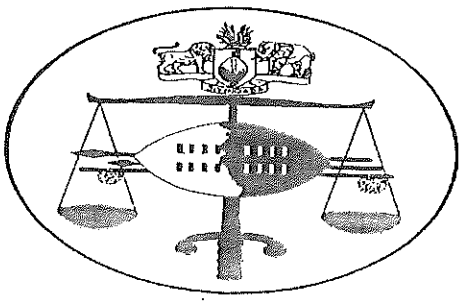

IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **Case No. 55/2021**

In the matter between: -

AFRICAN ECHO t/a TIMES OF SWAZILAND **Appellant**

and

INNOCENT MAPHALALA

Neutral Citation: ***African Echo t/a Times of Swaziland v Innocent Maphalala (55/2021) [2024] SZSC 65 (29 February 2024)***

CORAM: M.J. DLAMINI JA; S.J.K. MATSEBULA JA; J.M VAN DER WALT JA

HEARD: 20 October 2023

DELIVERED: 29 February 2024

JUDGMENT BY J M VAN DER WALT JA

Summary

Appeal against refusal of review application - labour law - procedure - review by High Court of Industrial Court judgment under ***section 19(5)*** *of the* ***Industrial Relations Act, 2000*** *– common law principles of review to be applied, restated*

Appeal against refusal of review application - labour law - procedure - review by High Court of Industrial Court judgment under ***section 19(5)*** *of the* ***Industrial Relations Act, 2000*** *– distinction between appeal and review restated*

Appeal against refusal of review application - labour law – review of Industrial Court judgment – held, that none of the grounds advanced in the High Court constitute grounds for common law review and that review application fell to be dismissed

Appeal against refusal of review application - labour law – interpretation of ***section 37*** *of the* ***Employment Act, 1980*** *– held that* ***section 37,*** *in suitable cases and as measured against the reasonableness standard incorporated in the section, would permit for the interpretation that there can be no constructive dismissal where a reasonable alternative/s to resignation such as internal or other remedies existed.*

Cur adv Vult

(Postea: 29 February 2024)

VAN DER WALT, JA

INTRODUCTION

[1] This Court is the third port of call of the parties, emanating from alleged unfair dismissal of the Respondent by the Appellant in 2017.

[2] The Respondent, who used to be the Sunday Editor of the Times Sunday newspaper, as Applicant successfully sued the Appellant for unfair dismissal in the form of "*constructive dismissal*" in the Industrial Court. The Appellant, aggrieved by the outcome, instituted review proceedings in the High Court in terms of **section 19(5)** of the **Industrial Relations Act, 2000**. The High Court dismissed the review application, resulting in the instant appeal now before this Court.

[3] The phrase "*constructive dismissal*" does not appear in either the **Employment Act, 1980** or the **Industrial Relations Act** but emanates from **section 37** of the **Employment Act**, which reads:

> ***"Termination of services due to employer's conduct.***
>
> ***37. 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."***

[4] The main bone of contention in the Industrial and High Courts was whether or not it is required that an employee should have exhausted all internal and other remedies before he/she may successfully claim constructive dismissal.

A THE INDUSTRIAL COURT APPLICATION [1]

[5] The claim *in casu*, according to the Industrial Court judgment, was grounded on the basis that the Respondent had been:

> *"frustrated with more work which resulted in him not meeting deadlines, having his supervisory powers being usurped by the publisher, being denied benefits enjoyed by most employees and finally the institution of vexatious charges against him in a bid to get rid of him."*

5.1 The Appellant denied constructive dismissal and raised as its defence that the Respondent had resigned voluntarily.

5.2 According to the Respondent's Founding Affidavit in the subsequent review application, the Respondent resigned as a result of an investigation relating to a story published by a publication known as the Independent News.

[6] The Court made the following findings:

"25. ....

[1] Neutral citation ***Innocent Maphalala v African Echo t/a/ Times of Swaziland 30/2018 SZIC 146 (30 October 2020)***

(i) *That there were indeed complaints by the Applicants [sic] before the charges were laid against him*

(ii) *That the complaints were known, acknowledged and explained by the Respondent's witness*

(iii) *The discussion and explanation appears [sic] not to have resolved the problems of the Applicant*

(iv) *That there was an investigation of the embalming powder story which was published in November 2016 and February 2017*

(v) *That the Respondent's witness testified to the effect that the audio bore what the Applicant narrated to be the events in Manzini*

(vi) *That there was the story of the arrest of the police officer for corruption in February 2017*

(vii) *That as a result of the unresolve grievances he communicated his frustration and prepared to resign, coupled with the willingness to train someone to replace him. The letter of March 2017 refers.*

(viii) *That the Respondent's witness testified that he asked Applicant about the claim for E 2 000.00 but he responded that he was still investigating and yet to claim*

(ix) *That the Respondent was grooming someone/people for the Applicants position, such that he had to extend leave to enable that*

(x) *That the Respondent's witness testified that the charge was that of failure to obtain authority and failure to declare the use of funds, despite having consistent record of event [sic], which it understood and believed, before the Independent News publication*

(xi) *That the Applicant did not resign with immediate effect but served notice*

(xii) *That the disciplinary hearing was not concluded within the notice period and the Respondent abandoned pursuit of same."*

[7] In holding that there had been constructive dismissal, the Industrial Court expressed itself as follows in paragraphs 27 to 30 of the Judgment:

"27. The onus of proof is placed on the employee to prove that the conduct of the employer rendered it unreasonable to continue in the employment.

28. *This court in* ***Glory Hlophe v SNIP Trading IC 69/2002***[2] *highlighted that it is not a constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship, but in casu there is evidence of written complaints to the proper authority in Respondent yet they remain unresolved.*

29. *The function of the court is to look at the conduct of the employer as a whole and determine whether in effect, judged reasonably and sensibly, that the employee cannot be expected to put up with it, see* ***Pinky Mngadi v Conco IC 199/2008.*** [3]

30. *Considered in total, the evidence of the conduct of the Respondent, and the responses by the Respondent regarding the said conduct, it is found to have been such that the Applicant cannot be reasonably expected to continue in the employment relationship...*" [4]

B THE HIGH COURT REVIEW[5]

[8] Said **section 19(5)** of the **Industrial Relations Act** provides that:

(5)A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

[9] It is unclear exactly how many grounds of review were actually advanced in the High Court by the Appellant. The relevant

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[2] Full citation ***Hlophe v Snip Trading Proprietary Limited (69 of 2002) [2005] SZIC 18 (5 April 2005)***

[3] Full citation ***Pinky Toi Mngadi v Conco (Pty) Ltd t/a Coca Cola Swaziland (Pty) Ltd (199 of 2008) [2015] SZIC 17 (16 April 2015)***

[4] The remainder of the paragraph deals with compensation

[5] Neutral citation ***African Echo t/a Times of Swaziland v Innocent Maphalala & Two Others (2378/20) [2021] SZHC 150 (15th September 2021),*** Paragraph [5] and further

paragraphs in the Founding Affidavit cover some seven (7) pages and some paragraphs contain multiple apparent grounds for review, and/or the same the ground in some instances seem to be spread over more than one paragraph.

9.1 As will appear more fully hereunder, on appeal it is contended that all the grounds had not been considered and/or adjudicated by the High Court, and that some grounds were considered but decided incorrectly.

