

## IN THE INDUSTRIAL COURT OF ESWATINI

### JUDGEMENT

CASE NO. 151/2018

In the matter between:-

**JIMSON GWEBU**

**APPLICANT**

AND

**SWAZILAND UNION OF FINANCIAL  
INSTITUTIONS AND ALLIED WORKERS**

**RESPONDENT**

**Neutral citation** : *Jimson Gwebu v Swaziland Union of Financial  
Institutions and Allied Workers' Union  
(151/2018) [2022] SZIC 93*

**CORAM** : **DLAMINI J,**  
*(Sitting with A.S. Ntiwane & S.P. Mamba  
Nominated Members of the Court)*

**Last heard** : **19 July 2022**

**Judgement Delivered** : **28 July 2022**

**Summary:** *Labour law – Constructive dismissal – Applicant resigning from his job alleging that he had been constructively dismissed. The Applicant's resignation came immediately after the Respondent had instituted investigations into allegations of assault by the Applicant against a union member. Held: It is only logical that an employee accused of any transgression exonerates himself instead of resigning. Held further – The Applicant's reliance on conduct that occurred years earlier does not give rise to a claim for constructive dismissal. Applicant's claims against the Respondent accordingly dismissed.*

1. Jimson Gwebu, a well-known trade unionist in the country, is the Applicant in this matter. He is a former employee of the Respondent, Swaziland Union of Financial Institutions and Allied Workers' Union (SUFIAWU) – a trade union in the financial and non-financial institutions in the kingdom of eSwatini. Gwebu has approached this Court for relief, alleging that he was constructively dismissed by the Respondent and as a result he is claiming that he be paid a total amount of E1,319,708.33 (One million three hundred and nineteen thousand seven hundred and eight emalangeneni and thirty three cents). The amount claimed is made up of notice pay (E39,764.85), pro rata 13<sup>th</sup> cheque (E7,468.28) and payment for the remainder of his contract (E1,272,475.20).
2. The claims of the Applicant are vigorously opposed by his former employer, the Respondent. The Respondent denies that the Applicant was constructively dismissed, contending instead that the Applicant resigned out of his own volition and that the resignation was a stratagem by the Applicant to avoid a disciplinary hearing for serious misconduct. As such, the Respondent denies that it is liable to pay the

Applicant the amount claimed, or any amount at all and implores the Court to dismiss the Applicant's claim in its entirety.

3. The case of the Applicant both in his pleadings and under oath, is that he was employed by the Respondent as Treasurer of the union (SUFIAWU) on April fool's day of 1995. He was engaged on a 4 year renewable contract. According to the Applicant his contract was renewed each time it lapsed at the end of every 4 years until October 2014. Apparently, his last contract lapsed at the end of September 2014 but the new one was not signed until he resigned in February 2016. He contends though that the contract was tacitly renewed at the beginning of October 2014.
4. Explaining the circumstances that forced him to resign from his employment, the Applicant informed the Court that the conduct of the Respondent towards him rendered continued employment intolerable and unbearable. The Respondent's conduct he complained of is listed as follows;
  - a) there was an allegation by the Secretary General of the Union (Jabu Shiba) that he had sexually harassed her.

- b) The same Secretary General also made another allegation against him that he was having secret meetings with management of Swaziland (now eSwatini) National Provident Fund in which he sold out members of the union.
- c) That he had obtained an illicit loan from First National Bank (FNB).
- d) He was ridiculed, insulted and humiliated by members of the National Executive Committee of the Respondent.
- e) The Respondent outsourced the Applicant's work without any communication or consultation with him.

5. *Allegations of sexual harassment.*

In relation to this issue, the evidence of the Applicant was that he was accused of sexual harassment by Jabu Shiba, the Secretary General of the union. He says this was a false allegation and that the Secretary General apologized for making this allegation. In his letter of resignation, the Applicant states that this sexual harassment issue was supposed to be finalized in 2014 but up to the date of his resignation, on 01 February 2016, it had not been resolved because the President of the union did not report to the national executive that the Secretary

General had apologized for making this false accusation against him. He had expected that when the national executive committee had been informed that the Secretary General had apologized, she would be admonished and warned against making such serious and false allegation in future. Because of the failure of the President to inform the NEC of Jabu Shiba's apology, then to him the matter remained unresolved.

6. Under cross questioning by the Respondent's Counsel, Attorney Mr. Simelane, the Applicant was asked as to when exactly this sexual harassment allegations arose, and he informed the Court that he could not recall when this allegation arose, he could not deny though that it first surfaced in 2007. He also confirmed that Patrick Ngwenya, a former president of the union, first dealt with the issue in 2007. The Applicant was then referred to an affidavit of the former president, Patrick Ngwenya, in which he stated that he (president) had been approached by the Applicant on 14 May 2014 requesting that the president should help him resuscitate the sexual harassment issue. The Applicant had apparently wanted the sexual harassment issue resuscitated because Jabu Shiba was now going to be working for the

Respondent full time and wondered how the NEC expected him to work with her when they knew they were not in good terms.

