



# ARBITRATION AWARD

Case Number: **GATW11679-21**

Commissioner: **Raasetja Suzanne Mothapo**

Date of Award: **21 February 2022**

In the **ARBITRATION** between

**MOGAKOLODI ALBERT PULE**

(Union/Applicant)

And

**BRINANT GROUP**

(Respondent)

**APPROVED**

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration was held on 11 January 2022 and was partly heard and re-scheduled on 10 February 2022, at the Tshwane offices of the CCMA at 09h00. The Employee, Albert Pule (hereinafter referred to as Applicant) was present and represented by Mhlahli Tladi, a legal representative from Malele Attorneys Inc. The Employer, Brinant Group., (hereinafter referred to as Respondent) was represented by an Employers Organization official., Angela Bender. The proceedings were conducted in English and Setswana. A digital recording was made, and I also kept handwritten notes.

## **BACKGROUND TO THE DISPUTE**

2. The Applicant was employed as Site Supervisor from 3 January 2020. He earned a monthly salary of R5189.00. He resigned on 18 August 2021 and alleged that the Respondent made working conditions intolerable. He lodged a grievance against his Site Manager, Isaac on 1 March 2021 and a hearing was held on 4 March 2021. The grievance was the approval of his annual leave and the fact that he wanted to go on leave before Sello, who he alleged was employed after him.

## **ISSUES TO BE DECIDED**

3. I am required to determine whether or not the Applicant was constructively dismissed and if so whether or not it was fair and the relief if any.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

4. The Respondent submitted a bundle of documents, which was marked bundle "R" and the Applicant submitted no bundle.

## **RESPONDENT'S EVIDENCE AND ARGUMENTS**

**Respondent's 1<sup>st</sup> witness, Angela Bender testified under oath as follows:**

5. She submitted that based on Section 95(1) (c),( failed to give a piece of legislation, she quoted from) the Applicant should have worked for a period of 2 years before claiming

constructive dismissal. She testified that there were 2 issues to be proven. Firstly, serious breach of employment contract and secondly the Applicant resigned in response of that breach. The Applicant must show that the actions of the Respondent resulted in his resignation. For constructive dismissal, the Applicant's decision to resign must quickly follow the conduct he complained of. If there was a marked time gap between the conduct complained of or resignation, then it has an adverse effect for the Applicant regarding the referral for constructive dismissal. That meant that the Applicant did not resign in response to the alleged breach. She submitted that the Applicant submitted a grievance on the 1<sup>st</sup> March 2021. It was wrong that the Applicant alleged that the Respondent did nothing, though there was documentary evidence to prove otherwise. A grievance form was submitted to the Applicant to formally state his complaint. On the 4<sup>th</sup> March 2021 a grievance hearing was held with all parties including the Applicant. The Applicant went on with business for a period of 5 months with no issues. The grievance of the 1<sup>st</sup> March was with regard to leave, which was a privilege and may be granted based on operations of the Respondent. The Applicant took leave since March without any grievance.

6. Under cross examination it was put to her that annual leave was not a privilege but a right, based on section 20 of the BCEA. She insisted that it was an entitlement and not a right. She pointed the page on the Applicant's contract of employment and read in points 6.5 and 6.10 as follows: *Leave shall be granted subject to the requirements of the Employer taking into consideration the Employee's circumstances. If there is no agreement between the parties as to the timing of the annual leave, the Employer will determine the time of annual leave*". 6.10 *"Leave must be applied for in writing on the "Application for Leave" form and must be signed by the duly authorized manager or any other Employee that has been granted delegated authority to sign the leave form"*. She confirmed that the Applicant's grievance was based on leave and that the Applicant reported directly to the Site Manager, Isaac. She explained that though the Applicant submitted that he did not get a response, it was not truthful because on page 6 first paragraph showed the opposite is the truth. Page 6

## **APPLICANT'S ARGUMENTS AND EVIDENCE**

7. He was employed on the 2<sup>nd</sup> January 2020, as a Site Supervisor. The Site Manager was Isaac Danster. He testified that one day his colleague, Delson Kutumela was late, and