9.2 The Appellant did not specify or abbreviate these grounds in either the Notice of Appeal or in the Appellant's Heads of Argument, thus obliging the Court, for the sake of convenience, to engage in a time-consuming exercise of attempting to summarise the averments in the Founding Affidavit, resulting in the following synopsis:

Paragraph	Apparent Purport
15.1	No findings whether sufficient evidence of interference in Respondent's duties; no finding of withholding of benefits, no finding on excessive workload resulting in less favourable working conditions; no finding relating to [*presumed – disciplinary*] charges being a reason for the Respondent's resignation

15.1.2	Respondent's complaints addressed by Appellant's Managing Director thus no evidence on which Court could reasonably have reached conclusion of employment being rendered intolerable
15.2	Court found Respondent's complaints had been addressed thus, logically, same could not have been basis justifying resignation.
15.3	Court acknowledged issues between parties dealt with, however not to Respondent's satisfaction. He should have appealed or gone to CMAC. Reasonable trier of fact ought to have found in absence [*presumed – internal*] appeal that issues remained resolved.
15.4	Court failed to apply mind to facts in relation to availability of other remedies
15.5	Court failed to apply mind to facts relating to the embalming powder story
15.6	Had Court applied its mind *re* that story, would have found no malice in charging Respondent
15.7	The evidence relating to grooming of a successor was challenged by Appellant who stated that is normal to train junior employees
15.8	Said evidence not unique to Respondent's department. Evidence that Respondent made aware of training arrangement unchallenged. No evidence that individual being trained eventually took over Respondent's position
15.9	Court failed to apply mind to fact Respondent's version did not disclose issue of paying bribe to avoid arrest
15.10	Court failed to apply mind to evidence relating to involvement or use of money *re* embalmment powder
15.11	Had Court applied its mind to facts would have found Respondent not honest from the beginning and concealed bribe
15.12	Respondent failed to come clean about bribe even after given a second chance
15.13	Common cause failure to conclude the [*presumed – disciplinary*] hearing could not be apportioned to either of parties
15.14	The above is a clear indication of willingness to have hearing finalised
15.15	Court ignored relevant evidence *re* incident of 16th April 2017[*incident not specified*]
15.16	Evidence *re* Respondent's resignation on 16th April 2017 [*resigned on 20th April 2017 according to Industrial Court judgment*] had everything to do with manner in which Respondent requested to write a report and manner in which he was served with notice of suspension and charges
15.17	Had Court applied its mind would have found Respondent had remedy of reporting to publisher as opposed to resigning

[10] The gist of the judgment of the High Court can be captured as follows, with reference to the above paragraphs:

10.1 *Apropos* 15.1: The Industrial Court made a clear finding in this regard in Paragraph 30 of its judgment, a finding which evidently covers all the aspects of the case. The Industrial Court did not have to make a piecemeal finding, as suggested. The contention that no finding was made therefore must fail.

10.2 ***Apropos* 15.1.2 and 15.2:** The complaints may have been addressed but they had not been addressed to the satisfaction of the Respondent.

10.3 ***Apropos* 15.3 and 15.4**: The Respondent had nowhere to appeal to since he was dealing with the employer and was not obliged to go to CMAC; the Respondent followed the law as provided for in **section 37**.

10.3.1 **Section 37** does not require an internal appeal or approach to CMAC, as contended for; the section does not stipulate what an employee should do before leaving his employment.

10.3.2 *"[11] ... Leaving employment is the employee's own decision and it cannot be dictated to him what to do before leaving his employment as he has a right to continue his employment or leave it any time and for whatever reason which he is not obliged to communicate. Section 37 is concerned with that happens after the employee has left the employment."*

10.3.3 *"[12] If the employee contends that he left his employment due to unacceptable conduct of the employer, then he can file for unfair dismissal. It is during the conduct of the case for unfair dismissal that he is required to prove that he left the employment due to the unacceptable conduct of the employer."*

10.3.4 *"[13] In casu Mr Gamedze who appeared for the applicant referred me to some persuasive authority from South Africa on the point that an employee should exhaust internal remedies before leaving his employment. I must say that I am not persuaded by this authority as it does not seem to be in line with our statutory provisions."*

10.4 ***Apropos the remainder:***

"[14] Other matters raised in this application constitute findings of fact by the court a quo. These are appeal points which cannot be dealt with by review proceedings."

C THE APPEAL

[11] The Notice of Appeal consists of two paragraphs, formulated as follows:

> *"1. The Court erred in law and in fact in the interpretation of Section 37 of the Employment Act. The Court failed to appreciate that the position of the law in Eswatini has evolved to including the exhaustion of the internal remedies and other remedies before an employee can resign and claim that he was constructively dismissed.*
>
> *2. The Court erred in law and in fact by misconstruing the Appellant's grounds of review for grounds of appeal. The Court failed to appreciate the provisions of section 19(5) of the Industrial Relation Act 2000 as amended. The Court in its judgment failed to appreciate that the Appellant was challenging the method as opposed to the result. The Court in its judgment does not make a specific finding as to which points constitute and/or constituted grounds of appeal as opposed to grounds of review. The Appellant has raised seventeen [17] grounds for review and the Court aquo[sic] indirectly acknowledges that there are grounds for review, which it did not categorically state but further failed to deal with those. This therefore constituted errors of law and fact."*[6]

C.1 SUBMISSIONS

C.1.1 ON BEHALF OF THE APPELLANT

[12] Mr Gamedze on behalf of the Appellant commenced with the second portion of the Notice of Appeal, contending that the High Court committed an error of law by simply holding that

[6] It was observed by the Court that the second numbered paragraph contains multiple grounds of appeal, which serve to complicate the task of the Court. **Rule 6(4)** of the Rules of this Court, in force at the time, required: *"(4) The notice of appeal shall set forth concisely and under distinct heads the grounds of appeal and such grounds shall be numbered consecutively."*.

some of the grounds are grounds of appeal, without identifying them.

12.1 This, evidently, pertains to Paragraph [14] of the Judgment.

12.2 With reference to the Industrial Court of Appeal case of ***Chairman of The Civil Service Commission v Isaac MF Dlamini***[7] Mr Gamedze underscored the distinction between questions of law and questions of fact and further emphasized that in terms of **section 19(1)** of the **Industrial Relations Act**, only questions of law are subject to appeal.

12.3 The High Court, the argument went further, failed to identify such questions of law.

[13] As regards the first ground of appeal pertaining the question whether or not **section 37** permits for an interpretation that

[7] ***Appeal Case 14/2015***

internal and other remedies have to be exhausted first, it was submitted that that local jurisprudence has developed to include reasonable alternatives to constructive dismissal and as such the reference to South African case authorities is not of much moment.

13.1 The Court was referred to the following passage in a case that the High Court had not been referred to, to wit ***Nicholas Motsa v OK Bazaars (Pty) Ltd t/a Shoprite***:[8]

> *"19. In the **Pinky Toi Mngadi v Conco**[9] case, this Court reiterated and re-emphasized that the principle in respect of constructive dismissal is that where a reasonable alternative to resignation exists, there can be no constructive dismissal. It is incumbent upon an Employee alleging constructive dismissal to prove that the Employer deliberately rendered the employment relationship intolerable and that resignation was an act of last resort. It is considered to be opportunistic for an employee to resign out of the blue, so to speak, without even raising an issue with the employer and giving the employer the opportunity to remedy the cause of complaint, thus giving it a chance to remedy any errant ways. (See **Albany Bakeries LTD v Van Wyk & Others (2005) 26 ILJ 2142 (LAC) para 28**)."*

13.2 In the circumstances, it was submitted, it was incorrect for the High Court to hold that an employee, once he or she feels that the employment conditions are not

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[8] **[2015] *SZIC 06/2015 (05March 2015)***

[9] Also referred to in the Industrial Court judgment

favourable, should simply resign without giving the employer an opportunity to remedy the situation.

