

ARBITRATION AWARD

Case Number: **GAEK 3552-26**
Senior Commissioner: **Eleanor Hambidge**
Date of Award: **27 June 2026**

In the **MATTER** between

LEFU SEPHIRI

(Employee)

And

LOTHLORIEN RECYCLING

(Employer)

DETAILS OF HEARING AND REPRESENTATION

1. The constructive dismissal involving Mr. **LEFU SEPHIRI** (Employee) and **LOTHLORIEN RECYCLING** (Employer) was heard at arbitration on 19 June 2026, during which proceedings an attorney, Ms. Ridgaard, represented the Employer and the Employee represented himself. The arbitration proceedings were recorded, and the services of an interpreter were also made available.
2. At the arbitration, the Employer's representative handed up a bundle of documents and the Employee relied on his documents, as handed up.
3. I had afforded the parties an opportunity to submit their closing arguments in writing on or before 26 June 2026, and such closing arguments were received and duly considered.

BACKGROUND TO THE DISPUTE:

4. The Employee had resigned in writing, on 12 March 2026 at 13:36, with immediate effect (therefore not serving any notice period).

ISSUES TO BE DECIDED:

5. The issue to be decided is whether the Employee was constructively dismissed.

SURVEY OF EVIDENCE AND ARGUMENTS:

6. The Employee's version to the events, which he considered to be indicative of intolerable working conditions, was refuted by the Employer.

7. The Employee testified in support of his own case. He testified under oath. The Employer's representative called one witness to testify, who also testified under oath. I summarized the relevant aspects of the evidence tendered, but such is not necessarily a verbatim record thereof. However, all evidence was considered, albeit not specifically referred to hereunder.

Employee's testimony:

8.1 In a nutshell, the Employee testified that although he had lodged a grievance previously, he was not furnished with the outcome thereof. He also alluded to his fluctuating salary and being asked, pursuant to the grievance previously lodged in December 2025, as to why he is still at the workplace. He considered the grievance to have caused a lot of problems for him. He further said that he had recruited 5 other employees to join a union. He indicated having resigned after the "tissue-issue" and not having lodged a grievance again.

During the cross-examination, he was asked about the timing of his resignation, and he denied having resigned as a result of possible disciplinary action being instituted against him, albeit it was put to him that he had resigned on the same day the "tissue-issue" was being raised and discussed, with him and others. He conceded that he previously lodged a grievance, and he claimed not to have received the outcome thereof and said he was threatened thereafter and verbally abused, albeit it was put to him that the grievance had dealt with the employees being held accountable for the machine breaking down and he conceded not to have been disciplined for such. He also indicated that the employees have been taking tissues all along and said that he gave the Employer three months to fix things having lodged a grievance. He also agreed that an issue pertaining to his salary being reduced had been settled. He opined that he was not expected to ask for a pay slip; such should be automatically issued by the Employer. He admitted having received the notice to attend a disciplinary hearing but stated he was already at home by then. He further considered Eugene Koekemoer to be a monster. He did not think that lodging another grievance would serve any purpose and considered having been targeted by management, with others, for wanting to join a union.

Employer's witness:

8.2 TJ Dreyer, a manager, testified that he had a good working relationship with the Employee. He indicated to have given the outcome of the grievance to the Employee. This witness further testified that he had investigated the "tissue-issue" and had stopped the alleged guilty parties from entering the change room on 12 March 2026, having informed them as to the reason why and said that the Employee had abruptly left the premises the same day and within 30 minutes, the resignation letter was received. He also indicated that at no stage did the Employee engage him as to any intolerable working conditions.

During the cross-examination, this witness denied having targeted the Employee and during the re-examination it was clarified that he had investigated other employees first, before investigating the Employee, for the "tissue-issue".