Victor Boshielo asked him to wear a reaction uniform for that night. The Site Manager was present as events unfolded. Immediately Delson arrived, the Site Manager asked him to accompany him to the taxi rank with the company car. He phoned the Regional Manager, Andre. He informed him that he was wearing the reaction uniform and carrying all the tools. His concern was that if the client call and seek for assistance, he will be in a predicament as the car was not available. The Regional Manager, informed him that he did not prefer that he drive the company car because he was too old. He informed him that he may not be able to react if there was an incident that needed reaction. He further informed him to await Kutumela and handover the reaction uniform. The Applicant submitted that he was hurt and disappointed, because there were 2 of his colleagues who were the same age as himself, but are getting the benefit of driving the company car. He explained that there was no benefit, but his main gripe was that he was the only employee who was not allowed to work as a reaction officer. He felt prejudiced.

8. He submitted that he was demoted from the position of Site Supervisor and his colleagues replaced him. He worked as an Access Controller in charge of helping people at the gate. He testified that at the gate they used a scanner. The Site Manager would take that scanner from his hands and after using it he would take it back to the guard room. The Site Manager would not respond if asked why he returned the scanner in the guard room. He submitted that the Estate Manager, Paul at one point attempted to mediate the problem between himself, Site Manager and Victor Boshielo, who was the Site Supervisor. Paul, advised them to work together as a team and above all respect each other. He could not see any changes after Paul's intervention. He at some point asked the Site Manager to give him a leave form as he was tired. He explained that he started at the Respondent soon after he resigned from the other company, where he never took leave.
9. He submitted that at that time he already completed the leave cycle. Though the Site Manager never responded, he brought a document from the office that showed that 2 employees, who had more leave days than him, must take leave before his leave could be approved. He submitted that later he saw another colleagues name written down and Sello was now the third one to go on leave, meaning he would now be the fourth one. He was not happy as he knew that this particular colleague was employed after him. He requested the Site Manager to at least afford him the opportunity to take leave

before the third person. The Site Manager informed him that there was nothing he could change, as everything would go according to the list. The Site Manager brought leave forms to the guard room and gave one to Kenny Matenche, as he was busy with a shift handover outside. He filled in the leave form without inserting the dates. He asked Kenny to give an incompleated leave form to the Site Manager to insert the dates, as he (Site Manager) knew he was going to go on leave as the fourth employee. He hurried outside as his transport was already awaiting him.

10. He later on send the Site Manager, a WhatsApp message, requesting him to help him fill in the dates. The Site Manager explained that he would not be able to fill in the dates on his behalf. He (Site Manager) would wait until he was back, so that both of them may fill in the dates. When the Applicant came back, he spoke to the Site Manager, with the intention of completing the form, but he did not get a response. The Applicant phoned the Regional Manager again, and pleaded with him to allow him take leave before the third employee. Andre promised to change the dates and advised him on how to complete the form. He asked the Applicant to take a shot of the leave form and send to him. He waited for feedback and it was not forthcoming. But when he phoned Andre, he was advised to contact the Site Manager as he (Andre) was busy in a meeting. The Applicant informed Andre that he would not be in a position to talk to the Site Manager, as he had realized that he (Site Manager) was abusing his powers when issues are relating to him. Andre advised him to fill in a grievance form and send it to Jan, the Human Resources Manager.

11. He did as instructed and e-mailed the grievance to Jan, the Human Resources Manager. After 2 or 3 days, Jan and Andre arrived and asked the Site Manager to call him to the Estate Manager's office for a discussion. Jan wanted to know why he wanted to go on leave before the 3<sup>rd</sup> employee. He explained that he was exhausted, as he joined them after he left another company, where he never took leave. He explained that resting would help him to come back and perform his duties well. Since he did not understand the grievance procedures well, he put Victor as his witness. He believed the meeting was a surprise, so he could not organize his witness.. He (the Applicant) was not happy with the manner in which the meeting was held, he felt prejudiced again. He was extremely hurt by Andre's stressing that, all the problems were caused by poor communication amongst the two of them. He was lost, as he believed that he attempt to reach out to the Site Manager, but he would not respond.