C.1.2 ON BEHALF OF THE RESPONDENT

[14] As regards the issue of exhausting other remedies prior to resigning, Mr Nxumalo submitted that this ground should fail in that:

14.1 Section 37 expressly provides for resignation "*with or without notice.*"

14.2 The Court was referred to two further extracts from the ***Nicholas Motsa*** case *supra* wherein the Industrial Court approved and/or affirmed the following:

14.2.1 In Paragraph [18] with reference to ***Pretoria Society for the Care of*** **the** ***Retarded v Loots:*** [10]

[10] *(1997) 18 ILJ 981 (LAC) at page 985*

"It has been held that it is not necessary to show that the Employer intended any repudiation of the contract. Instead, the function of the Court is to look at the Employer's conduct as a whole and determine whether, when judged reasonably and sensibly, it is such that the Employee cannot be expected to put up with it."

14.2.2 Paragraph [21]:

"21. *Lord Denning in the* ***Western Excavating*** *case (1978 1 All ER 713 at 717 D-F) authoritatively stated that; 'where the Employer exhibits conduct 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.' At page 717 paragraph E Lord Denning stated thus; '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 his right to treat himself as discharged'.*

14.3 It then follows that the employee should leave immediately and without delay for any delay might lead to a waiver of the remedy to resign.

[15] As regards the complaint about the failure of the Court to specify certain of the grounds relied on in the review application, the submission was to the effect that it does not matter because a different conclusion would not have been reached on the contentious interpretation of **section 37**.

C.2 ANALYSIS

C.2.1 INTERPRETATION OF SECTION 37

[16] Neither the High Court nor this Court is bound by legal precedent created by the Industrial Court and in this matter, this Court is at pains to consider the **section 37** issue independently and afresh.

[17] It is common cause that the section does not expressly require any steps to be taken prior to resignation by an aggrieved employee. In fact, the employee has the option to resign with or without notice, which *ex facie* the provision permits for immediate resignation or, conversely put, the section does not prohibit resignation forthwith pursuant to objectionable or intolerable conduct by the employer.

[18] The case of ***Nicholas Motsa*** case *supra,* which it appears the High Court had not been referred to, is particularly apposite in that it contains important extracts from other cases, notably:

18.1 The ***Pinky Toi Mngadi v Conco*** case (referred to *in casu* by the Industrial Court) to the effect that where a reasonable alternative to resignation exists, there can be no constructive dismissal.

18.2 The ***Glory Hlophe*** case (referred to *in casu* by the Industrial Court) which was to the effect, where an employee has the option of facing a disciplinary hearing but resigns, that there can be no talk of constructive dismissal. A portion not captured in the **Motsa** judgment but evidently relied upon by the Industrial Court, is a passage at p.11:

> *"The learned author D. Du-Toit & Others in Labour Relations Law, A Comprehensive Guide 3rd Edition 343 states: "The question is whether taking all the circumstances into account there was objective unfairness which drove the employee to believe there was no way out but to walk away. Mere unreasonableness or illegitimate demands by the employer according to this approach do not amount to constructive dismissal as long as the employee retains a remedy against the employers conduct short of terminating the employment relationship".*

18.3 The ***Pretoria Society for the Care of the Retarded v Loots***, case, the relevant paragraph of which, in full, reads that:

> *"18. The test for determining whether or not an employee was constructively dismissed as set out in authorities is; whether the Employer without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relations of confidence and trust between the parties (Employer and Employee). It has been held that it is not necessary to show that the Employer intended any repudiation of the contract. Instead, the function of the Court is to look at the Employer's conduct as a whole and determine whether, when judged reasonably and sensibly, it is such that the Employee cannot be expected to put up with it;"* and

18.4 The British ***Western Excavating*** *case,* holding that:

> *"Where the Employer exhibits conduct 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.... 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 his right to treat himself as discharged."* [11]

[19] The views of the High Court expressed in Paragraphs [11] and [12] of the Judgment are to the effect that resignation is a matter of free choice, an employee cannot be dictated as to what to do before resigning and is under no obligation to communicate his reason/s for resigning. Further, that **section**

[11] Own abbreviation

37 is concerned with what happens after he had left the employment and that it is when claiming constructive dismissal that he is required to prove that he left the employment due to the unacceptable conduct of the employer.

[20] These views, in the form of general propositions, would seem to be sound. However, the reasonableness requirement built into the section was not explored any further by the High Court. This could be because the High Court did not enjoy the benefit of being referred by Counsel to the ***Motsa*** judgment and all the authorities. It is perhaps as a consequence thereof that the High Court failed to subject the "*...can no longer reasonably be expected to continue...*" requirement to closer scrutiny and this Court will now do so.

[21] In my considered opinion, the operative phrase in **section 37** is that the employee "*...can no longer reasonably be expected to continue in his employment*" and the key word is "*reasonably.*"

[22] In proper context, there can be no general blanket rule of injunction that internal or other remedies have to be exhausted first in that each case has to be considered on evaluation, and valuation, of its own peculiar facts and circumstances.

22.1 If one were to make an example involving extreme ends of the spectrum: Employee A resigns without any further ado because she does not like the type of tea provided by the employer in the tearoom; Employee B resigns without any further ado because she was raped by her employer:

22.2 A preference for say, green tea over rooibos tea is *de minimis* whereas rape hardly is a trivial matter.

22.3 The first step therefore is to determine the nature, gravity, extent and effect of the employer's conduct complained of.

22.4 The second step is to ascertain what reasonable alternatives to resignation existed, i.e., alternatives that would be reasonable in the given circumstances of a particular case.

22.5 Exhausting such remedies may in certain circumstances be commensurate with the reasonableness requirements, but in other circumstances such as the rape scenario, obviously absolutely not.

[23] Another basis on which the High Court rejected the proposition is to be found in Paragraph [13] of the Judgment, which is to the effect that the Court was not persuaded by South African authority referred to by Counsel "... *as it does not seem to be in line with our statutory provisions.*"

23.1 **Section 185(a)** of the **Labour Relations Act, 1995** stipulates that every employee has the right not be unfairly dismissed and in **section 186(e)** thereof, ***"dismissal"*** is defined as to include where ***"an employee terminated***

employment with or without notice because the employer made continued employment intolerable for the employee."

23.2 The Eswatini standard of "*...can no longer reasonably be expected to continue...*" and the South African standard of *"intolerable conduct by the employer"* are not worded identically but are perfectly compatible and have the same effect.

23.3 To this extent, the High Court erred in holding that the South African position "*...does not seem to be in line with our statutory provisions.*" However, in the end result not much turns on this.

[24] Taking into account all of the above, it is held that **section 37,** in suitable cases and as measured against the reasonableness standard incorporated in the section, would permit for the interpretation that there can be no constructive dismissal where a reasonable alternative/s to resignation such as internal or other remedies existed.

[25] On my reading of the affidavits filed in the High Court application, neither party took issue with the interpretation to be attached to **section 37.** This aspect will be addressed later hereunder.

C.2.2 SECOND PARAGRAPH OF NOTICE OF APPEAL

[26] The gravamen of this paragraph is that to the effect that High Court misconstrued the grounds of review for grounds of appeal.

[27] The difference between appeal and review has been restated as follows in ***Ngwenya Glass (Pty) Ltd v Presiding Judge of the Industrial Court of Swaziland and Others:***[12]

> *"[9] **Booysen J.** in **Anchor Publishing Co. (Pty) v Publications Appeal Board 1987 (4) S.A. 708 at 728 D – F** defining the distinction between an appeal and a review pointed out as follows:*
>
> *"It is important, when considering a matter such as this, to bear in mind the main distinction between an appeal and a review and that is that the court will **on appeal set aside a decision when it is satisfied that it was wrong on the facts or the law, whilst judicial review is in essence concerned not with the decision but with the decision-making process**.[13] .... upon review, the court is thus in general terms concerned with the legality of the decision and not its merits."*

[12] ***(3206/2008) [2013] SZHC 48 (28th February 2013)*** **Paragraphs [9] and [10]**

[13] Own underlining and emphasis

[10] Applying the above dictum, their ***Lordships*** *in* ***Liberty Life Association of Africa v Kachelhoffer 2001 (3) S.A. 1094 C*** *at* ***1110-111****:*

"Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness – or otherwise of the decision that is being assailed on appeal."