7. It also emerged under cross examination though that Shiba first raised this allegation whilst she was still a member of the NEC. Then in 2012, when Shiba came to be a full time employee of the union the Applicant says he now felt vulnerable, hence his decision to report it to the new President so that it could be resolved. He wanted the President to convene a meeting between the 2 of them (Applicant and Shiba) so that this issue could be thrashed out.
8. The Applicant further confirmed under cross examination that the new President of the Union, Brian Mabuza, convened the meeting, as per his request, and Jabu Shiba apologized for raising this allegation. Even though Jabu Shiba apologized, the Applicant says when the President reported to the NEC, he did not inform it (NEC) that Shiba had apologized. He says he only informed the NEC that the issue had been resolved, without mentioning the apology, hence his contention that it was not resolved. When questioned on why he decided to use an issue that arose some 9 years ago as one of the reasons for his

resignation in 2016, the Applicant informed the Court that there was a possibility that Jabu Shiba could still come up with another false sexual harassment claim against him.

9. *SNPF matter.*

In respect of this issue, the contention by the Applicant was that he was wrongly and maliciously accused of having secret meetings with management of the Swaziland National Provident Fund (SNPF), especially with a certain Zithulele Gina. This, he says agitated members of the union at SNPF and they then resolved that the Applicant should not represent them in matters concerning their welfare because he was selling them out to management. The Applicant says the source of this allegation was the same Jabu Shiba, and that she had colluded with shop stewards at SNPF and a certain Steven Ntshalintshali in raising this false allegation. From the evidence before Court, this allegation dated back to October 2013.

10. Under cross examination, the Applicant confirmed that this SNPF allegation first arose at a meeting chaired by Jabu Shiba and that it initially came from union members of SNPF, specifically Steven

Ntshalintshali. He further informed the Court that his attempt to counter the allegation was ignored by Shiba as chairperson of that meeting. When the Applicant was referred to correspondence directed to the union President, from a NEC member (Simon Khoza), stating that the allegation was raised by a union member and that the issue was resolved at the same meeting, he still denied that the issue had been resolved.

11. The Applicant was also referred to minutes of a special executive committee meeting of 30 September 2014, which indicate that the SNPF issue was raised by Ntshalintshali and not Jabu Shiba. These minutes indicate that the NEC deliberated on this SNPF issue, with the President even requesting the Applicant to withdraw it from his lawyers after indicating that he wanted to sue Ntshalintshali for the allegations he made about him meeting management secretly. The Applicant confirmed that he indeed had initially wanted to sue Ntshalintshali but eventually withdrew the suit after the NEC deliberated on the issue. When questioned on why he waited 3 years before resigning on the basis of this SNPF issue, he unconvincingly informed the Court that he was still trying to clear his name.



12. *FNB issue.*

In respect of this issue, the evidence of the Applicant was that he was unfairly and maliciously accused by a NEC member Simiso Gwebu and shop stewards of FNB of obtaining an illicit loan from the First National Bank to consolidate his debts. He was also accused of having secret talks with management of the bank, specifically with the Human Resources Manager. The Applicant informed the Court that these allegations were false.

13. Under cross examination on this issue, the Applicant was referred to a letter of complaint from Simiso Gwebu, dated 05 January 2016, which is at page 12 of exhibit 'SF1'. In this letter Simiso Gwebu was complaining about the Applicant having come to his work place, FNB, and physically abused and assaulted him by manhandling him and holding him by the collar of his shirt and pinning him against a wall. The Applicant was also referred to page 13 of the same exhibit 'SF1' which is a letter from the president of the union enquiring about the assault on Simiso. In his letter of response at pages 14 and 15 of 'SF1' the Applicant did not deny the incident but complained that the

letter from the president was a perpetuation of what he called 'collective bias' against him by the NEC.

14. Interestingly, the Applicant's letter of response is dated 01 February 2016, which is the same day as his letter of resignation. The Respondent's Counsel questioned the timing of the Applicant's resignation, especially because he resigned when he was being investigated for the assault on Simiso Gwebu. When the Respondent's Counsel suggested to the Applicant that he resigned because he was avoiding discipline in the Simiso Gwebu assault incident, he informed the Court that he resigned because 'things were hotting up' - instead of easing up. He informed the Court that his 'problems were piling up' and that none of them had been effectively resolved. He denied that he resigned to avoid the investigation which could have culminated in a disciplinary hearing.

15. ***Outsourcing of his duties.***

Then in relation to the issue of the outsourcing of his duties, the Applicant informed the Court that in 2014 the NEC curtailed his accounting duties as Treasurer by outsourcing them to an accounting

firm. He says his duties were only restored in May 2015 after he received a letter from the President to that effect. Apparently, the Applicant's duties were restored because the accounting firm was failing to carry out the work effectively. And under cross questioning, the Applicant confirmed that all his duties were restored by the President in May 2015 and that the issue was resolved. When questioned however on why he still relied on this issue as one of the reasons for his resignation, the Applicant failed to explain why he still relied on this issue when it had been resolved to his satisfaction. He could only inform the Court that he wanted to find out why he had been stripped of his duties in the first place.