Jan promised to send each one of us the email and give them the outcome. He testified that he never received any outcome promised until he resigned. He explained that he was working under pressure since then, as he continued waiting for that outcome. He later realized that he would not be efficient and effective, due to the unfavourable working conditions. The rumours from his colleagues that the Site Manager talked negatively about him, added more pressure. He submitted that he valued his job, as he had a car instalment to pay and 7 dependents. He had no option due to unbearable situation that he found himself in, and resigned. He really loved his job as it was his only source of income. He submitted that after the last session at the CCMA he received a call that he was welcomed at the company, but would never drive the company car.

12. Under cross examination he was referred to page 15 – 22, and that was his contract of employment. He was further referred to page 17 of the same contract and item 6.10 was read in as follows: *“Leave must be applied for in writing on the “Application for Leave” form and must be signed by the duly authorized manager or any other Employee that has been granted delegated authority to sign the leave form”*. He conceded that he send an e-mail to Andre. The response from Andre was on page 51 and was read in as follows:
13. *“For quite some time now it is evident that you are aggrieved by the fact that Isaac Danster is the Site Manager. You have sent me WhatsApp and telephonically relayed to me, that you are treated like a dog, that your leave has not been processed and also conveyed that Mr. Danster is not doing the right thing. Formally, I am advising you now to fill in the grievance form against him, so that the situation can be investigated and finalized. It is highly concerning that proper process was not followed with your leave application. First, it was that it was not filled in correctly, then after some time, you had completed another one and rejected to inform Isaac, the form was handed to a Zero. This basically cut out your direct supervisor. I am uncertain of why you refuse/ do not want to communicate with Isaac? By sending me messages stating you are waiting for me is not going to solve underlying personality problems on site. My single biggest apprehension is that the Estate Manager, Mr. Paul had been involved in certain discussions regarding our internal operations. At the point that he had the meeting with you guys, it seemed the issues were sorted out? That was what I was told ... The site*



*can only work and work well if the personnel on site follow the procedures and work coherently. I am of the opinion that the clash between yourself and Isaac can easily be sorted out by communicating with each other. Failing to do so, leave enormous holes in our goals on site. We are all adults, surely some form of relationship and communication could sort this out? In conclusion, please find the grievance form attached, fill it in and send back to either myself or Mr. Jan Scheepers, Human Resources of Brinant. Mr. Jan can advise on the procedure following the submission”.*

14. He conceded that Andre advised him to fill the grievance. He was referred to pages 44 to 48 and he conceded it was his grievance, relating to annual leave. He read in page 46 of the grievance as follows: *“I filled the form and I informed Kenny Matenche to inform Isaac that I filled the form but not filled the dates in, so he could fill dates on my behalf, because I am not sure about the new roster shifts. I then went for off days. Back home I phoned Andre and informed him about the leave. He promised to speak to Isaac. On the other hand Isaac sent me a WhatsApp message that the leave form was incomplete. I ask him to fill the dates for me, but he explained that he would talk to me about it when I come back to work. On the 08 February 2021, we were both working day shift and Isaac said nothing about the leave form”.*

15. *“On the 10<sup>th</sup> February 2021, Andre phoned me and instructed me to fill in the new leave form and send him a screen shot. Andre had the intention to swap me with Sello Vinger. I did as instructed immediately. To date I don’t know what is the progress of the leave. I sent Andre a reminder on the 23<sup>rd</sup> February 2021 and he pleaded with me to talk to Isaac, as he was attending a meeting”. I respectfully informed Andre that I cannot manage to talk to Isaac because he is abusing his power, when it comes to myself to proof me wrong and to display that he is the Manager”.* It was put to him that in the process he said he spoke to the Site Manager, but in the grievance letter he mentioned that he spoke to Andre. He disagreed and argued that he said he sent him a WhatsApp. It was put to him that he was not truthful for the reason that on page 46 second paragraph he stated that he spoke to Andre. That statement was corroborated by Andre’s e-mail on page 51. He was accused of been dishonest. He conceded that he expected his Manager to fill in the dates on his behalf. It was put to him that he never mentioned the third person, whose name was handwritten. He argued that it was

Sello Vinger and he did mention him. On the question of why he overlooked the Site Manager and spoke to Regional Manager, he argued that he was making a follow up.

