. She was busy attending to a patient and as she was about to leave,

she saw a car, as she approached, he opened the door wearing black glasses. He chased her and she ran to her bachelor's flat, she quickly opened the door, locked it and shouted and called the CEO who later came and as a result, police were involved, who advised her to open a protection order. During this time the Applicant had insulted her and mentioned news of people who had died like Doctor Paule and made an allegation that she killed them through witchcraft.

## **SURVEY OF EVIDENCE & ANALYSIS**

96. Section 186 (1)(e) of the LRA defines a constructive dismissal in the following terms:-

*“(A) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.*

97. In ***Pretoria Society for the Care of the retarded v Loots***, the LAC stated:

*“where an employee resigns or terminates the contract as a result of a constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely, to work.*

*The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”*

98. In ***Strategic Liquor Services v Mvumbi NO & Others***, the constitutional court held that constructive dismissal does not require that the employee should have no choice but to resign but only that the employer should have made continued employment intolerable.

99. There is thus a fundamental shift from the test from one in which the employee had no option to resign, to one in which no other option was reasonably, available to an employee save for resignation. The shift is from a strict test to one that is slightly less strict.

100. In this matter, the Applicant gave a very lengthy exposition of what he claims to have transpired and thus in the process, making a very painful touching depiction of a situation which portrayed a victim and a very traumatised, abused and ill-treated former employee.
101. I wish to place it on record that after the Applicant had tendered his evidence, one got emotionally drained to the extent that one truly believed that indeed this was a solid case of constructive dismissal, but all this assertion was dismantled when the Respondent rendered its case.
102. There are a few incidences which surprisingly were not rebutted by the Applicant but the most crucial incident which deserves serious due regard to be analysed is the one referring to the application of what the Respondent referred to as unscheduled leave.
103. For the record, according to the evidence, the Applicant had applied for leave for the 06th-07th January 2022, but what is unique about this event is that according to the evidence, the Applicant had already submitted a complaint relating to abuse and ill-treatment by his supervisor, one Doctor Mampane. This letter triggered processes in that Doctor Machacha, who was the head of the institution, initiated that a meeting should be held with various stake holders, i.e HR department, Exco, Doctor Mampane, the Union and the Applicant. This meeting was intended to deal with the allegations which were made by the Applicant in his letter.
104. According to Doctor Machacha, there was also an intention to disprove the claims which were made by the Applicant.
105. Instead of the Applicant welcoming the initiative by Doctor Machacha, having scheduled the said meeting, the Applicant embarked on the process of avoiding attendance to the meeting. It appears that the leave by the Applicant was unknowingly approved by Doctor Makobe who had regarded the leave application as an ordinary item in the normal course of events. However, his interaction with Doctor Machacha on the 5<sup>th</sup> January 2022 revealed that the meeting was in the main created to resolve issues which were the subject matter of discussion in the complaint letter by the Applicant.
106. Consequently, the leave was disapproved, and this position was duly communicated to the Applicant by Doctor Machacha on the very same day. Interestingly, Doctor Machacha went to an extent of suggesting or proposing that if he could furnish them with a guarantee that he will attend that meeting, the leave could be approved. It is now a matter of record that the Applicant did not attend the meeting, notwithstanding that the disapproval and the requirement of his attendance to that meeting were properly and duly communicated to the Applicant.

107. Even up to the arbitration process, the Applicant had failed to advance any viable, justifiable reasons for his decision to opt to take leave and avoid the meeting which was meant to address his concerns.

108. This incident, surprisingly, was not denied by the Applicant, and in addition, thereto, it is in the evidence and undisputed that the Applicant, instead of attending his evaluation process, sat in his car and ignored all and sundry, an aspect which eventually led to Doctor Machacha issuing a directive that his assessment will be dealt with on the 17th January 2023.