### ***Contract renewal***

16. Another issue which featured prominently during the Applicant's examination in-chief and under cross examination was that of the renewal of his contract after it lapsed at the end of September 2014. The evidence of the Applicant was that on 10 April 2014 (exhibit 'JG1' page 41) he wrote to the President of the union informing him that because of tensions between him and the Secretary General and a host of other issues, he (Applicant) had decided that he did not intend

to have the contract of employment renewed. It would seem that the NEC of the Respondent initially accepted that the Applicant did not intend to have his contract renewed. Again on 26 September 2014 the Applicant wrote to the President still insisting that he did not wish to have his contract renewed. Then on 03 October 2014, after what the Applicant said were engagements between him and the President, he withdrew his last letter of September 2014 in which he had said he did intend to renew his contract. Meaning he now wished that his contract be renewed.

17. The Respondent's counsel wondered how the Applicant was able to continue working for the union when he was clashing with almost everyone, from the Secretary General, to the Vice President and the NEC. He also questioned how the Applicant was able to continue working for the Respondent when some of the reasons which he says forced him to resign had existed for at least more than 2 years, and some for close to 10 years. Attorney Mr. Simelane further put it to the Applicant that all the grounds he listed for his resignation were unreasonable in the circumstances, but the Applicant maintained that all his grounds were reasonable.

18. First to testify in support of the Respondent's case was Brian Mabuza. He informed the Court that he has been involved with the Respondent union from 2006 up to 2018. Between 2006 and 2009 he was a representative on Standard Bank employees. Then between the years 2009 up to 2018 he was the President of the union. Mabuza also informed the Court that the Applicant was employed as the Treasurer of the union.

***Sexual harassment issue.***

19. Witness Mabuza informed the Court that he first became aware of this issue in 2012 when he was approached by the Applicant complaining that the union had employed Jabu Shiba as Secretary General when they (NEC) were aware that he (Applicant) and Jabu Shiba were not in good terms because Jabu Shiba had previously accused the Applicant of sexual harassment. Mabuza further testified that he then engaged the previous President of the union, Patrick Ngwenya, to find out if he knew anything about the Applicant's complaint. It turned out that the previous president was aware of the matter as he said the Applicant had also approached him with the same complaint, in 2007, and that they discussed it between the 3 of them (Applicant, Jabu

Shiba and Ngwenya) and it was resolved. When Mabuza informed the Applicant what his predecessor had told him, he (Applicant) insisted that since Mabuza was now the current president and that he should resolve it.

20. Mabuza also informed the Court that he also questioned Vincent Ncongwane about this sexual harassment issue, and Ncongwane confirmed knowledge of same but wondered why it was still being discussed because it had been resolved by the former president, Patrick Ngwenya, in 2007. Mabuza further testified that the Applicant was raising the sexual harassment issue at every available opportunity, such that he then asked him how he wanted the issue to be resolved once and for all. The Applicant informed him that he wanted Jabu Shiba to apologise. He says he then convened a meeting between the 3 of them (Applicant, Jabu Shiba and himself) where he ask Jabu Shiba to apologise for the sake of peace and maintenance of harmony in the office. Even though Shiba wondered why the issue kept on being raised when it had been resolved in 2007, she nonetheless apologized and he (Mabuza) thought that was the end of the matter. He further

informed the Court that he reported to NEC that the issue had been resolved but did not inform them how.

***SNPF issue***

21. In relation to this issue, the evidence of Mabuza was that employees of SNPF who were members of the Respondent union had alleged that the Applicant held a meeting with management behind their backs in November 2013. Apparently, the source of this allegation was Steven Ntshalintshali. The union members were not happy that the Applicant had met with management without their knowledge. When the Applicant learnt of this allegation against him, he instituted legal proceedings against Steven Ntshalintshali and demand that he should retract the allegation. Mabuza says seeing that things were getting out of hand, he requested the Applicant to withdraw the legal proceedings, which he did. He then set up a committee to investigate and resolve the matter.
22. According to Mabuza, the SNPF issue was resolved after a meeting was convened with the union members where it was explained that the Applicant was not having meetings behind their backs and they

understood, and the matter was put to rest. Mabuza says he then informed the NEC of the outcome of this matter and it was closed as a resolved issue. The Court was also informed that after the Applicant had instituted legal proceedings against Ntshalintshali, the SNPF union members were no longer comfortable with the Applicant handling their matters. They also alleged that he would threaten them when they met in the streets.

***FNB issues***

23. From the evidence of Mabuza, it would seem that SNPF union members were not the only employees not happy with the Applicant. In this regard, the Court was informed that FNB union members at some point also alleged that the Applicant was holding meetings with management behind their backs. Apparently, at FNB there was a job evaluation negotiation exercise and the union members at this institution alleged that they suspected that the Applicant was pushing them to agree to a settlement because he was holding secret meetings with the Human Resource manager of the bank.