[28] The High Court did not err in holding, as a general proposition, that findings of fact "*[14] are appeal points which cannot be dealt with by review proceedings.*"

[29] May I add, *en passant*, that the statutory exclusion of appeals on questions of fact in labour law proceedings, at times appears to induce parties to test the waters of fortune by bringing applications for review on grounds that in effect are factual appeal grounds, presented under the guise of review.

[30] Because of this phenomenon, it would be prudent to revisit the review grounds permissible at common law, as intended by **section 19(5)** of the **Industrial Relations Act.** This Court held as follows in ***Charles Dlamini and 3 Others v The Registrar of Insurance and Retirement Funds & 3 Others:*** [14]

[14] ***(539/12) [2012] SZHC 102 (30 April 2012)***

"44. With regard to the review, the Supreme Court of Swaziland in the case of ***Takhona Dlamini v the President of the Industrial Court and Another*** *Appeal Case No. 23/1997 approved and applied the decision of Corbett JA in the case of* ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*** *1988 (3) SA 132 at 152 A-D where he stated the following:*

> *"Broadly in order to establish review grounds it must be shown that the President failed to apply his mind in the relevant issues in accordance with the behest of the Statute and the tenets of natural justice ... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose; or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated."*

[31] The focus therefore has to shift back to an enquiry whether the "*review grounds*" advanced by the Appellant, are of merit *vis-à-vis* the review grounds permissible at common law. Reverting to the summary of the grounds advanced:

31.1 The findings of the High Court *apropos* **15.1, 15.1.2** and **15.2,** which essentially were findings on the facts before the Industrial Court, are not challenged on appeal.

31.2 The findings of the High Court *apropos* **15.3** and **15.4** concern the interpretation of **section 37,** which this Court has dealt with under the first ground of appeal.

31.3 In respect of the remainder, it was held that they constitute findings of facts which cannot be dealt with by review proceedings.

[32] In my view it behoves this Court to examine the remainder *vis-à-vis* common law review requirements:

32.1 The correctness or not of a factual finding is not a matter for review; judicial review is in essence concerned not with the correctness of the decision but with the decision-making process.

32.2 It is not sufficient to allege an incorrect decision on the mere basis that the court had not properly applied its mind: more is required. Where failure of the decision maker to properly apply his/her mind is alleged, it must be shown that "***the decision was so grossly unreasonable***" as to warrant the inference of failure to properly apply his/her mind.

[33] Revisiting the table of allegations:

33.1 Paragraphs 15.6; 15.9; 15.10. 15.11 and 15.17: These pertain to factual findings and there are no allegations to the effect that the decision is so grossly unreasonable as to warrant the inference sought.

33.2 Paragraphs 15.7; 15.8; 15.12; 15.13; 15.14; and 15.16: These do not resemble any common law ground and appear directly to challenge the correctness of factual findings.

33.3 Paragraph 15.14: That relevant evidence was ignored would constitute a ground but more than a bald allegation is required; the Appellant failed to set out the relevant particulars of the incident or what the finding would have been had that evidence been taken into account.

[34] On the basis of the above analysis, none of the purported grounds of review have merit.

D CONCLUSIONS AND ORDER

[35] In view of all the above, it is concluded that:

35.1 The High Court erred in its interpretation of **section 37.**

35.2 The interpretation by the Industrial Court of **section 37** was not raised as a ground of review and in the end result, the erroneous finding of the High Court represents a detour to the application of the relevant common law review principles, which ultimately is what the case was all about. Put differently, a mistaken interpretation of **section 37** does not *in casu* affect the issue of reviewability and the appeal cannot be upheld solely on the basis of this error by the High Court.

35.3 Upon application of the principles of common law grounds for review, it is evident that none of the grounds advanced constitute grounds for review.

[36] In the result, it is held that:

36.1 **Section 37**, in suitable cases and as measured against the reasonableness standard incorporated in the section, would permit for the interpretation that there can be no constructive dismissal where a reasonable alternative/s to resignation such as internal or other remedies existed.

36.2 Measured against the principles and requirements of common law review, none of the grounds advanced in the High Court constitute grounds for common law review and the application review fell to be dismissed.

[37] It then follows that the dismissal of the application for review is to be confirmed, albeit on different bases than those pronounced on by the High Court.

[38] Accordingly, I consider the following Order to be appropriate:

(1) The appeal is dismissed.

(2) Costs to be paid by the Applicants.

JUDGMENT BY M J DLAMINI JA

Summary: *Labour Law – Employment Act 1980, section 37 – Constructive dismissal – Test for constructive dismissal – Whether local remedies be first exhausted – Local remedies may be exhausted depending on the facts and circumstances of the case – The final straw – Appeal dismissed with costs.*

M.J. Dlamini JA

Part of the reason for this separate judgment is that Supreme Court Justices have to show to have done sufficient work in the course of the session in which they are empanelled. I wrote this judgment independently before I read the judgment of my sister. This is not a dissenting judgment and the same conclusions ultimately were reached.

[1] In this matter Appellant was dissatisfied with the judgment of the Court *a quo*, (per Justice J.S. Magagula J.) dated 15 September 2021 and has noted an appeal on two grounds as follows:-

1. The Court *a quo* erred in law and in fact in the interpretation of section 37 of the Employment Act. The Court failed to appreciate that the position of the law in Eswatini has evolved to including the exhaustion of the internal remedies and other remedies before an employee can resign and claim that he was constructively dismissed.

2. The Court erred in law and in fact by misconstruing the Appellant's grounds of review for grounds of appeal. The Court failed to impute the provisions of section 19 (5) of the Industrial Relations Act 2000 as amended. The Court in its judgement failed to appreciate that the Appellant was challenging the method as opposed to the result. The Appellant had raised seventeen (17) grounds for review and the Court *a quo* indirectly acknowledged that there are grounds of review, which it did not categorically state but further failed to deal with those. This therefore constituted errors of law and fact.

[2] This appeal has developed from a review by the High Court in terms of section 19 (5) of the Industrial Relations Act, 2000. The matter raises an issue of constructive dismissal of the Respondent by the Appellant. The Industrial Court had found for the Respondent as applicant (and 1st respondent *a quo).* The Appellant as respondent being dissatisfied applied for review. The Court *a quo* dismissed the application. The Court *a quo* identified a single ground of review, namely –

> *"4. That the judgment of the 2nd Respondent granted on 30 October 2020 be and is hereby reviewed and be substituted with an order dismissing the 1st Respondent's claim for constructive dismissal.*
>
> .....
>
> 6. Costs".

[3] The Court *a quo* set out the claim for constructive dismissal as follows in paragraph [3] of its judgment:

> "3.1. He was given more work to do such that the conditions of his contract of employment were altered, making it impossible for him to meet deadlines and this was frustrating him leading to a situation whereby he was admitted in hospital for stress-related sickness.
>
> 3.2. His duties were taken over by the publisher. These included holding meetings, giving instructions and granting loans which fell within 1st Respondent's scope of work. According to 1st Respondent this made his position redundant.
>
> 3.3. He was denied most of the benefits which even junior employees enjoyed. These included the use of a company car and company accommodation. When he asked why he was denied such, he was told that his contract did not provide that he would be granted such.
>
> 3.4. Disciplinary charges were preferred against him without justification. He considered this to be nothing but a move to get rid of him".

