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(2013) 22 LC 1.1.6

Reported in Butterworths	[2013] 9 BLLR 906 (LC)
Case No.	JR3304/09
Judgment Date	24/05/2013
Jurisdiction	Labour Court, Johannesburg
Judge	Naidoo Acting Judge
Subject	Practice and Procedure Terms of reference/Jurisdiction

Keywords

practice and procedure – terms of reference/jurisdiction – commission for conciliation, mediation and arbitration – commission having jurisdiction to decide merits of constructive dismissal claim without first having to rule on whether dismissal had occurred – proof of constructive dismissal claim not a jurisdictional issue

dismissal – constructive – employee resigning because cool air from air conditioner adversely affected her health – constructive dismissal proved

Mini Summary

The respondent employee was told to "choose between her job and her health" after complaining that a newly installed air conditioner was too cool and that it was adversely affecting her health. She resigned, and claimed to have been constructively dismissed. The respondent Commissioner found that the employee had indeed been constructively dismissed an awarded her compensation. The applicant claimed on review that the Commissioner had erred by accepting that the employee had complained about the air conditioner before her dismissal, and had failed to take into account the facts that she had not filed a grievance before resigning and had been offered alternative workstation while her problem was being attended to, and that the late filing of the employee's answering affidavit should not be condoned because it had been filed nearly two years outside the time set by the rules.

Having decided that the late referral should be condoned because the employee had good prospects of success and the matter raised an important question of law, the Court turned to the appropriate test for review. If the matter concerned a jurisdictional issue, the proper test was whether the Commissioner was right or wrong in finding that the employee had been constructively dismissed. The Court noted that this view had been adopted in a number of judgments of the Labour Court and the Labour Appeal Court, where the issue had been whether the employees concerned had proved that they had been dismissed. This view is premised on the view that the CCMA's jurisdiction is founded on the existence of a dismissal. The Court noted, however, that Commissioners determining whether an employee has been constructively dismissed embark on a two-pronged inquiry: first, whether the employer had indeed rendered the employee's working conditions intolerable; second, whether the employer can justify its conduct. Once these issues are determined, Commissioners must determine the appropriate remedy.

The Court noted further that there is no provision in the LRA which states that the CCMA has jurisdiction only when a dismissal is established. The Act merely requires the CCMA to arbitrate unresolved disputes if the Act "requires" arbitration and a party has asked for it. This obligation is cast in peremptory terms. The CCMA's jurisdiction, accordingly, arises as soon as an employee refers a constructive dismissal dispute within the prescribed time frame. Whether the employee is able to prove his or her case has nothing to do with jurisdiction. While employers may raise genuine jurisdictional points at arbitration, such as denying that the applicant was an employee or that the dispute was not referred within the prescribed time, they may not at that stage contest jurisdiction on the basis that there was no dismissal. Otherwise, every constructive dismissal claim could be met with a jurisdictional challenge. This could not have been what the Legislature intended. Such a claim conflates he merits of the claim with jurisdiction. It is illogical for a Commissioner first to entertain the merits of a claim, and then to rule that the CCMA lacks jurisdiction if a constructive dismissal is not proved, or that it does have jurisdiction if a constructive dismissal is proved. Furthermore, if a jurisdictional ruling is taken on review, the court must consider the issue *de novo*. This would mean that the court is not confined to the evidence presented at the arbitration, but may hear fresh evidence on the very same issue. This would contradict the provisions of section 157(5) of the LRA, which provides that the Labour Court lacks jurisdiction to adjudicate disputes which may be referred for arbitration. The Court, accordingly, held that an arbitrator's ruling concerning a claim of constructive dismissal, whether for or against the employee, is not one concerning jurisdiction. The appropriate test on review is accordingly that of reasonableness.

Turning to the merits, the Court noted that the applicant had not disputed that the employee had provided medical certificates before her resignation confirming that she was ill. It could not be said that the Commissioner had acted unreasonably by accepting the employee's version that she had complained about the air conditioner before her resignation. Given the nature of her complaints, the filing of a formal grievance was unnecessary. Furthermore, the applicant had given the employee the choice between putting up with the situation, and resigning. The alternative workstation offered would not have helped the employee as she would still have been exposed to the cool air.