24. There was also another issue at FNB, which however the Applicant conveniently did not mention in his evidence in chief and did not list as one of the reasons which forced him to resign. This is the issue of Simiso Gwebu. On the Simiso Gwebu issue, Mabuza's testimony was that he was approached by Simiso around December 2015, complaining that he had been assaulted by the Applicant at his place of work, FNB premises. Mabuza says he directed Simiso to reduce his complaint into writing. Indeed Simiso wrote a letter directed to the NEC at the beginning of January 2016, in which he detailed how he had been assaulted by the Applicant. Upon receipt of Simiso's complaint, Mabuza says he wrote to the Applicant, on 22 January 2016, informing him about the complaint and further requesting that he responds with details of what transpired in relation to the alleged incident.
25. The Applicant's response to the president's request is dated 01 February 2016, the same day in which he also tendered his resignation. In his response, the Applicant did not deny that the incident had taken place. Instead he stated that; *'...it is quite surprising that when Simiso raises the matter you – (the President) –*

*quickly write this kind of letter and the tone is quite revealing of your bias. Simiso should have reported the matter to his employers, not the union.'*

26. Instead of addressing the serious allegations of assault levelled by Simiso, the Applicant went on to complain that the NEC was fully aware of the lies being peddled by Simiso and the Secretary General (Jabu Shiba) against him but the President still went ahead and wrote to him enquiring about the alleged assault. He then concluded by saying '*...Mr. President, I regret to say that your letter is nothing but perpetuation of the collective bias of the National Executive Committee against me. I feel very bad about this ill-treatment in the hands of the NEC since it has been ongoing for the past four years and is not abating.*'
  
27. The letter from the President, which the Applicant was complaining of is at page 13 of exhibit 'SF1'. It is barely 4 lines, and it is written in simple language and is straight forward. It is written thus; '*...I have received a letter of complaint from Simiso Gwebu former Rep for FNB members about your visitation at his work place and subsequent*

*harassment there after by yourself. He alleges that not only did you harass him but also threatened him with more to follow. Please provide me with details according to your knowledge of this incident...'* (sic).

28. From where I am sitting, there is nothing untoward with this letter from the President. It is just a simple and straight forward letter in which the President was informing the Applicant of Simiso's complaint and was further requesting that he provides him details of what exactly transpired in relation to the incident in question. If anything, the President's letter was seeking the Applicant's side on the alleged assault, and nothing more. For the Applicant to then go on and on about lies that Simiso and the Secretary General had been peddling against him and the collective bias of the NEC to him, instead of responding to the President's request is quite astounding.
29. As things turned out, the Applicant wrote another letter, on the same date, also addressed to the president, in which he resigned citing constructive dismissal. These 2 letters were delivered at the same time. Mabuza informed the Court that in his opinion, the Applicant

resigned because he knew that the Simiso matter was going to lead to a disciplinary enquiry being instituted against him. So he resigned to avoid being disciplined.

***Outsourcing of Applicant's duties.***

30. In respect of this allegation, Mabuza informed the Court that the decision to outsource the accounting duties of the union came about as a result of the Applicant's conduct in which he was frustrating the process after he had indicated that he would not be renewing his contract in the year 2014. He testified that the Applicant was not posting the financial statements in the union's financial system hence the financials were behind schedule. The NEC then decided that the union should appoint an independent firm to do the posting so that the auditors can get the financials on time. However the firm appointed had challenges with the postings in the Respondent union's system, as a result of which no financials were presented for the year 2014.
31. Further testimony from Mabuza was to the effect that in May 2015 he restored the Applicant's duties and he (Applicant) sorted the issue of the financials such that they were presented later on in the year.

Mabuza then referred the Court to annexure exhibit 'JG1' page 53, which is the letter which restored the Applicant's duties. Thereafter, he says the Applicant worked without any qualms in respect of this issue. He informed the Court that he was surprised when the Applicant raised this issue amongst the issues which forced him to resign when it had been resolved.

*Issue of hatred*

32. Another issue addressed by the former president of the Respondent, Brian Mabuza, was that of alleged hatred, which the Applicant listed as one of the reasons for his sudden resignation on the 01<sup>st</sup> February 2016. In relation to this issue Mabuza informed the Court that the Applicant had alleged that he was not in good terms with the vice president, who was Mphikeleli Dlamini at the time. Mabuza further stated that after the Applicant had raised the issue of the alleged 'open hatred' by the vice president, he, together with the NEC, engaged both of them for purposes of thrashing and ironing out their differences. He informed the Court that the animosity between the two was more on a personal level than work related. After engagement by him and the NEC he says issues between the Applicant and the vice president were

resolved. Mabuza informed the Court that he was therefore surprised that the Applicant also used this issue of the alleged hatred by the vice president as one of the reasons that forced him to resign.