[4] Of the Respondent's claim for constructive dismissal, the Industrial Court stated its finding, in favour of the [Applicant], stated in para [5] of the judgment *a quo,* as follows –

> *"Considered in total, the evidence of the conduct of the Respondent and the responses by the Respondent regarding the said conduct, it is found to have been such that Applicant could not be reasonably expected to continue in the employment relationship. However, this court cannot grant the prayer for maximum compensation . . ."*

[5] The Appellant denies being the cause for Respondent's termination of employment. Appellant mainly argues that Respondent did not exhaust internal remedies such as approaching CMAC or the Labour Commissioner or filing for an internal appeal. The issue in this regard is whether the so-called internal remedies are a requirement of section 37 of the Employment Act. The Court *a quo* held that it was not a requirement. It appears that Respondent had been in the employ of the Appellant from 1998 to date of termination in April, 2017 – some 18/19 odd years. Following the termination of his employment, Respondent claimed maximum compensation for unfair dismissal. That amount of claim was denied by the Court *a quo*.

[6] The beginning of the end of the relationship between the parties was in November or December 2016 when the publisher, the owner of the publishing company, the Appellant, is said to have "added more responsibility in the form of an instruction [to the Respondent] to assist the advertising department". Respondent's complaint as a result of the added responsibility was the time he would be away from his normal daily responsibility and the fact that he was not trained in advertising. This was brought to the attention of the publisher. Respondent also complained about various other forms of interference by the publisher in his normal office chores which interference resulted in Respondent being undermined by his subordinates and the staff he supervised. But nothing serious was done by management to resolve the complaints. Respondent was only told that the apparent interference was due to the publisher's 'hands-on' policy which was not peculiar to the Respondent.

[7] The Industrial Court noted the following in its judgment:

> "14. The Applicant also testified to being frustrated by the publisher usurping his supervisory powers. The publisher would come and give direct orders to his subordinates without involving the Applicant. The publisher would also

sign off and grant loans applied for by Applicant's staff, without the Applicant signing the application forms. The signature of the loan applications by the supervisor was an unwritten control mechanism ... It assisted the supervisor in managing their subordinates, such that they worked optimally knowing they will need the signature at some point. The Applicant's testimony was that, as a result of the publisher's conduct of signing forms directly from the officers, they started to be difficult to work with. Two officers were specifically identified ...

16. The Applicant further testified that he did not get the benefit which other employees, including those who were junior to him enjoyed . . . benefits including houses, car loans and cars .... He testified that he had previously applied for a car loan but it was declined and again asked for school fees loan and was declined too. He then gave up on applying for loans".

[8] The difficulty and potential weakness in Respondent's testimony is that the time or period when these events took place is not told for proper assessment of their effect in causing or contributing to Respondent's departure from Appellant's employ in April, 2017. In the transcript, for instance, it appears that Respondent had no benefits at all other than his salary. Respondent says that he gave up requesting for loans for motor vehicle or school fees. On the issue of the denial of employee benefits such as loans, use of company car or house, Respondent was told that those benefits were not part of his terms of employment and that those employees who got these benefits got them not from the company but from the personal coffers of Mr. Loffler, the publisher. Still, whether company or personal, the provision of these 'benefits' appeared very discriminatory and was likely to cause ill-feeling between the excluded employee and the publisher. The issue of loans, however, cannot in my view be a contributory factor to Respondent's resignation from Appellant's employment, giving rise to these proceedings.

[9] It appears that Respondent submitted his letter of resignation on 20 April 2017, giving the employer one month's notice. This was soon after he received a letter, on the 19th April, inviting him to a disciplinary hearing. Respondent says he resigned because "working conditions had become unfavourable... There was a lot of frustration and...intimidation". Respondent explains:

> *"A few months before I resigned, I would say three or four months before, I was given extra work to do. Usually, I used to work 12 hours a day in the newsroom; that is regarded as normal even though one is supposed to work only 8 hours... Then, around November – December 2016, the publisher who is the owner of Company (Paul Loffler) instructed me to now assist the other department, the News Department, with their work... So after putting in 14 hours or more I was supposed to start working for the Daily News department. Usually, as I said earlier, that would be after midnight on Saturday."*

[10] In February 2017 Mr. Loffler is said to have instructed Respondent to assist in the advertising department: "I [am] not skilled or trained in advertising or marketing", Respondent told Mr. Loffler. Some of his responsibilities as a head of department were inexplicably removed from him, for instance, the signing of loan forms for his subordinates, which forms were then taken directly to the publisher without Respondent's recommendation. This had the effect of undermining Respondent causing disrespect from his subordinates. The signing of the forms by the head of department was understood to be a control mechanism. The junior employees had to behave and be respectful to their supervisor or departmental head knowing that they might need his signature to a form in which a loan was sought from the employer.

[11] In paragraphs 15.3 and 15.4 of its founding affidavit at the High Court, Appellant contends that there were other remedies available to Respondent. After the complaints were

addressed but "not to 1st Respondent's satisfaction", Respondent should have lodged an internal appeal or reported a dispute to CMAC or approached the Labour Commissioner in terms of section 26 of the Employment Act. The absence of an appeal meant that "the issues remained resolved"; that resigning by the Respondent was premature and pointless. Appellant also argued that the alleged additional work on Respondent was only temporary and not permanent. But Respondent countered pointing out that he was never told anything about the additional duties being temporary and as far as he was concerned they were permanent as he was never told when to stop. Of the so-called 'internal appeal' or 'internal remedies' we have not been told about these beyond the Managing Editor, Human Resources Manager and Paul Loffler (the management) who tried but did not succeed to resolve the dispute. It appears that the dispute did reach CMAC who certified the dispute as 'Unresolved'.

[12] Respondent says he complained to Mr Loffler about the extended duties. But nothing was done to reverse the new situation. Even then Respondent says he never claimed for overtime and was never paid for overtime. It was all so frustrating. He overworked to meet deadlines that should not have been there. In that way, employer never had to complain of unmet deadlines. Respondent says he managed by spending extra hours in the office than was normal, such as by knocking off at midnight instead of 10.00 p.m. For not claiming overtime, Appellant contended that Respondent was comfortable and not stressed by the extra work imposed on him. Ordinarily, if the additional work was bearable there would be no cause to complain about unfair treatment.

[13] On the 19th April 2017, Respondent was instructed by the managing editor to submit a report within an hour, in writing, explaining events in respect of a matter Respondent had been investigating in connection with stolen embalming powder. The investigation had led to the involvement of the police in which police bribery was also suspected. On presenting the report to the Managing Editor, Respondent says he was handed by the Managing Editor a letter requiring Respondent to attend a disciplinary hearing on 27th April 2017 in

connection with the same matter of embalming powder and alleged bribery. The Respondent was by the Appellant accused of having paid bribe to police officers in the course of the investigation. As a result of the letter from the Managing Editor, the Respondent on the following day submitted a letter of resignation, giving a month's notice. As we have seen, the resignation was based on section 37 of the Employment Act. The disciplinary hearing was postponed from 27 April to 15 May 2017 when hearing occurred but did not finish. The hearing was subsequently abandoned by the employer claiming that they no longer had jurisdiction over Respondent following the resignation.

[14] An excerpt from the hearing at the Industrial Court might shed some light on the proceedings at the stage of cross-examination (pp 93-96 of Transcript):

> **RC.** "Would you agree with me that your resignation was as a result of what happened on the 19th April, being the final straw".
>
> **A.** "If we take into account the events of the 19th April, where first, I was stopped from working, ordered to write an explanation letter within an hour. And then after presenting the explanation letter before it was even read, given an invitation to a disciplinary hearing, my answer would have to be yes, that was the final straw.
>
> "So when I went back to my office I found my colleagues at the department still waiting for me for us to continue with the meeting. I had to tell them that I was suspended and I was going home. If that is not embarrassing then I wouldn't know what else would be embarrassing. I felt that this was unbearable because in my view this was a fight more than a workplace issue because it's the employer's right to ask for clarification, but in this case I was given one hour to explain and then given an undated letter inviting me to a disciplinary hearing. And it's very frustrating to explain one thing over and over again.