The application was dismissed, with no order as to costs.

Judgment

Naidoo AJ:

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent ("the Commissioner") under the auspices of the first respondent and under case number GAJP3142/09, in terms of which the Commissioner found the third respondent ("the employee") successful in her claim for constructive dismissal and awarded her compensation.

Background facts

[2] The employee commenced her employ, as a cutter and binder, with the applicant ("employer") on 4 April 1998. During the latter part of 2008, the employer installed an air-conditioning unit in proximity to the employee's work station.

[3] The employee complained that the cold air emitting from the air-conditioning unit was adversely affecting her health to the extent she was booked off from work for a period during January 2009 and returned with a medical certificate confirming her complaints. It was common cause that the area, in which the air-conditioner was placed, was partitioned from the room where the employee was stationed. The wall partitioning the two rooms did not reach the ceiling, leaving a gap of between 300 to 400mm in which the air from the air-conditioner seeped through. It was further common cause that to close the gap, would not have come at a financial cost to the employer and would have taken an hour to do. On 29 January 2009, that being a Friday, the employee was advised by her manager, Viviers, that she should either choose between her work and her health; the employee resigned the following Monday, being the 2 February 2009 and referred her dispute to the first respondent, claiming a constructive dismissal.

[4] On 27 October 2009, the dispute was arbitrated by the Commissioner who, in his award dated 18 November 2009, found the employee was successful in her claim and awarded her compensation in the amount of R42 000.

[5] The employer sought to review the award and filed its application on 15 December 2009 and subsequently its supplementary affidavit, in terms of rule 7(A)(8)(a), on 12 February 2010. The third respondent filed her opposing papers on 9 January 2012.

[6] In brief, the employer's grounds for reviewing the award are:

6.1 The Commissioner unreasonably accepted the version of the employee, more particularly that she, as early as October 2008 informed the employer that the air-conditioner was adversely affecting her health, over the version of the employer's manager who stated the first time he became aware of the employee's medical condition was on 29 January 2009 and he only had sight of her medical certificates after she resigned.

6.2 The Commissioner failed to appreciate the fact that the employee's resignation without first lodging a grievance was fatal to her claim for constructive dismissal.

6.3

The Commissioner should have found that the employee was unreasonable to give the employer only two days in which to attend to closing the gap in the wall, more especially since no one had advised the employee that the gap would be closed within the time frame she subjectively assumed it would.

6.4

The Commissioner, when making his findings, failed to appreciate the fact that as a temporary alternative, the employee was offered the opportunity of moving her work station to another space within the same room, but chose not to and opted rather to resign.

Condonation

[7]

The employee is nearly two years late in filing her answering affidavit. Mr *Meyerowitz*, appearing on behalf of the employee, argued at all material times the employee had the intention of opposing this matter. In support of this she filed her notice of intention to oppose on 6 January 2010. Subsequently she sought assistance at the Legal Aid Board, but after numerous visits to its offices, did not receive the necessary assistance. Due to lack of income, the employee could not repeatedly travel to the Legal Aid Board in search of this assistance. At a later stage a lay person helped draft her answering affidavit.

[8]

Mr *Meyerowitz* argued that the employee has not been employed since resigning, leaving her without income to this date. She has moved in with her son who assisted her financially whenever he could. Mr *Meyerowitz* relied on the Labour Appeal Court decisions in *NEHAWU obo Mofokeng and others v Charlotte Theron Children's Home*1 and *South African Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and others*2, wherein the Labour Appeal Court condoned lengthy periods of delay if it is the interest of justice to do so or secondly, if the party seeking condonation has good prospects of success.

[9]

Mr *Mer*, appearing for the employer argued condonation should not be granted as the employee has failed to properly account for her delay and further to this, has weak prospects of success.