***Refusal to meet.***

33. In his letter of resignation the Applicant mentioned that the refusal by the NEC to meet him and his legal representative was one of the reasons that also compelled him to resign. He stated that he felt he was denied the opportunity to meet the NEC with his representative because he was being pushed out of the union. In his testimony however, Mabuza was surprised that the Applicant could state that he was resigning because the NEC had not met his representative. He stated that the NEC always dealt with the Applicant's complaints internally and until they were resolved in one way or the other. He informed the Court that it was disingenuous of the Applicant to allege that the NEC was refusing to meet him and use this as a basis for his resignation when he knew very well that all his issues and concerns had been addressed and resolved.

***Renewal of the Applicant's contract of employment.***

34. Mabuza finally testified about the renewal of the Applicant's contract of employment after it had lapsed through the effluxion of time. He informed the Court that the Applicant had written to him, in his capacity as president of the union, to advise that he did not wish for his contract to be renewed because he felt there were some grievances which had still not been resolved. Mabuza further testified that initially the NEC accepted his resignation and tasked him (Mabuza) to inform him that the NEC had accepted that he did not wish to be an employee of the union after the lapse of his contract on 30 September 2014. However, Mabuza says instead of informing the Applicant that the NEC had accepted his wish not to renew his contract, he engaged the Applicant and convinced him to withdraw his resignation letter because his grievances were being addressed and most of them had been resolved.
35. Indeed the Applicant wrote a letter addressed to the president on 03 October 2014, and effectively withdrew his letter which was communicating his desire not to have his contract renewed. Mabuza further informed the Court that a new contract was then prepared for

the Applicant to sign but the Applicant kept the contract saying there were some issues he wished to have addressed first before appending his signature. He says the Applicant never returned the contract until he resigned on 01 February 2016.

36. Under cross questioning by the Applicant's Counsel, Attorney Mr. T. Sibandze, questioned about the sexual harassment allegations and witness Mabuza maintained that the sexual harassment issue was resolved, first by his predecessor Patrick Ngwenya in 2007, and then by him in 2012. He further clarified that in 2007, Jabu Shiba was not employed by the Respondent union but was a member of the NEC. Mabuza further informed the Court that when he assumed presidency in 2009 the Applicant never raised the sexual harassment issue. He says it was only in 2012, when Shiba was engaged on a full time basis as Secretary General that the Applicant then decided to once again raise this issue, saying he was not comfortable working with her since he was going to be in contact with her on her full time basis. Mabuza wondered why the Applicant suddenly felt uncomfortable working with Shiba on a full time basis because they had previously worked in



close contact when Shiba acted in the position of secretary general before 2012.

37. When Mabuza was questioned on whether he reported to the NEC that Jabu Shiba had apologized for the sexual harassment allegations, he informed the Court that he only informed the NEC that the issue had been resolved and did not inform them of the nitty gritty of how exactly it was resolved.
38. Then in respect of the SNPF issue, Mabuza insisted that this issue was also resolved after meetings were held with the SNPF shop stewards, which meetings were facilitated by NEC member Simon Khoza. He says the matter was discussed at length and all parties came to the understanding that the issue had been closed as resolved as it was explained to the SNPF union members that the Applicant was holding secret meetings with the management of SNPF. Mabuza again reiterated that the union members at SNPF also resolved that the Applicant would no longer deal with their issues and the matter was put to rest.

39. With regards to the FNB issue, Mabuza also maintained that it was resolved after the NEC met with the shop stewards and they informed them (NEC) that they suspected that the Applicant was getting favours from management because he was putting them under pressure to accept the job evaluation terms when they were not comfortable with them. After the meeting with the NEC the FNB union members, like the SNPF members, also resolved that the Applicant would no longer handle their issues.
40. Finally Mabuza informed the Court that it was suspiciously convenient for the Applicant to resign when he was being investigated for the alleged assault on Simiso Gwebu. He further testified under cross questioning that the Applicant decided to bring up every grievance he could recall to make out a strong case for constructive dismissal when the real reason behind his resignation was that he was avoiding the investigation which would have culminated in a disciplinary hearing. He wondered why the Applicant failed to exonerate himself when given the opportunity to do so instead of hastily opting to resign.

41. Simiso Gwebu was the second witness to testify in support of the Respondent's case. His evidence mainly focused on his alleged assault by the Applicant. He informed the Court that at the time of the assault incident he was employed by FNB as Risk Analyst and was a member of the NEC of the Respondent representing FNB union members. In relation to the assault incident, Simiso informed the Court that he received a call from the receptionist informing him that the Applicant had come to see him. He went to meet him at the reception area and thereafter ushered him to an interview room so they could meet privately.
42. When they were inside the interview room the Applicant asked if Samkeliso Mamba, the chairperson of the shop stewards, was present and Simiso says he answered in the affirmative. Further evidence by Simiso was that suddenly the Applicant's tone changed and he informed him that he wanted evidence of the lies that he (Simiso) was spreading about him (Applicant). Simiso further testified that the Applicant informed him that there was a petition that he (Simiso) had signed alleging that the Applicant was colluding with the bank. When he denied knowledge of such petition the Applicant said he should

stop playing games with him and started manhandling him. As he was manhandling him he pushed and pinned him against the wall, holding him by his shirt and this resulted in one of the buttons on his shirt being ripped off.