16. He was reminded of section 6.10, read above, that he did overlook his direct Manager. It was further put to him that Andre begged him to speak to the Site Manager. He conceded that he expected the Site Manager to fill in the dates, as he already informed him to put leave days based on his off days. He explained that it really did not matter which days, but just wanted to be on leave. The Applicant kept on referring to the phone messages which he never printed. He conceded it was not company procedure for the Manager to complete the leave form on behalf of his subordinate. He agreed that initially himself and the Site Manager were on the same level as Site Supervisors and Isaac was promoted to a managerial position above him. He further conceded that he had a grievance meeting and had a chance to air out his frustrations. He agreed that he lodged a grievance on the 01<sup>st</sup> March 2021 and he was part of the delegation for his grievance on the 04<sup>th</sup> March 2021. He was referred to page 55 which was the outcome of the grievance. He nevertheless refuted that he was part of the problem, though he admitted that he had no grudges and bad feeling towards Isaac.
17. He confirmed that the Site Manager, never issued any warning against him or charged him. He argued that even if he resigned after 5 months 14 days, there were no changes after the grievance. It was put to him that he was not truthful, because if the situation was extremely bad, he would not have stayed. He argued that he stayed because of a car debt and his dependents. On the issue of asking for a transfer, he submitted that he was bound by his contract of employment to work at Mooikloof Heights Estate, once the contract was terminated there, he would not have anywhere else to work. That contention was disputed as he could not find it in his contract and made allegations that it was on a single page, which he did not have. It was put to him that he failed to exhaust any possible alternatives to resolve his problems. He argued that he realized that there was no possible means to try and resolved the issues. He argued that he did not know that he could fill in another grievance as he was advised by Andre to fill in the first one. He argued further that he could not tell Andre again as he was awaiting feedback from the previous grievance meeting.



18. He confirmed that he had a lawyer then, like he had one in the process, but could not speak to her regarding his unhappiness because it was work-related problems. He nevertheless argued that his case was not frivolous, though he did not have any form of evidence. He explained that his understanding of constructive dismissal was that if one is not properly handled at work, he could resign, because if he does, the employer would compensate him. He argued that though his job was not changed he was verbally informed he was a Site Supervisor, though he could not produce any evidence that he was a Site Supervisor. He argued that he was not jealous of Isaac been promoted, as he would not do the work that he was doing. He conceded that even though he was devastated after Andre informed him he was old, he did not fill in a grievance against him, he thought as he spoke about him, his complain would be combined in the grievance meeting held. He agreed that he had an accident and injured his leg, but he believed that Andre did not know.
19. Under re-examination he confirmed that he did not refer the matter to mislead anyone, he really felt he was mistreated due to lodging a grievance form. He stressed that he believed that the company failed him even after lodging a grievance. He explained that he still worked under pressure and felt discriminated, felt uncomfortable as opposed to other colleagues because of the treatment he received. He conceded that the way he felt made him overlook Isaac and refer issues to Andre. He conceded that he never spoke to Isaac man to man , as he was avoiding him at all costs. He confirmed that he gave the leave form to Kenny, even if he was not the right person. He conceded going back to the Site Manager about the leave form, but verbally so. His lawyer informed him that he could not bring verbal evidence because is hearsay. He stressed that he never had a problem with Isaac, but he (Isaac) had a problem with him. He confirmed further that he had a dispute with Isaac, but Andre became part of the problem because he said he was old. He confirmed that been told he was old hurt as there were other employees, who were as old as he was, but allowed to drive the company car. He stressed that he never received the outcome or finding from the chairperson (Jan).
20. In closing the Applicant argued that he failed to provide evidence so did the Respondent to a certain degree did not provide all documentary evidence. Yet the Applicant was forced to dig deep and provide evidence from a cellphone which he was not in possession of. The Applicant stressed on been compensated. His little

knowledge or lack thereof on how to apply for leave should not be detrimental to him not getting what was and still due to him.