This is why I felt that this was too much. The way I was being treated was painful, especially as a senior person who had worked for the Times for 18 years without even one disciplinary issue.

RC. "... (D)id you exhaust all internal remedies available. Let's say the HR did not respond to your letters, and you go to Paul Loffler the Publisher.

A. "No I did not.

RC. "I therefore put it to you that your actions were premature simply because you did not exhaust the internal remedies in relation to the incident of the 19th:

A. "Putting that to me would mean we are completely disregarding the other letters which are evidence and just sticking to issues or events of 19th as if that was the first and only time I was being frustrated. And I don't think that would be fair".

[15] In February 2017 Respondent wrote to management complaining about his ill-treatment and stating that he might have to resign soon as he felt that the "company was working hard to frustrate [him] to a point where [he had] to resign". He wrote: *"This is not yet a resignation but a form of notice to indicate that I will be leaving soon. I cannot take this unfairness any longer."* (Transcript, pp 109, 110). The above reference to Respondent not exhausting all internal remedies would seem to be limited to the events of April 19 only. The earlier suggestion that Respondent should have approached the Labour Commissioner in terms of section 26, I am not sure if Appellant's counsel was serious about it. Respondent expressed ignorance of the section. Indeed, section 26 places the initiative on the employer to "notify the employee in writing specifying the changes which are being made." *In casu* the employer did not give any written notification regarding the alleged changes to the terms of service. The section does not apply. On the allegation that

the events of April 19 presented the 'final straw', the issue of exhausting local remedies also does not arise. The Respondent notified resignation the following day on the basis that he had had enough. Pursuing internal remedies would have meant Respondent still wanted to remain in employment: it would have been contradictory.

[16] The cross examination at the Industrial Court continues:

> RC. "... I put it to you that you had no valid reason to resign from the Times of Swaziland besides the fact that you were running away from dealing with the issue of the embalmment powder especially the E2000 bribe that you paid. That is why you resigned at the Times of Swaziland.
>
> A. "That would be incorrect. The issue of the E2000 so-called bribe was already a public matter. Everybody knew about it, readers of the Times knew about it. All reporters at the Times knew about it. Management knew about it. And it had been explained, that is why people knew about it. I am the one who had revealed it to the rest of the world, first by informing management. In fact I was the first one and the only person to inform management specifically my immediate supervisor Martin Dlamini in January 2017 of the issue of the E2000 bribe. I would not have therefore run away from it in April, towards the end of April, two months later. In any event, I attended the disciplinary hearing, someone would have said you are no longer obliged to go to the Times and respond to these charges because you have resigned. And then my response would have been even after all the painful things that have been happening I did not resign immediately. Simply because I wanted to talk about the issue of E2000 bribe". (Transcript, p101).

[17] According to Martin Dlamini, the Managing Editor, Respondent *"tendered a resignation which coincided with a disciplinary hearing that we had undertaken with him"*.

As to when exactly Respondent was served with the letter inviting him to a disciplinary hearing, Mr. Dlamini does not quite remember – whether it was the same day Respondent submitted his explanation report to Mr. Dlamini, or whether it was later that day or the following morning. But, Mr. Dlamini says, he and the HR officer first read the explanation given by Respondent which they found unsatisfactory and thereafter wrote the letter which invited the Respondent to a disciplinary hearing. Dlamini says management had required a further explanation from Respondent following 'another publication' (indicated elsewhere as the 'Independent News') which, according to Dlamini,

> "*... implied that the whole transaction which Innocent was involved in with the embalming powder story was more than just an investigation by the newspaper but that he had been personally involved and illegally so which raised our curiosity and caused us to revisit the matter by inviting him once again to give a full account from the beginning to the end of what really happened and how he got involved or suspected to be involved in the way that they say he was. What also caused us to raise the question was the issue of the money that he allegedly paid. Because it was done in a way that we don't normally do such transactions and there was no claim for those finances. And the fact that we had not initially authorized such payment as we would normally do because if you are going to use money there is request that is made, we approve it, especially if it is going to involve a transaction that is of an illegal nature. So we brought that to the table. He gave us an explanation which we found not to be satisfactory. And because of the conflicting of what was reported and what he was saying, we decided to charge him.*" (pp 117 -118, of Transcript).

[18] The Managing Editor denied that he had been made aware of the embalming powder story and the bribery as early as end of January 2017, when Respondent first published the story. He gave the impression that he only came to know about the police involvement following the publication by 'another newspaper' in mid February 2017. That publication was by one journalist who had worked under Respondent at the Times but had to resign

following a report to management by Respondent. On the investigation at issue, the Times management seems to have believed the competing publication and by a person who may well have had an axe to grind with the Respondent. The account of the Managing Editor is that the disciplinary charges were as a result of Respondent's failure to request for the money that was to be used in the investigation or failure to claim that money having used it during the investigation. The failure to so claim supported the view that there was something fishy about the investigation giving rise to police bribe by Respondent.

[19] But the manner of sourcing money for investigation purposes as explained by the managing editor does not seem to answer to the specific situation in which Respondent alleges to have found himself, where the money was demanded on the spot from Respondent and not from the newspaper. How, then, could the demand have been re-directed to the newspaper when it was illegal? How could Respondent call the newspaper to send him money to 'bribe' the police and 'free' himself? The story told by the Respondent of how he came to pay the E2000 seems to have been somehow unusual – where the investigator became the investigated, a handy suspect, so to speak. At any rate Respondent's explanation for not claiming the money paid was that *"he was still investigating the story and he was yet to declare or claim the monies pertaining to whatever he had to pay"*. With respect, I do not see how the normal procedures for securing money for a purported investigation as explained by managing editor could have been followed in this case. It is not indicated how Respondent could have anticipated having to pay as alleged, and Respondent's account of how he came to pay is not disputed on record. The police, we are told, were subsequently charged for demanding a bribe.

[20] The managing editor denied that working conditions had been deliberately made unbearable for Respondent. He thought Respondent resigned to avoid the embalming powder and bribery fallout, notwithstanding that Respondent did attend the disciplinary hearing and without legal representation on 15 May 2017. There is no clear reason why the disciplinary hearing could not finish within the notice period, that is, before the 19th or

20th May 2017. On the 15th the hearing had reached cross examination stage. According to Appellant in its reply at the Industrial Court "*the [Respondent] in the month of April 2017 was charged with gross misconduct and bringing the name of the Times Group into disrepute in that on or about the 17th January 2017 whilst the [Respondent] was allegedly investigating a story on behalf of the employer, he paid a bribe of E200-00 (sic) (...) in an effort to avoid arrest*". It is not stated why Respondent had to be arrested.