43. Simiso says he tried reasoning with the Applicant but he (Applicant) was in an uncompromising mood and threatened to deal with him because he (Simiso) was destroying his career. When the Applicant finally let go of him, Simiso says he walked out of the interview room and the Applicant was closely following behind, issuing threats to the effect that he was not done with him and he left the premises.
44. After this incident, Simiso says he reported the issue to his supervisor, the President of the Respondent, the vice president, the secretary general, shop steward and to the police. He says he did not necessarily lay a charge against the Applicant but made a report because he now felt threatened. The President informed Simiso that his issue would be dealt with in January 2016 since it was almost time for the Christmas holidays. Then in January 2016, Simiso says he wrote a formal letter in which he detailed the assault incident (see page 12 of exhibit

‘SF1’), which he also copied to the bank. Following his complaint Simiso says he later learnt that the Applicant had resigned from the union. Under cross examination this witness denied spreading lies about the Applicant. He maintained his evidence and was unshaken.

45. The third and last witness called by the Respondent was Patrick Ngwenya. He informed the Court that he was the president of the Respondent union between 2007 and 2009. He further informed the Court that he is the deponent to the affidavit at pages 9 and 10 of exhibit ‘SF1’. In this affidavit he states that he was approached by the Applicant at his house on 14 May 2014, requesting that he assists him (Applicant) in resuscitating the sexual harassment issue.
46. Ngwenya testified as well that before signing this affidavit, and whilst he was president of the union in 2007, he had previously dealt with a sexual harassment complaint brought by Jabu Shiba against the Applicant. Jabu Shiba’s complaint was that the Applicant had approached her saying since her husband had relocated to South Africa She (Jabu) should now start dating him. Jabu was very upset

about this and approached Ngwenya to complain and demanded that the president should warn the Applicant to never say this again.

47. Further evidence by Ngwenya was that the Applicant was very remorseful about the incident and indicated that he wanted to meet with Jabu Shiba so that he could apologise for his utterances. Unfortunately for him, Ngwenya says Jabu Shiba was not interested in meeting him but just wanted him to stop making such utterances. According to Ngwenya, that was the end of the matter and he closed it as resolved in 2007.

48. Then in 2014, Ngwenya says he was surprised when the Applicant approached him requesting that he should help him resuscitate the sexual harassment issue when it had been resolved some 7 years earlier. When he questioned the Applicant on why he wanted a closed matter re-opened, he stated that he was now working closely with Jabu Shiba, as such feared that Shiba would tell lies about the incident.

49. Under cross questioning by the Applicant's Counsel Ngwenya maintained that the Applicant had approached him requesting that he helps him revive the sexual harassment allegations because he said he feared that now that he was working closely with Jabu Shiba she might want to still raise the issue.
50. To start off with, the paramount question entailing in this present matter and which has to be determined by this Court is whether the Applicant was constructively dismissed by the Respondent. The other question of whether his contract of employment was tacitly renewed will only be determined if the Court makes a finding that he was constructively dismissed.
51. In our jurisdiction, constructive dismissal is regulated by section 37 of the Employment Act No.5 of 1980, which provides thus;
- "When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether*

*with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer."*

52. Section 37 of the Employment Act defines constructive dismissal to mean that an employee terminated a contract of employment, with or without notice, because the employer made continued employment intolerable.
53. This therefore means that where an employee claims constructive dismissal, the onus is on that particular employee to prove that the resignation was not voluntary and that it was not his intention to terminate the employment relationship. Once the employee discharges the onus, the conduct of the employer must then be assessed and the question in this regard is whether the employee could reasonably have been expected to put up with the conduct of the employer?
54. In *Eagleton and Others v You Asked Services (Pty) Ltd (2009) 30 ILJ 320 (LC) at para 22* the South African Labour Court previously considered what an employee must prove to claim constructive



- a) He or she terminated the contract of employment;*
- b) continued employment became intolerable for the employee; and*
- c) the employer made continued employment intolerable.*

55. The first requirement in a case of constructive dismissal is that an employee claiming constructive dismissal must prove that he or she, and not the employer, terminated the contract of employment. The resignation must also not be voluntary. That is to say, the resignation must have been because the situation had become so unbearable that the employee could not work. By resigning the employee is effectively saying he or she would have carried on working indefinitely, or until his contract lapsed, had the unbearable situation not been created.

56. In *Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at 984* the Court held that the employee must satisfy the Court that at the time of the termination of the contract, he or she was under the genuine impression that the employer behaved in a manner that rendered the relationship intolerable and would continue

to do so. This is the second requirement in constructive dismissal cases. The operative word here is '*intolerable*'.