**Respondent's 2<sup>nd</sup> witness, Jan Scheepers, testified under oath as follows:**

21. He was the Group Human Resources Manager. He explained that the procedure for dealing with a grievance was to first make contact with the aggrieved for clarity on the issues and to acknowledge receipt of the grievance. He would further inform the other party to give them the basis of the grievance. He would arrange a grievance meeting as soon as possible. Based on the correspondence between the Applicant and Andre, he sent the grievance form to Andre to send to the Applicant. He confirmed that he was the chairperson of the grievance meeting. There was a repetition of when the grievance was lodged and when it was heard and the e-mail of Andre to the Applicant. He confirmed that he communicated with both parties, the Applicant and Isaac shook hands afterwards. He testified that he, later communicated formally with all parties by e-mail. He referred to page 55, which was the outcome of the grievance and a summary of what parties agreed on. It was common cause that the grievance was about leave.

22. He submitted that the Applicant applied for leave but failed to follow procedures. He (Applicant) felt victimized or badly treated as someone who was employed after him, followed the procedures and his leave was granted before him. The reality was that the Applicant penalized himself by not following the procedures, and submitted an incomplete leave form. He explained the process, that when someone applies for leave, he was expected to fill in the form and hand same to his direct manager, so that the replacement could be arranged. It was not the duty of the manager to fill in the leave form on behalf of any employee. He confirmed that Kenny was not a Supervisor, and there was no reason for the Applicant to give him the leave form. He explained Andre's position that he was an Area Manager who oversees the whole operations. He explained that following protocol was the basis in any company. One was expected to first talk to the direct manager before escalating his issues to the higher authority. The Applicant was supposed to sit with Isaac, as his direct manager and arrange the appropriate time that he could take leave. He confirmed that it was the Applicant's responsibility to fill in the dates after agreement.

23. In this case, the Applicant never directed his leave form to his manager, but handed it to his colleague. He confirmed that there were 12 employees reporting to Isaac, and no one had issues with him. He explained that the Applicant and Isaac were once appointed as Acting Site Supervisors, after their Manager resigned. Isaac was finally appointed in the position. Each of them were given the opportunity to act, and the possibility was that the Applicant became jealous of Isaac due to his promotion. He believed that some people are genuinely glad for the others success, while some may feel they have been robbed the opportunity. He submitted that there were no issues between the two before Isaac was promoted. He submitted that in the grievance meeting the Applicant understood that he also played a role in their lack of communication. He believed that after the grievance, all had been sorted. He explained that the Applicant used to communicate with him on regular basis, he mentioned around 20 times after the grievance, with all other issues except any issue relating to the grievance. He submitted that he never thought the Applicant would go to an extent of resigning, after the manner in which they dealt with the problems in the grievance.

24. He read in the Applicant's resignation letter on page 41 as follows: " *Unfair treatment from the site – I am not treated like other employees. There is hatred against me by the Site Manager (Isaac). I do not want to loose my standard of work, due to fraud which is taking place on the site. In that I resign with immediate effect to protect my dignity*". Due to the manner in which they dealt with the problem in the grievance, he never thought there was still other issues. The Applicant never asked him about any problem or asked for the advice, but they communicated on several occasions. Page 16 item 5.6 was read in as follows: *The Employee agrees to undertake and obey all reasonable and lawful orders and instructions, which may be given by any person who is in a managerial or supervisory position*". He agreed that the Applicant failed adhered to this rule, which was in his contract of employment. He explained that the Applicant was insubordinate to his manager, but depending on the level of insubordination discipline might be instituted. He confirmed that he was not aware of any discipline against the Applicant. He submitted that the Applicant must be grateful to Isaac, because he should have taken him up for insubordination. Isaac's actions must be commendable because he was greater than the issues and took nothing personal. He submitted that he did not believe that the Applicant was constructively dismissed.