[10]

While the delay in which to file her answering affidavit is excessive, I am of the view condonation should be granted. As will become apparent, the employee has good prospects of success in defending the review application and on the strength of *South African, Post Office* (*supra*), I see it proper to condone her delay despite her explanation being somewhat vague. I am also convinced that this matter raises an important question in law and hence it would be in the interest of justice for it to be heard. My reading of *NEHAWU* (*supra*) is that a flexible approach in deciding on condonation is not only limited to circumstances wherein the interest of justice demand the merits be addressed, but extends and includes circumstances where important legal arguments arising from the merits, be heard. As I will deal with below, the important legal question this matter raises is the appropriate test on review to be adopted by this Court in matters concerning constructive dismissals.

Test on review

[11]

Mr *Meyerowitz* argued that the test to be adopted in this matter, is not whether the Commissioner's findings are one which fall within the band of reasonableness as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*3, but rather the test is an objective one in which this Court must decide whether the Commissioner was right or wrong in arriving at his findings. The basis for his argument is premised on the view that a constructive dismissal is in fact a jurisdiction enquiry and hence the test on review must be consistent with reviewing rulings of this nature. While the applicant's representative based his arguments in line with the test set out in *Sidumo*, Mr *Meyerowitz*'s argument was met with little resistance. Nevertheless, in approaching the merits of this case, it would be critical to first determine the appropriate test in which to address the merits on review.

[12]

If a constructive dismissal is found to be an enquiry into jurisdiction then it will follow that the test to be adopted is an objective one, if on the other hand a constructive dismissal is not a jurisdictional enquiry, then the appropriate test would be the reasonable decision maker test.

[13]

In support of this contention, Mr *Meyerowitz* referred to *SA Rugby Players' Association* (*SARPA*) *and others v SA Rugby* (*Pty*) *Ltd and others; SA Rugby Pty Ltd v SARPU and another* 4. In that decision the Labour Appeal Court, when faced with a dispute referred to in terms of section 186(1)(b) of the Labour Relations Act 66 of 1995 ("the Act"), said the following:

> "The issue that was before the Commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the Act.
>
> The CCMA is a creature of statute and is not a Court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services* (*Edms*) *Bpk v Jacobs NO and others* (1994) 15 ILJ 801 (LAC) at 804C–D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The Court held that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the industrial Court may make with regard to jurisdictional facts but upon their objective existence. The Court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties.
>
> . . . The question before the Court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the Commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary."

[14]

While the facts of the *SA Rugby* matter dealt with the non-renewal of a fixed term contract, the Labour Court *in MEC for the Department of Health, Eastern Cape v Odendaal and others* 5, relied on the same principle when hearing an application to review and set aside an award concerning a constructive dismissal.

[15]

More recently, the Court in *Asara Wine Estates & Hotel* (*Pty*) *Ltd v Van Rooyen and others*6, when faced with a review concerning a constructive dismissal, not only relied on the above quote from the SA Rugby judgment but also confirmed the decision of *Members of the Executive Council supra.* The Court said the following:

> ". . . I am bound by the authority in *SA Rugby*. This Court also applied *SA Rugby in Member of the Executive Council, Department of Health, Eastern Cape v Odendaal and others*. In that case, dealing with a constructive dismissal Basson J explicitly held that the question whether a dismissal had taken place goes to jurisdiction and that the review test as laid down in *Sidumo* does find application in reviewing a jurisdictional ruling."

[16]

Although not referred to by Mr *Meyerowitz*, his argument finds favour in another decision of the Labour Appeal Court in *Yvonne De Milander v The Members of the Executive Council for the Department of Finance: Eastern Cape and others*7 delivered on 30 November 2012, which confirms the above principle.

[17]

Thus in terms of the above authorities, the legal position is that when faced with an unfair dismissal claim relating to a constructive dismissal or non-renewal of a fixed-term contract, the enquiry before the arbitrator is whether or not there was a dismissal, which goes to the heart of CCMA's jurisdiction. It follows from there that when hearing a review application with regard to these disputes, our Courts have adopted an objective test, ie whether the arbitrator was right or wrong in finding there was or was not a dismissal and with that whether or not the CCMA had jurisdiction to hear the dispute – this as opposed to the reasonable decision maker test.