[21] In his letter of resignation dated 20 April 2017 (pages 41 -42, of the Record) in rehashed paragraphs of the letter, Respondent highlighted as follows –

> "After 18 years and seven months working for the Times of Swaziland it is with a heavy heart that I hereby tender my resignation. The reason is that it is clear that you as Managing Editor, the Human Resources Manager and Publisher Paul Loffler are hell bent on making my working life unbearably difficult. For years I have endured untold frustration, unfairness and unlawful treatment from management. My frustrations have been detailed in various letters which management never responded to but copies of which I have . . . The last straw was on Wednesday, April 19, 2017 when I returned to work from leave... I was in the middle of chairing my daily departmental meeting when you called me verbally to stop working. I had to cut the meeting short. This was embarrassing to me in front of the staff... You gave me a letter dated 18 April, 2017 (....) asking me to explain events that led to two police officers, who had demanded a bribe from me while I was working on a story, getting arrested. This was shocking because it happened in January /February and I had discussed it with both you and Silindile Mngomezulu, the Human Resources Manager soon after it happened. You both stated that you clearly understood everything... You had already written a letter dated April 18, 2017 and handed it to me, asking me to explain an issue you had been well aware of for several weeks. After my explanation letter, you immediately handed me an undated letter, inviting me to appear before a disciplinary hearing on charges of a matter you had been aware of but did not act on ... The said disciplinary hearing is scheduled for Thursday, April 27, 2017 at the offices of Musa Sibandze Attorneys. Sibandze is on the payroll of the Times and represents the company in many court cases. I have actually given him instructions myself, on behalf of the Times when we needed . . . I find it extremely strange therefore, that he (...) would be asked to chair a

disciplinary hearing with me as the accused person. He would never be objective.... It is against that background that I view this as constructive dismissal. The decision to fire me has been taken already. . . . Besides, your undated letter says I may call witnesses to give evidence. Such witnesses, as you are aware, would have to include Police Commissioner [I.M], Superintendent [K. M], the two police officers who were arrested for demanding a bribe from me".

[22] The Industrial Court found, in para 25, *inter alia*, -

"(i) That there were indeed complaints by the [Respondent] before the charges were laid against him;

(ii) That the complaints were known, acknowledged and explained by the [Appellant's] witness;

(iii) The discussions and explanation appear not to have resolved the problems of the [Respondent];

(iv) That there was an investigation of the embalming powder story which was published in November 2016 and February 2017;

(v) That the [Appellant's] witness testified to the effect that the audio bore what the [Respondent] narrated to be the events in Manzini;

(vi) That there was the story of the arrest of the police officers for corruption in February 2017.

(viii) That the [Appellant's] witness testified that he asked [Respondent] about the claim for E2000-0 but he responded that he was still investigating and was yet to claim.

(x) That the [Appellant's] witness testified that the charge was that of failure to obtain authority and failure to declare the use of funds.... before the Independent News punctuation".

[23] The Industrial Court awarded an overall amount of E502, 838-59 as compensation to Respondent, giving rise to the review at the High Court and this appeal by Appellant.

[24] The High Court, (per JS Magagula J.), noting that section 37 "makes no provision for what an employee should do before he leaves his employment" and that there were "no prerequisites to be satisfied before employee leaves his employment", rejected the Appellant's argument that Respondent needed to approach CMAC or the Labour Commissioner or lodge an internal appeal before resigning in terms of s 37: *"[12] If the employee contends that he left his employment due to unacceptable conduct of the employer, then he can file for unfair dismissal. It is during the conduct of the case for unfair dismissal that he is required to prove that he left his employment due to the unacceptable conduct of the employer"*. The High Court also rejected *"some persuasive authority from South Africa on the point that an employee should exhaust internal remedies before leaving his employment"* holding these authorities not to be in line with our statutory provisions. But these authorities are not cited in the judgment *a quo*.

[25] On the point of exhausting domestic remedies, we have not been told of any such internal dispute settlement remedies beyond the Managing Editor and or the Publisher, both of whom were *au fait* with the complaints and had not been able to resolve them. CMAC had determined the dispute 'unresolved'; that prepared the matter for court. No specific provision had been cited as requiring the Respondent in the circumstances to approach Labour Commissioner or any internal appeal mechanism. Without deciding the point raised on the exhaustion of internal remedies, I am of the view that in the circumstances of the present matter pre-court remedies were exhausted by Respondent. In that case, the

South African case(s) rejected by the learned Judge *a quo* would be satisfied, without signifying them as defining the law in this jurisdiction.

[26] Section 37 of the Employment Act, 1980 reads:

> *"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."*

[27] Robert Sharrock writes: [15] *"The test for determining whether the employer has made continued employment intolerable is whether the employer's overall conduct, judged reasonably and sensibly, was such that the employee could not have been expected to put up with it."* And editors Robert Venter and Andrew Levy write: [16] *"Constructive dismissal refers to the situation in which an employer's actions are such that the employee is effectively forced to leave the job, either by formally resigning or by simply not returning to work. The test is that the employer has created circumstances that make it 'intolerable' for the employee to remain in employment, and the term 'constructive dismissal' reflects the fact that the employer is sometimes said to have been the author of these circumstances, or of having 'constructed' them."*

[28] In the Industrial Court case of **OK Bazaars** [17], Motsa had a couple of disciplinary verdicts against him with a written warning and a final written warning, resulting in him believing that his immediate supervisor did not like him, that he wanted him out of Shoprite's employment. The final straw however was a charge against Motsa that he had used his staff credit card to purchase goods for certain customers in exchange for cash.

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[15] Robert Sharrock, **Business Transactions Law**, 8th Edition at p. 463

[16] **Labour Relations in South Africa**, 5th Edition at p. 342.

[17] **Nicholas Motsa v OK Bazaars (Pty) Ltd T/A Shoprite** SZIC 06/2015 (05 March 2015)

When he received the charges against him Motsa said 'he was shocked and confused', and thereafter he made a decision to resign as an employee of **OK Bazaars**. Motsa's reason to resign was constructive dismissal. Motsa held the position of Branch Manager at **OK Bazaars.** He stated that his reason to resign *"was not because he was avoiding the disciplinary hearing"* to which he had been summoned, *"but was because of the harsh life he was enduring at the hands of Schoeman,"* his immediate supervisor.

[29] As a result of the manner Motsa had used his staff credit card, Motsa was referred to staff buying rules which he confirmed full knowledge of: *"17 Motsa further confirmed receiving the notice to attend the disciplinary hearing in relation to the staff credit card transactions. He also stated that he read that notice and knew and understood what it was and was not confused by it. When questioned further on what really then confused him in relation to the notice to attend the disciplinary hearing, his response was that he knew that the company was going to dismiss him and that this was going to ruin his future job prospects hence the decision to resign. That was the applicant's case..."*

[30] On the issue of constructive dismissal, the learned Judge in the **OK Bazaars** case stated:

> "18. The test for determining whether or not an employee was constructively dismissed as set out in authorities is: Whether the Employer without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relations of confidence and trust between the parties (Employer and Employee). It has been held that it is not necessary to show that the Employer intended any repudiation of the contract. Instead, the function of the Court is to look at the Employer's conduct as a whole and determine whether, when judged reasonably and sensibly, it is such that the Employee cannot be expected to put up with it. (See in this regard the case of **Pretoria Society for the Care of the Retarded v Loots** (1997) 18 ILS 981 (LAC) p 985".

[31] In the **OK Bazaars** case, it was pointed out – Motsa conceding – that Motsa did not report his grievances to Schoeman's seniors such as the Divisional Manager or follow the Company's formal grievance procedures; Motsa, therefore, did not exhaust his remedies. The learned Judge *a quo* continued:

> "19. In the **Pinky Toi Mngadi v Conco** case,[18] this Court reiterated and re-emphasised that the principle in respect of constructive dismissal is that where a reasonable alternative to resignation exists, there can be no constructive dismissal. It is incumbent upon an employee alleging constructive dismissal to prove that the Employer deliberately rendered the employment relationship intolerable and that resignation was an act of last resort. It is considered to be opportunistic for an employee to resign out of the blue, so to speak, without even raising an issue with the employer and giving the employer the opportunity to remedy the cause of complaint, thus giving it a chance to remedy any errant ways. (See **Albany Bakeries Ltd v. Van Wyk & Others** (2005) 26 ILJ 2142 (LAC) para 28."