ANALYSIS OF EVIDENCE AND ARGUMENTS:

9. As a point of departure, it is advisable to summarise the legal principles applicable to a constructive dismissal.
10. The first question to be decided in any constructive dismissal case is whether there was a dismissal or not and this must be determined before any enquiry into the fairness of the dismissal can be embarked upon. The question as to the existence of a dismissal impacts jurisdiction. If the Employee fails to prove that a constructive dismissal occurred, there is no need to interrogate the fairness thereof. In *Solid Doors (Pty) Ltd v Commissioner Theron and others*¹, the Court held that there are three requirements that must be present before it could be said that a constructive dismissal has been established. All three requirements must exist and be established before it could be found that an employee was constructively dismissed and, absent any one of them, a constructive dismissal had not been established. All three requirements will be discussed hereunder.
11. In respect of the first requirement, the Employee must have resigned. In the matter before me, it was common cause that the Employee had terminated his employment, with immediate effect. As to the second and third requirements (that the Employer made continued employment intolerable and that the Employee had resigned as a result thereof), the Employer disputed such. In fact, it was the case of the Employer that the failure of the Employee to have lodged another grievance pursuant to his hasty resignation was fatal to his case. The conclusion from the Employee that the Employer had made continued employment intolerable will be assessed objectively.

¹ [2004] ZALAC 14; (2004) 25 ILJ 2337 (LAC) (*Solid Doors*).

Whereas the Employee, who has to prove the existence of a constructive dismissal, felt very aggrieved by the manner in which he has been treated, I will assess the evidence holistically to determine whether the onus was indeed discharged on a balance of probabilities.

12. Turning to the law, section 186(1)(e) of the Labour Relations Act (LRA) defines a constructive dismissal to mean that an employee terminated a contract of employment, with or without notice, because the employer made continued employment intolerable. Where an employee claims constructive dismissal, the onus is on the Employee to prove that the resignation was not voluntary and that it was not his intention to terminate the employment relationship but was “forced” to do so. The conduct of the Employer must be assessed, and the question is whether the Employee could reasonably have been expected to put up with the conduct of the Employer. The Court has previously considered that an employee who claims constructive dismissal must prove that:²

1. He or she terminated the contract of employment;
2. Continued employment became intolerable for the employee;
3. The employer must have made continued employment intolerable.

As previously stated, I will deal with these requirements in turn and make the necessary findings, based on the evidence led:

The employee terminated the contract of employment

13. At this arbitration, it was common cause that the Employee resigned, in writing, with immediate effect. Such resignation was done in writing and sent via e-mail. In his resignation, the Employee gives reasons for such and they are: victimization; verbal abuse; and gross violation of my statutory rights. In this regard, he also unpacked his reasons for resignation in detail. However, as correctly pointed out by the Employer’s representative, the fact that another grievance was not lodged prior to his resignation is indeed fatal to the case of the Employee in circumstances where it was common cause that the Employee previously lodged a grievance which was attended to by the Employer. In the recent judgment of the Constitutional Court in *Maleka v Boyce NO and others* (CCT 175/23) (handed down on 24 February 2026) the importance of lodging a grievance before resignation, was reiterated and the lack of confidence in internal measures will not necessarily relieve an employee of his obligation in this regard.

² *Eagleton and others v You Asked Services (Pty) Ltd* [2008] ZALC 102; (2009) 30 ILJ 320 (LC) at para 22.

This judgment of the Constitutional Court reiterates and reinforces judgments of lower courts as to the principles applicable in a constructive dismissal - dispute.

14. In *Pretoria Society for the Care of the Retarded v Loots*³ (*Pretoria Society*), the LAC held that when an employee resigns as a result of constructive dismissal, the employee, is in fact, indicating that the situation has become so unbearable that the employee cannot work. Effectively, the employee is saying that he or she would have carried on working indefinitely had the unbearable situation not been created. The employee resigns because he or she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If this assumption was wrong and the employer proves that the employee's fears were unfounded, there was no constructive dismissal but in fact a resignation.
15. In *Strategic Liquor Services v Mvumbi N O and others*⁴ (*Strategic Liquor Services*), the Constitutional Court held that the test for constructive dismissal no longer requires that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable. This of course moved away from the position of a "strict" test that in a constructive dismissal case, the employee had no other choice or option, but to resign. In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and others* (*Asara*), the Court expressed the view that it was doubtful that the "strict" test, namely that employment should be so intolerable that the employee had no option but to terminate the employment relationship, would survive the Constitutional Court formulation in *Strategic Liquor Services*. In *Asara*, the Court considered the authorities and held that where a reasonable alternative to resignation exists, it cannot be said that the employer has made continued employment intolerable for the employee. The following was stated by the LAC in *National Health Laboratory Service v Yona and others*:⁵

"In other words, a constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee. Ms Yona terminated her employment relationship with the appellant, by resigning with a month's notice. She alleged that the resignation constituted a constructive dismissal in terms of section 186(1)(e) of the LRA. The appellant denied that Ms Yona was dismissed at all. Ms Yona bore the onus to prove her alleged constructive dismissal. The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively,

³ (1997) 18 ILJ 981 (LAC).