[18]

The above principle is premised on the view that the CCMA's jurisdiction is founded upon the existence of a dismissal. It is this viewpoint I shall interrogate and in doing so, will arrive at the conclusion that the establishment of a dismissal is not a trigger which confers jurisdiction on the CCMA to arbitrate such disputes. As a consequence to these findings an award by an arbitrator as to whether or not the employee was successful in their claim for constructive dismissal, should not attract an objective test on review for the simple reason that the arbitrator's findings does not concern an enquiry into jurisdiction.

[19]

Before addressing this principle, it would be prudent at this stage to set out the enquiry an arbitrator should embark on when dealing with a claim for constructive dismissal. This form of dismissal is unique in that it is the employee who terminates the employment relationship. At the centre of the arbitration process the arbitrator must determine whether or not the employee was constructively dismissed. In doing so the arbitrator embarks on a two pronged enquiry, the first is whether the employee can objectively establish that the employer made working conditions intolerable, and if so, the second stage is whether the employer can justify its actions, for example its actions were objectively and rationality linked to its operational requirements. Thus to hold an employee successful in his or her claim for constructive, an arbitrator must find the employee was able to discharge his onus in the initial stage while the employer failed in its onus in the second stage. Once the arbitrator makes such findings, ie that the employee was constructively dismissed, he moves straight onto the issue of remedy, which is unlike conventional dismissal disputes where once a dismissal is established the onus shifts to the employer to prove the fairness thereof.

[20]

Returning to the principle set out in *SA Rugby* (*supra*) as the CCMA is a creature of statute, the starting point from which to properly analyse this principle would be to examine the relevant sections of the LRA.

[21]

The first significant observation is that there is no section in the LRA that states that the CCMA, in deciding an unfair dismissal dispute, has jurisdiction only when a dismissal is established. What the LRA does however provide for, are circumstances in which the CCMA does acquire jurisdiction to arbitrate disputes. Both section 115(1)(b)(i) of the Act, titled "Functions of Commission" and section 133(2)(a), titled "Resolutions of disputes under the auspices of the Commission" state the following:

> "The Commission must – if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if –
>
> this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration."

[22]

Does the LRA provide for a claim of constructive dismissal to be arbitrated at the CCMA? One has to look no further than section 191(5)(a)(ii), which expressly requires such disputes to be arbitrated, and states the following:

> "If a council or a Commissioner has certified that, the dispute remains unresolved, or, if 30 days have expired since the council or the Commission received the referral and the dispute remains unsolved –
>
> (a)
> the council or the Commission *must* arbitrate the dispute at the request of the employee if –
>
> (i)
> the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity unless paragraph (b) (iii) applies;
>
> (ii)
> *the employee has alleged that the reason for dismissal is that the employer made continued employment in tolerable*; or
>
> (My emphasis added.)

[23]

It is thus my view clear that the question of jurisdiction is determined by the provisions of the LRA: the CCMA's jurisdiction to conciliate the dispute is confirmed as soon as the employee refers a constructive dismissal dispute to it within the prescribed time frame. If conciliation fails and the employee requests the matter be arbitrated, then in terms of section 115(1)(b)(i) and section 133(2)(a), read together with section 191(5)(a)(ii), the CCMA's jurisdiction to arbitrate the matter

is confirmed, barring no other jurisdictional challenge. The issue of whether the employee can prove his or her case is independent to the question of jurisdiction.

[24]

In *Fidelity Guards Holdings* (*Pty*) *Ltd v Epstein NO and others*8 Zondo JP, as he then was, said the following when interpreting section 191(5)(a);

> "In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or Commissioner has issued a certificate in terms of s 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute . . ."

[25]

While I accept the fact that a respondent at arbitration, can raise a jurisdictional point any time before or during the arbitration process, such as the applicant was never an employee or that the referral to arbitration was not made within the prescribed time frame, in terms of the above sections read with the passage from *Fidelity Guard Holdings* quoted above, it is not open for the respondent to raise a point *in limine* challenging the CCMA's jurisdictional on the basis of the dismissal being in dispute. If this was the case then the question begs as to why the Legislature gave the CCMA the mandate to arbitrate such a dispute knowing full well that a critical feature to a constructive dismissal claim is a resignation rather than a conventional dismissal. Surely it could not have been the intention of the drafters of the LRA to not only introduce a constructive dismissal claim but to further mandate the CCMA to arbitrate such claims, with the knowledge that every employee's referral will be met by a point *in limine* concerning the establishment of a dismissal. If it is not open for the employer party to raise such a point, I fail to see on what basis our Courts do so.