[32] In the **OK Bazaars'** case, the Court also held that Motsa neglected *"to utilize the reasonable alternatives available to him by not reporting his alleged dispute with Schoeman to higher authority or management before he resigned"*. That Motsa *"had a remedy against the alleged ill-treatment he was subjected to by Schoeman, and this remedy was clearly not to resign and then scream constructive dismissal. Instead, it was to let management know about and deal with it, not what he did"*. The Court went on to observe that *"senior positions, like that occupied by Mr. Motsa, come with considerable, and in some instances, quite high levels of frustration, irritation and tension"*. So the *"Managers are expected to put up with 'ambiguity, conflict in relationships, power struggles, office*

[18] The Report as cited to this case is not provided in the judgment.

politics and the demand for performance'. . . . But none of these challenges are sufficient to make a case for constructive dismissal. Indeed, the adage that constructive dismissal is not for the asking holds true for cases that end up before our courts . . ." such as the instant case. (See **Jordaan v CCMA** [2010] 12 BLLR 1235 (LAC) quoted in **Asara Wine Estate & Hotel (Pty) Ltd v JC Van Rooyen & Others** (2012) ILJ 363). And, Lord Denning MR in the **Western Excavating v. Sharp** [1978] 1All ER 713 (CA), 717, case stated: "*Where the Employer exhibits conduct 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.*" However, Lord Denning warned: "*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 his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*"

[33] It was then observed, in para 22, that between 2008 and the time he resigned:

> "*(N)one of the issues or conduct of Schoeman he complains of were sufficiently serious for Motsa to make up his mind about leaving at once. In fact he continued working for a considerable period without even hinting to anyone in management that he was facing challenges in working with Schoeman. By continuing to work as if nothing was bothering him and failing to raise (the) same through the relevant company structures, he shot himself in the foot because he lost his right to treat himself as constructively dismissed. Indeed, the length of time between the conduct complained of and date of resignation cannot be ignored. What the Applicant has done in this matter is to go back in history to make out a case for constructive dismissal which the court cannot countenance. And the court points out as well that objectively viewed the Respondent's conduct cannot be said to be calculated to drive him away. The finding of the court therefore is that there is no causal link between*

the conduct complained of by the Applicant in this matter and his ultimate decision to resign".

[34] In the **OK Bazaars** case the Court further pointed out that Motsa avoided the disciplinary hearing on the fear that he would be found guilty and be dismissed, which event would ruin his future job prospects; he then "opted for the easy way out – he chose to resign", meaning that he really was not compelled to resign with the result that *"the problem he is faced with before this Court now is that the law prescribes that where an employee has the option of facing a disciplinary hearing but resigns, there can be no talk of constructive dismissal. (See local decision of* ***Glory Hlophe v Snip Trading (Pty) Ltd,*** *Case No 69/2002, see also* ***Smithline Bucham (Pty) Ltd v CCMA*** *[2000] 21 ILJ 988 at 997). Indeed, it is only logical that where an employee is accused of any transgression, the first thing he would want to do is exonerate themselves rather than take the easy way out of pre-emptying the outcome of the hearing and ultimately resigning. Unless he proves that the disciplinary hearing was itself a sham, which is not the case in this matter, the court cannot come to his rescue. Instead, the only reasonable conclusion the court arrives at is that he resigned to avoid the disciplinary enquiry on the staff credit card fiasco. He second-guessed the outcome of the disciplinary hearing and decided to avoid it by resigning which is improper".*

[35] What the **OK Bazaars** case clearly establishes is that an employee cannot hope to benefit by resigning to avoid disciplinary hearing. That is, if the employer –employee relationship breaks down and to the employee continued work becomes unbearable the employee better resign before he is served with disciplinary charges. Once served with the disciplinary charges the employee must await the outcome if his contention that he resigned because of the unbearable working conditions is not to be very hard to prove. Importantly, however, the **OK Bazaars** case emphasizes that the employee must exhaust available domestic remedies in the endeavor to support the contention that the working conditions had become irresolvable. This consideration however does not render nugatory a decision

taken by the employee to resign at once when he establishes or deems the employer's conduct to have nullified the contract of employment. It would seem therefore that where the employee's case is very clear the employee may resign at once; but to be on the safe side bearing in mind the saying that one swallow does not make a summer, the employee may pursue reasonably available remedies before deciding to resign. In this regard, it is important that the employer be aware of the offensive conduct liable to entitle the employee to constructive dismissal.

[36] In the matter before Court, the hardening and souring of the working conditions between the Respondent and the Appellant is said to have appeared in November – December 2016 culminating in the events of April 19, 2017. In between, a lot of water passed under the bridge. The Respondent brought to management his grievances which were not attended or where attended not resolved to the satisfaction of the Respondent. Unlike in the Motsa case, Respondent had been in the Appellant's employ for some 18 years without ever being hauled before a disciplinary court. At some point during the four or five-month period, Respondent wrote a letter to the management in which *inter alia* he threatened to resign very soon, presumably unless the situation changed for better. But seemingly things did not change as in particular the issue around the embalming powder investigation and alleged payment of a bribe by Respondent to avoid arrest kept on raising its ugly head to the utter frustration of Respondent. As we have been informed above, the final straw in the breakdown of the Appellant – Respondent relationship came about in the events of April 19, resulting in Respondent resigning on April 20, 2017, on a month's notice – meaning that effectively his employment was to terminate on or about 20 May 2017. In my opinion, the resignation was sufficiently prompt even if the period between November, 2016 and April 2017 is to be considered or else the events of April 19 alone would sustain the claim for unfair or constructive dismissal.

[37] On April 19, 2017, Respondent was served with a letter suspending and inviting him to a disciplinary hearing scheduled for April 27. According to Respondent – although this

account is somehow disputed by the managing editor – Respondent was called upon to submit within an hour's time a full explanation of the embalming powder – bribery police arrest investigation. Respondent says on being so instructed by the managing editor, he left the meeting he was then conducting with his staff, he wrote and presented the explanation to the managing editor who, or receiving the letter from Respondent, even without reading the explanation, handed the Respondent with the letter, undated, inviting Respondent to the disciplinary hearing on charges based on the very matter for which an explanation had been required from Respondent. As already stated, this was the final straw as far as Respondent was concerned: he could bear it no longer. But he says not to appear to be running away from the disciplinary hearing, he gave a month's notice for his resignation. As intimated above, disciplinary proceedings could have finished in the notice period if Appellant was serious about it.

[38] The disciplinary hearing itself was before a firm of Attorneys said – and not denied by the Appellant - to be "on the payroll" of the Appellant. Was the hearing not a sham? It is said that Appellant abandoned the hearing because it no longer had jurisdiction over Respondent. I take it this refers to the postponement of the hearing from 15 May to possibly beyond 20 May. In that case and in all the circumstances of the case I cannot find blame with Respondent in the sense it might be argued that he resigned to avoid the disciplinary hearing – which he did not. It has not been clearly stated why the disciplinary hearing could not finish. For not requesting the funds for the investigation which was known by management and not requesting reimbursement, Respondent explained that he had not known that money would be spent on the investigation and the case of the police was still pending in court in Manzini. This meant that at the time Respondent was charged with paying a bribe the 'investigation' had not been completed and the charges were possibly premature.

[39] Accordingly, I am of the considered opinion that the change in the working environment from about November 2016 resulting in more work being loaded on

Respondent, work that was not in his line of duty or department, such as assisting in other departments to the neglect of work in the department to which he was employed and demanding that more hours be spent at the place of work should suffice to support Respondent's claim in this matter. This is particularly so, since Respondent did not run away from disciplinary hearing which was abandoned by the Appellant thereby proving that Respondent was not guilty of anything to necessitate resignation but the treatment by both the Managing Editor and the Publisher. Having regard to the final straw, there would be no point in further pursuing local remedies.

[40] In light of the totality of the foregoing, I would dismiss the appeal with costs:

It is so ordered:

MJ Dlamini JA

I Agree

SJK Matsebula JA

I Agree

JM Van der Walt JA

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