109. The Labour Court has held that if an employee is too impatient to wait for the outcome of the employer's attempts to find solutions to the perceived intolerable situation and resigns, then constructive dismissal is almost always out of the question- (Smith Kline Beechmen (Pty) Ltd v CCMA & Others (2000) 21 ILJ 98 (LC)

110. It is crucial for one to reflect on the demeanour of the Applicant as a Witness.

111. He portrayed a disturbing personality/traits and unstable emotional reactions. For example, whenever he was addressing the Commissioner, he would display a very calm, good measured behaviour but the moment he would be engaging, particularly when cross-examining Doctor Mampane, he would go ballistic with anger and a clear indication of unwarranted arrogance and disrespect. As Commissioner, one had to repeatedly intervene in an attempt to call the Applicant to be orderly.

112. This was a giveaway to my observation that, the assertions made in the testimonies by the two Witnesses for the Respondent, are in all probability correct that the Applicant did not respect his supervisor, Doctor Mampane.

113. Whilst it was strange for the Applicant not to have welcomed the opportunity, and opted to absent himself from the meeting for the 07th January 2023, in addition, there was unchallenged evidence.

114. Notwithstanding the intervention of the Commissioner to invite, remind and/or solicit comment on the following issues:

- (i) That there was an allegation that at some stage he was seen following Doctor Mampane holding a stick. A situation which later exacerbated with the Applicant literally and physically chasing Doctor Mampane, who sought refuge in her house. The Applicant did not dispute this allegations, thus seemed to be very strange.
- (ii) Again, there was this unchallenged evidence that when he realised that leave without pay was effected and money was deducted, the Applicant angrily confronted and/or charged at Doctor Machacha, and prodded him with a finger. These are very damning, to say the least, and the

question to ask is that the apparent failure by the Applicant to challenge/rebut/deny the same was a clear indication that he knew that this actually happened. I made an observation that he appeared to have no problem with his rebellious conduct towards the two witnesses who were his superiors. He seemed to be more comfortable with the portrayal of being a victim and at the same time felt justified to have taken the law into his own hands and to be rebellious towards his superiors.

(iii) He appeared to be more concerned about what happened to him for example when he was not in agreement in terms of his rating by his supervisor, but surprisingly he didn't dispute the fact that at some stage he did not attend and chose to remain in his car and deliberately decided to absent himself, and I also agree with the Witness that it appeared that the meeting of evaluation scheduled for the 17th January 2022, was imposed upon him, otherwise, he would not have bothered to attend.

115. My overall assessment of the situation is that the Applicant had extremely poor relations with his colleagues and superiors and I suspect that because of how he handled himself, the Respondent through its officials because of the provocative manner of the Applicant. For example, the issue of his conduct of scratching and overwriting his superiors' remarks thus forcing his way. It appears to me a very extreme demonstration of disrespect.

116. The Applicant, in my view, is guilty of an attempt to mislead this arbitration process in that he claimed that the Respondent denied his transfer, a request which was intended to relieve him of the abuse and ill-treatment by Doctor Mampane. Whereas it was proven beyond doubt that actually, the request was solely based on the personal considerations which applied to him then. Apparently, he had a young child as a newlywed person and wanted to be closer to his family. There was no single shred of evidence at that time of any ill-treatment or abuse of anybody.

117. All the issues which have been raised above, cumulatively point to a situation that the Applicant was the author of his challenges. He was not an innocent victim as he attempted to portray.

118. For a claim of constructive dismissal to be sustained, it is where an employee leaves his employment because he can no longer endure the situation at work. Ironically, this is indeed so. The relationship between the two parties had obviously irretrievably broken down. It is however unfortunate that the culpability, was, as I hereby find, not on the part of the employer i.e the Respondent.



119. The onus to discharge the onus of proof lay with the Applicant and on a balance of probabilities, I am satisfied that the evidence led clearly shows that the provocateur an instigator, under the circumstances, was the Applicant.

120. The evidence clearly points out that he was uncooperative, had temperamental challenges and in my view he was the rabble-rouser.

121. Consequently, I hereby find that the Applicant had dismally failed to sustain any claim of constructive dismissal and thus his claim falls to be dismissed.

### **AWARD**

122. The claim of constructive dismissal by the Applicant is hereby dismissed.



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Isaiah Nyathi