[26]

This is not to suggest that the two pronged enquiries is altered in any way; the employee will still bear the onus of establishing intolerable working conditions and if successful the onus will shift to the employer to justify its conduct. Where the difference lies is how one categorises the status of an arbitrator's findings concerning a constructive dismissal. In terms of the *SA Rugby* case (*supra*), such findings by an arbitrator are akin to a jurisdictional ruling where the establishment of a dismissal is linked with the CCMA's jurisdiction. As stated earlier it is for this reason that the objective test is adopted on review.

[27]

In my view this approach conflates what can be regarded as the merits of the claim ie whether or not the claim is good or bad in law, to that of jurisdiction, in *Chirwa v Transnet Ltd and others* 2008 (4) SA 367 (CC);9 Langa CJ stated the following:

> "it seems to me axiomatic that the substantive, merits of a claim cannot determine whether a Court has jurisdiction to hear it. That much was recognized by this Court in *Fraser v ABSA Bank Ltd* (*National Director of Public Prosecutions as amicus curiae* 180, Van der Westhuizen J, when deciding on what constitutes a constitutional issue, held as follows:
>
> > 'An issue does not become a constitutional matter merely because an applicant calls it one. The other side of the coin is, however, that an applicant could raise a constitutional matter, even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed. The acknowledgment by this Count that an issue is a constitutional matter, furthermore, does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.[181]
>
> The corollary of the last sentence must be that the mere fact that an argument must eventually fail cannot deprive a Court of jurisdiction.'" (My emphasis.) [*Sic*.]

[28]

Similarly in *Makambi v MEC, Department of Education, Eastern Cape Province* 2008 (5) SA 449 (SCA)10 the SCA held:

> "Whether a Court has jurisdiction (in the sense that is now relevant) to consider a particular claim depends upon the nature of the rights that the claimant seeks to enforce. (Whether the claim is good or bad in law is immaterial to the jurisdictional enquiry)."

[29]

The Supreme Court of Appeal confirmed this view in *Makhanya v University of Zululand* 11 where it held the following:

> "The submission that was advanced by counsel invites the question how a Court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer because there is none.
>
> There is no answer because the submission offends an immutable rule of logic, which is that the power of a Court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a good claim or a bad claim."

[30]
The view held in *SA Rugby* contradicts this *dictum* in that it links jurisdiction to whether or not the employee can prove his of her claim for constructive dismissal.

[31]
In my view the question of whether or not the employee would succeed in his or her constructive dismissal claim is independent to the issue of jurisdiction – the fact that the employee cannot prove a construction dismissal does not deprive the CCMA of jurisdiction and hence a Court reviewing such findings is not dealing with a jurisdictional finding.

[32]
A further conundrum the principle in *SA Rugby* (*supra*) brings with it, is the notion that the CCMA hears the merits of the matter and then has to decide on whether there is jurisdiction or not. As per *Makhanya* (*supra*) such a stance is illogical. The merits of a claim can only be heard once the forum at which it is referred to has jurisdiction to hear it.

[33]
The above viewpoint focuses on circumstances where the arbitrator finds the employee unable to establish a constructive dismissal. As will become apparent in the following paragraphs, the same principle held in the *SA Rugby* matter must be extended to circumstances where the arbitrator finds the employee was indeed constructively dismissed. This leads me to the second reason why I differ with such an approach.

[34]
If the view that the CCMA's jurisdiction turns on the establishment of a dismissal is correct, then it must equally be correct to hold a finding by an arbitrator that there was indeed a constructive dismissal, also a finding on jurisdictional (more particularly a finding that the CCMA does have jurisdiction) and therefore also subject to an objective test on review. Yet in taking such a view, certain sections in the LRA would be rendered meaningless and ineffective.

[35]
Before articulating my reasons by way of a scenario, it would be useful at this point to reiterate the principle adopted in *SA Rugby.* In the passage quoted from the said judgement, more particularly the last sentence in the second paragraph, is the view that any finding by the CCMA on its own jurisdiction is not binding on parties until confirmed by the Labour Court.