25. Both the legal representative and the Applicant failed to cross examine this witness. They were cautioned that this would mean that all what the witness submitted was the truth, nothing else but the truth and they were comfortable with that.

**Respondent's 3<sup>rd</sup> witness, Isaac Danster, testified under oath as follows:**

26. He was currently a Site Manager at Mooikloof Heights. He confirmed that the Applicant was his direct report. They worked together for a year, before he was promoted. They had a normal working relationship, as they were both Acting Site Supervisors. The relationship changed after some time in Dec/Jan 2021, after he was appointed as Site Manager. He had 12 personnel reporting directly to him. He submitted that he gave the Applicant the leave form which he completed but when he returned back to work the following morning he realized that the form was incomplete. He confirmed that he worked only day shifts, from Monday to Friday. He left a voice message on the Applicant's phone, to inform him that he failed to fill the form properly, as there were no dates.

27. He explained that the Applicant never gave him the leave form. As he was off for couple of days, he found that he had allocated all the leave on the roster. Sello asked for only 5 days leave. In the past he used to manipulate the system to accommodate the Applicant if he had to attend funerals or traditional rituals. After the Applicant finally completed the leave form, he established that all the days the Applicant wanted to be on leave were already allocated, as the roster was already completed. That was when the Applicant started to communicate with his boss, Andre. He waited for instruction from Andre, as he had no powers to change the roster. He testified that he only knew about the grievance against him after the office informed him. Before the grievance, he never thought that they had a problem. As far as he could remember, they had a good working relationship. After the grievance meeting, the relationship was normal. He would give some instructions and generally they would talk and eat together. The morning that the Applicant resigned, he was surprised because things looked normal.

28. Under cross examination he agreed that the Applicant applied for leave and submitted an incomplete form. He explained that the roster was put on the notice board for guards to check how they were booked. He further explained that the first thing when a

guard was appointed was to understand how the roster worked. After the Applicant came back, he filled in the form, but never gave it to him. He submitted that he believed that he treated all employees equally. At the grievance hearing, the only thing that surprised him, was the fact that the Applicant alleged that he treated him like a dog. He could not understand as they did not speak on daily basis. He confirmed that he wrote the e-mail to the company and asked to be removed from the site, so that whatever he had done wrong, could be fixed in his absence. He referred to the e-mail on page 53. He was equally surprised when the Applicant resigned, as he believed they had a good working relationship. He explained that they were acting site supervisors at the same time, though there was no benefits. The Applicant indicated that he was no longer interested in acting as he did not receive an acting allowance, and he was not going to be paid for handling the firearm. He reiterated that he left the leave form in the guard room, and explained that the leave forms are brought to the guard room. He filed others and left other on the table, to enable any guard to fill in, in case they needed leave. He could not remember which messages he failed to respond to.

29. The Respondent failed to submit closing arguments.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

30. I intend to offer brief reasons in my analysis and award as per Section 138(7) (a) of the Labour Relations Act 66 of 1995, as amended, which provides that, "*Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons*".

31. *Section 192 of the LRA provides that in any proceedings concerning any dismissal, the Applicant must establish the existence of the dismissal. If the existence of the dismissal is established, the Respondent must prove that the dismissal is fair*". The procedural and substantive fairness of the dismissal was in dispute.

32. In most unfair dismissal cases, the existence of the dismissal is common cause and the enquiry at arbitration is whether the dismissal was fair; and whether the finding of the arbitrator in this regard was reasonable. In the case of an alleged constructive dismissal in terms of section 186(1) (e), though, the prior question is whether there was



a dismissal. The onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, I am required to investigate the full merits of the case. Only then can I decide if there was dismissal as defined. If so, I must then decide whether it was fair.