57. Courts have confirmed that the use of the word 'intolerable' means that there is an onerous burden on the employee in that he (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. Instead what is relevant is the conduct of the employer viewed in an objective sense. (see: *Van Niekerk et al, 'Law @ Work' (Lexis Nexis, Durban, 2008 at page 213)*).
58. The third requirement to prove constructive dismissal is that the circumstances that pushed the employee to resignation must have been brought about by the employer. In other words, the intolerable circumstances must have been created or brought about by the employer.
59. In *Pretoria Society*, supra, the South African Labour Court emphasized that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated

or likely to destroy or seriously damage the relationship of confidence and trust between the parties (employer and employee). The question here is not whether the employer intended any repudiation of the contract of employment. 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.

60. In *Western Escavating (ECC) Ltd v Sharp* (1978) 1 All ER 713 at 717 (D-F) Lord Denning authoritatively stated that where the employer exhibits conducts which is in breach of the contract of employment, or which shows that such employer no longer intends to be bound by such contract, the employee is bound to there and then treat himself as constructively dismissed. Lord Denning further stated that;

*"...But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose the right to treat himself as discharged."*

*continues for any length of time without leaving, he will lose the right to treat himself as discharged."*

61. Now, in this matter before Court, the Applicant, Jimson Gwebu, alleges that the intolerable conduct he was complaining started as far back as 2007. Some of this conduct occurred between the years 2012 and 2014. But it would seem that none of this conduct was sufficiently serious for him to make up his mind and leave at once. The evidence before Court indicates that Mr. Gwebu continued working for a considerable period despite the intolerable working conditions.
62. Take for instance the sexual harassment issue, the evidence indicates that this issue first arose in 2007, but in 2016, some nine years later, the Applicant still relied on it as one of the reasons that forced him to resign. A question one then asks himself is; how could the Applicant have worked for over 9 years with this issue still bothering him and rendering his work environment intolerable? The evidence of the Respondent in relation to the sexual harassment issue, which the Court accepts as more probable than that of the Applicant, is that it was resolved first in 2007 by the then president, Patrick Ngwenya,

to this question is that he wanted to make out a strong case for his alleged constructive dismissal case. If indeed this issue rendered his work conditions intolerable, he would not have worked all this time and then decide after 9 years that he could still use it as a basis for his resignation.

63. Even with the rest of the grounds he relies on for his alleged constructive dismissal, the evidence indicates that the Respondent had attended to all his concerns at least 2 years before he ultimately decided to resign. In respect of the outsourcing of his duties for instance, the Applicant himself conceded that his duties were restored. Why then did he use this issue as one of the issues that forced him to resign? The answer again lies in the fact that he was bringing everything up to make up a strong case for his constructive dismissal case.

64. Similarly with the SNPF and FNB issues, the evidence before Court indicates that the president of the union attended to these grievances or complaints raised by the Applicant and both issues were resolved. In respect of the SNPF issue the Applicant had been accused by the

union members, who were employees of SNPF, of holding secret meetings with management. This allegation first arose in 2013 and at the beginning of the year 2014 the president mandated NEC member Simon Khoza to meet with the Applicant and the union members at SNPF to resolve the matter. Indeed a meeting was convened and the issue was resolved. Even the claim the Applicant had instituted through his Lawyers, against union member Steven Ntshalintshali, was withdrawn after the intervention of the president so that his grievance could be dealt with internally.

65. Then in respect of the FNB issue, the allegations from the union members were to the effect that the Applicant was pushing them to accept a settlement proposal because he was holding secret meetings with management and had allegedly obtained a loan to consolidate his debts. The bank denied having given the Applicant any such loan or holding secret meetings with him and the matter was closed. That should have been the end of the matter.
66. Surprisingly, the Applicant then turned around in his resignation letter to say these accusations were an NEC 'sanctioned project.' The

evidence before Court, however, clearly indicates that the NEC had nothing to do with both the SNPF and FNB accusations. These accusations came from the union members, who were employees of the bank and pension fund, frustrated that the Applicant was pushing them to accept a not so favourable settlement in their negotiations with their employer because he was getting favours from it (bank), on the one hand and that he was holding meetings with management behind their backs (pension fund), on the other. As to why the Applicant then decided to use these allegations from union members against his employer boggles one's mind.

67. The mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes the conditions intolerable. So the critical circumstances must have been of the employer's making. (see: *Murray v Minister of Defence (2008) 29 ILJ 1369*)
68. The complaints by the union members of SNPF and FNB cannot be said to be of the employers' making in this matter. It is therefore a

finding of this Court that it was unreasonable of the Applicant to use these complaints by union members as a basis for his resignation and blame the employer of creating intolerable conditions. The law is that the employer must be culpably responsible, in some way, for the intolerable conditions. This cannot be said of the Respondent in this matter.