[36]
Let us for example assume employee "A" resigns from the employ of company "XYZ" and refers a constructive dismissal dispute to the CCMA. At conciliation the dispute remains unresolved and "A" completes the 7.13 form requesting the matter be arbitrated. The arbitrator, having heard all the relevant evidence, finds "A" was successful in discharging her onus while "XYZ" was unable to justify its conduct. For this reason, the Commissioner finds "A" was constructively dismissed and awards her compensation.

Sections 143 and 158 of the LRA

[37]
As substantiated, the principle adopted in *SA Rugby* must logically extend to the arbitrator's findings in the above scenario being termed a jurisdictional finding. Yet it is this very view which distorts the following sections in the LRA. Firstly to take such a view would render section 143(1) of the LRA, which stipulates an arbitration award is final and binding on the parties, ineffective. This would be because the Commissioner's findings on jurisdiction are neither final nor binding until confirmed by the Labour Court (as *per* the *SA Rugby* decision).

[38]

Following this same trail of thought, section 143(3) and section 158(1)(c), both providing recourse to an employee to enforce an arbitration award, would likewise be ineffective. Returning to the above scenario, unhappy with the award, "XYZ" refuses to pay "A" the compensation awarded. Should "A" embark on either recourse as contained in section 143(3) or section 158(1)(c) to enforce compliance, all "XYZ" will have to argue is that if the Commissioner's finding on jurisdiction is not binding on the parties, then it would logically stand to reason that any award of compensation, which flows directly from a finding that the CCMA has jurisdiction, is equally not binding on the parties. This can hardly be the convenience spoken off in the said *dictum*.

[39]

Let us take it a step further, if the matter is taken and the Labour Court adopts the objective test when hearing the application, it would do so on a *de novo* basis. (See *Sanlam Life Insurance Ltd v Commission for Conciliation, Mediation & Arbitration and others* (2009) 30 ILJ 2903 (LAC) and *Chabeli v Commission for Conciliation, Mediation & Arbitration and others* [reported at [2010] 4 BLLR 389 (LC) – Ed]).

[40]

This would entitle the Court to not only hear the same evidence that was before the arbitrator but to further hear new evidence by either party. This, together with the fact that at the centre of the enquiries both at the Labour Court and the CCMA arbitration, lies the very same question, that is whether "A" was constructively dismissed; the Court in hearing this application would be acting as a Court of first instance and hence contrary to section 157(5) of the LRA which states that the Labour Court does not have jurisdiction to adjudicate a dispute which is required to be adjudicated at arbitration. As stated earlier, section 191(5) expressly provides for a constructive dismissal dispute to be arbitrated at the CCMA.

[41]

In my view the CCMA is empowered by legislation to arbitrate constructive dismissal disputes. In keeping with the two pronged approach referred to above, the onus will firstly rest with the employee and if he or she is unable to discharge such onus, the enquiry ends there and their claim is dismissed, not for want of jurisdiction but for the reason that the employee's claim is bad in law, or put differently he or she is unable to prove his/her claim. If, however, the employee is successful in their claim, the award is final and binding until set aside by the Labour Court.

[42]

Before giving a brief recap I am satisfied that by following the views of both the Constitutional Court and the Supreme Court of Appeal in the respective judgments cited above, I have not displaced the *stare decisis* principle in arriving at a view which differs from the Labour Appeal Court on this issue.

[43]

To recap; the CCMA is a creature of statute and its jurisdiction is derived from the Act. A CCMA arbitrator's jurisdiction to arbitrate a constructive dismissal dispute is found in and confirmed by the provision of section 191 (yet can be challenged on other grounds at arbitration). The Commissioner's findings on whether or not there was a constructive dismissal, is not a jurisdictional finding but a finding on whether or not the employee can establish his or her claim, taking into account each parties respective onus.

[44]

On this basis I find that an arbitrator's award concerning a claim for constructive dismissal, irrespective of whether the arbitrator finds for or against the employee, is not one concerning jurisdiction and hence the appropriate test when reviewing such an award, is that as set out in *Sidumo* case (*supra*) and not an objective test applicable to jurisdictional rulings.