33. Section 186 (1) (e) of the Labour Relations Act, defines a constructive dismissal. The section states that: “ *Dismissal means that –(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee*”. The principles and accepted test requires whether an employee is constructively dismissed that he/she must show that:

(a) ***There was no voluntary intention to resign***

(b) ***The conduct of the employer was so serious that there was no other option than to resign.*** The test for determining whether or not an employee was constructively dismissed was set out in:

34. **Pretoria Society for the Care of the Retarded v Loots (1997) 18 ILJ 981 (LAC) at page 985 Part 5**, where the Labour Appeal Court (*Myburgh JP, Froneman JP and Nicholson AJP*) stated as follows: “*When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable; that the employee cannot fulfill what is the employee’s most important function, namely to work. The Employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption, and the employer proves his fears were unfounded then he has not been constructively dismissed and his conduct proves that he has in fact resigned .... The enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract; the court’s function is to look at the employer’s conduct as a whole and determine whether .... Its effect, judged reasonably and sensibly in such that the employee cannot be expected to put up with it*”.



35. When the above dictum is applied to the evidence before me, it is clear that the Applicant alleged that the workplace had become intolerable because his application for annual leave was not handled promptly. He deliberately see wrong in everyone except himself. It was evident that the Applicants could not swallow the fact that Isaac, who he once acted as a supervisor with, was now his Manager. He was the person who never attempted to talk to his manager. He failed to follow protocol on several occasions. In actual fact, he wanted Isaac to be dismissed when he reported him to the Regional Manager that he used the company car for private appointment. If he was a good colleague, he would have immediately spoken to Isaac to establish what he should do in case an emergency. Instead, he reported him to the higher authority. He was frustrated by the fact the Andre did not take the matter further, and Isaac was not disciplined for the incident. I have reason to believe that Andre may not have told him he was old, Andre informed him that he has a leg injury and may not be in a position to run after a robber in case the need arise.

36. The Respondent's undisputed evidence was that the Applicant looked satisfied "after the grievance. There was no way that the Respondent would predict that he was still unhappy or not totally satisfied. In **M.L. Wolfsohn Motors (Pty) Limited T/A Lionel Motors v Dispute Resolution Centre and Others, (2008) 29ILJ 356 (LC)**, the Court found that there had been no constructive dismissal on the basis that a grievance procedure had not been exhausted. The Court further made the following useful comment in that regard: "[12] ..... *Where an employee could reasonably be expected to invoke a grievance procedure, the resignation will not be regarded as a constructive dismissal*". In this case the Applicant already knew the recourse if his manager was acting unfair to him, but failed to approach either Andre or Jan in Human Resources and outline what his other issue where. He expected the company to prophesy or predict that he could still be unhappy.

37. In **Moco/PEFCO ( A Division of Murray and Roberts Foundries (Pty) Ltd. [2004] 7 BALR 908 CCMA**, Commissioner Govender at page 915 of his award stated " *the 3<sup>rd</sup> edition of Workplace at page 76 Grogan states that " Where a grievance procedure exists an employee should generally pursue them before resigning and claiming constructive dismissal. The onus of proving that there was a dismissal in this sense rests with the employee while justification rests with the employer..."* Also in the **Moco**

**case**(supra), it was concluded that the mere fact that the conduct on the part of the employer is unreasonable is not enough to constitute dismissal. The conduct must be such that resignation is the only reasonable option open. The employer's conduct must be assessed holistically and not be "pigeonholed". In the light of the above cases the failure by the Applicant to exhaust all the internal processes, in this case requesting to be transferred to another site, is a clear indication that resignation cannot be considered as the last resort. The Applicant resigned with immediate effect after working night shift and failed to give the company an opportunity to re-look at his other issues. His resignation spoke about fraud and unfair labour practice, which he never bother to explain and give details. The Applicant was not constructively dismissed. I believe he resigned because he received a wrong advice from his legal representative, hence the weird manner of his understanding of constructive dismissal. He resigned with the knowledge that he would get money from the Respondent. Having indicated the above, I believe it would be pertinent to outline the behaviour and the attitude of the legal representative.

#### **The attitude and behaviour of Ms. Mihlali Tladi**

38. I was totally not happy with the manner the legal representative behaved. She was most of the time on her phone, and failed to cross examine a witness that buried the Applicant's case.

**AWARD APPROVED**

39. The Applicant's case is hereby dismissed.

Signature:



Commissioner: **Raesetja Suzanne Mothapo**

Sector: **Private Security**