69. There is also this issue of what the Applicant referred to as 'open hatred' by the vice president in his letter of resignation. Again he accused the NEC of supporting the vice president and not doing anything to protect him. The Applicant's letter of resignation suggests that as at 01 February 2016, when he resigned, there were still unresolved issues between him and the vice president. Brian Mabuza though, who was the president at the time, informed the Court that he personally convened a meeting between the Applicant and the vice president, Mphikeleli Dlamini, to amicably resolve their differences. Mabuza said he discovered that their differences had nothing to do with their professional work but were more personal. After their meeting they put their personal differences aside and undertook to work harmoniously. The Applicant though vehemently denied that the



‘open hatred’ by the vice president issue had been resolved at the time he tendered his resignation.

70. As the Court was preparing this judgement, and from the matters that appeared in one of the Court’s sittings, I learnt that the Applicant had been re-engaged by the Respondent as an employee of the union with effect from the 01<sup>st</sup> day of May 2022. As much as I was shocked that the Applicant had gone back to the same work environment he said was intolerable, I was more surprised to learn that he had been offered employment by the same former vice president, who coincidentally is now president of the union!
71. I invited both the parties’ respective Counsel to address the Court with respect to these developments, especially on the question of how this re-engagement of the Applicant affected his constructive dismissal claim. I gave the Attorneys a timeline within which to have filed any such further submissions on this development but it would seem they opted not to.

72. Now, a question which came to mind immediately upon learning that the Applicant had been re-engaged as an employee of the Respondent is; how could the same Applicant who resigned because of a breakdown in the employment relationship with his employer still go back to the same employer he left because working there had become intolerable? Worse still, how could he accept re-engagement from the same president, who was the vice president then, whom he had accused of openly hating him?

73. Authors *Taylor, Steenkamp & Kantor* in their work titled “*Unfair dismissal: misconduct, incapacity and automatically unfair dismissal*” published in the *South African Labour Law* state that;

*“The word intolerable indicates that a significant level of breakdown in the employment relationship...It means that the employee could not continue to endure the employment relationship.”*

74. In *Oelofse v New Africa Publications Ltd [2001] 10 BALR 1098*, in considering a claim for constructive dismissal it was found that an

attempt by an employee to withdraw his resignation is inconsistent with a claim that the employment relationship had become intolerable.

75. The same principle as expounded above applies in this present matter of Jimson Gwebu. I say this because it has been held in a number of decisions that when an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that he cannot fulfil what is his most important function, which is to work. The employee is in effect saying he would have carried on working indefinitely had the unbearable situation not been created. He resigns on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment.
76. It cannot be therefore that the same employee, in Jimson Gwebu, who resigned because he did not believe that his employer, the union SUFIAW, would ever reform or change its conduct of creating an unbearable work environment, could then take up the offer to re-engage him when he left because the work relationship had broken down. That is a contradiction to his assertion that the work

relationship had irretrievably broken down. Compounding issues for the Applicant in this matter is that the offer to re-engage him came from the very same Mphikeleli Dlamini, whom he said openly hated him.

77. As stated earlier on in this judgement, the Applicant resigned after the Respondent instituted investigations into the allegations of assault committed by him. Instead of going through with the investigations and exonerating himself, the Applicant seems to have chosen the easy way out – he opted to resign. In resigning the Applicant relied on every complaint and grievance from as far back as 9 years earlier. The evidence before Court indicates that all of these complaints and grievances had been promptly attended to and resolved.


78. With that said, it is accordingly a finding of this Court that the real reason behind the Applicant's hasty resignation was to avoid the investigations, which could have culminated in a disciplinary enquiry. In this regard, our law prescribes that where an employee has an option of facing investigations or a disciplinary enquiry but opts to resign, there can be no talk of constructive dismissal. (See local

decision of *Glory Hlophe v Snip Trading (Pty) Ltd Unreported IC case no. 69/2002*, see also *Smithkline Beecham (Pty) Ltd v CCMA [200] 21 ILJ 988 at 997*).

79. Indeed it is only logical that where an employee is being investigated for any alleged transgression, the first thing he would want to do is to exonerate himself rather than take the easy way of pre-emptying the outcome of the investigations and ultimately the disciplinary processes which may follow. This, the present Applicant failed to do. Instead of absolving himself he decided to run.
80. Objectively viewed therefore, the Court finds that there is no causal link between the conduct complained of by the Applicant in this matter and his subsequent decision to resign. In other words, the Respondent union in this matter, SUFIAW, never made the Applicant's continued employment intolerable. As such, the Respondent cannot be held to be culpably responsible in any way for the Applicant's resignation.

81. In conclusion, it is accordingly the Court's finding therefore that the Applicant's application is without merit, with the result that his claims against the Respondent be and are hereby dismissed in their entirety. The Court makes no order as to costs.

The members agree.



T. A. DLAMINI  
JUDGE – INDUSTRIAL COURT

**DELIVERED IN OPEN COURT ON THIS 28<sup>th</sup> DAY OF JULY 2022.**

*For the Applicant* : *Attorney Mr. T. Sibandze (Rodrigues and Associates Attorneys)*  
*For the Respondent* : *Attorney Mr. K. Simelane (Henwood and Company Attorneys)*