[45]

With regard to the factual dispute as to when the employee advised Viviers that the air-conditioner was adversely affecting her health, the employee testified that she did so in October 2008 as well as handed in medical certificates to this effect. Viviers, on the other hand, testified that the first time he became aware of her condition was on 29 January 2009 and only had sight of all medical certificates on 6 February 2009. It is worthwhile noting that the employer does not dispute the mental [*sic*] certificates handed in 2008 but rather the contents of the certificates do not support the employee's assessment that her ill-health was caused by the air-conditioner. In accepting the employee's version the Commissioner noted that one of the employer's own witnesses contradicted Viviers' testimony on this point when the witness stated he brought the employee's latest medical certificate to the attention of Viviers on 23 January 2009. From the record, when the Commissioner put the employee's version to Viviers, he was evasive; saying he could not recall such a conversation with the employee, then saying he would like to give her the benefit of the doubt to

say she did so, then later saying he was certain the employee never raised the issue with him prior to 29 January 2009.

[46]
It can hardly be said the Commissioner committed any misconduct when choosing the employee's version. The issue of whether or not the employee called her doctor to testify at arbitration becomes irrelevant as the veracity of the medical certificates were not of issue, once the employee advised the employer of same and what she thought was the cause, the employer became aware of her complaint.

[47]
Having accepted, the employee did inform the employer as to her medical conditions and the reasons for same, I cannot agree with Mr *Mer*'s argument that there was a need to lay a formal grievance before resigning. In the context of a constructive dismissal, the purpose of lodging a grievance is to inform one's employer of a particular problem so as to afford the employer an opportunity to address it. This very same purpose was achieved when the employee, as from October 2008, advised the employer of her medical problem caused by the air conditioner.

[48]
Turning to the third ground of review it must not be forgotten that Viviers did advise the employee on two occasions, both on 29 January 2009, (that being two days before she resigned), that she should choose between her health and work. It is further noteworthy that at arbitration Viviers denied giving the employee this choice, yet on review Mr *Mer* confirmed this statement by Viviers was common cause.

[49]
While it is correct that no one advised the employee that the gap in the wall would be closed over the weekend, the inference Mr *Mer* seeks to draw is that the employee unreasonably subjectively affixed the time frame of that weekend for the employer to solve the problem. I cannot agree that this is the only inference that can be drawn. The employee seems to have allowed the weekend to pass to ascertain whether or not the threat from Viviers was indeed his view. The fact that she came in on the Monday and saw the gap not closed, was confirmation to the employee that Viviers' threat was in fact the choice before her. This was further confirmed by the employer's third witness Cynthia.

[50]
On the fourth ground, the fact that an alternative was offered to the employee before she resigned did not take the employer's case further. The employee acknowledged the offer but disputed its suitability on the basis that she would still have been exposed to the air from the air-conditioner if she took up the alternative station. Only the employee testified to this, it cannot be said the arbitrator committed any misconduct. He accepted the version of the employee for reasons set out in his award.

[51]
In adopting the reasonable decision maker test, I cannot conclude that the Commissioner's findings are that which a reasonable decision maker could not have reached given the evidence before him. The application stands to be dismissed.

Order

[52]
In the premises the following order is made:

52.1 The applicant's review application is dismissed.

52.2 There is no order as to costs.

Footnotes

1 [2004] 10 BLLR 979 (LAC).

2 [2012] 1 BLLR 30 (LAC).

3 [2007] 28 ILJ 2405 (CC) [also reported at [2007] 12 BLLR 1097 (CC) – Ed].

4

[2008] 29 ILJ 2218 (LAC) [also reported at [2008] 9 BLLR 845 (LAC) – Ed]. 5

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[2009] 30 ILJ 1539 (SCA) [also reported at [2009] 8 BLLR 721 (SCA) – Ed].

Footnote	✖
[2004] 10 BLLR 979 (LAC).	1
Footnote	✖
[2012] 1 BLLR 30 (LAC).	2
Footnote	✖
[2007] 28 ILJ 2405 (CC) [also reported at [2007] 12 BLLR 1097 (CC) – Ed].	3
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