⁴ [2009] ZACC 17; (2009) 30 ILJ 1526 (CC) at par 4.

⁵ (2015) 36 ILJ 2259 (LAC) at para [30]

the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances." (my emphasis)

In *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (MIBCO) and others*,⁶ Hulle AJ opined that the above statement in *Strategic Liquor Services* must be understood to mean the absence of reasonable alternatives. He said as follows:⁷

"It seems to me that this latter statement must be understood to exclude a 'reasonable' choice. If it was intended to mean that an employee was not required to demonstrate that he or she had no 'reasonable' alternatives to resignation it would be in conflict with the language of the section. Quite apart from all the authorities on the question, the ordinary meaning of the word "intolerable" connotes the absence of a (reasonable) choice. I emphasise the meaning of the phrase intolerable and its various synonyms as set out above. If an employee has reasonable alternatives, it implies that the conduct of the employer is not unbearable or not beyond the limits of tolerance".

For me, in light of the above judgments, the Employee has to establish that he resigned as there was no reasonable alternative available to him. Of this, I am not entirely persuaded, based on the evidence and argument led. Not only could the Employee have exercised his rights by lodging another formal grievance before his resignation, but he could also have escalated his previous grievance since there had been a formal grievance hearing and an outcome rendered, which he claimed not have received. Of this I am not entirely convinced either. Evidence was led by the Employer that the outcome of the initial grievance was given to the Employee and having read such outcome, it is clear that the chairperson thereof was balanced and fair in her approach, dealing with all the issues raised. Thus, it is my finding that the Employee, who impressed me as intelligent, was very much aware of his rights and should have and could have lodged a grievance, prior to his resignation. He certainly was aware of his rights in this regard, as he previously lodged a grievance.

In this matter before me, a lot of reliance was placed by the Employer on the timing of the abrupt resignation and although the Employee vehemently denied that his resignation was as a result of the "tissue-issue", once again, I am not persuaded thereof. The resignation was tendered on the same day the manager had called a group of employees to discuss the alleged unauthorised removal of tissues from the workplace, which previously transpired on a Saturday. On the Employee's own version, he was aware of the reason for meeting the manager, with others, and thus I can safely conclude the reason for resignation was not so much the intolerable working conditions being experienced, but the daunting reality of possibly being disciplined in the wake of allegations pertaining to unauthorised removal of

⁶ [2013] JOL 30442 (LC)

⁷ At paras 129 and 130

company property. It is not my duty in this constructive dismissal-dispute to express any opinion on the guilt or otherwise of the Employee in relation to the “tissue-issue”. He left his employment before such issue could be ventilated in a disciplinary hearing.

Continued employment became intolerable for the employee

16. In *Pretoria Society*, the Court held that the employee must satisfy the Court and, by implication, the arbitrator, that at the time of the termination of the contract, he or she was under the genuine impression that the employer behaved in a manner that rendered the relationship intolerable and would continue to do so. The operative word is “intolerable”. The Courts through the years have confirmed that the use of the word “intolerable” means that there is an onerous burden on the employee, and the employee is required to show that continued employment would be objectively unbearable. Intolerability is not established by the employee’s subjective views. What is relevant is the conduct of the employer viewed in an objective sense. Therefore, the test remains that the conduct of the employer must be judged objectively.⁸ The subjective apprehensions of an employee cannot be a final determinant of the issue. In *Smithkline Beecham (Pty) Ltd v CCMA and others*⁹ (*Smithkline*), the Court held that it would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when those perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the LRA. The word “intolerable”, in my opinion, suggests that constructive dismissal should be confined to situations in which the employer behaved in a deliberately oppressive manner. In *Gold One Ltd v CCMA and others* (JR 1109/15) (handed down on 9 September 2020), the Court, once again, emphasized that intolerability is a high threshold. Learned author and Judge of the Labour Appeal Court Van Niekerk *et al* in *Law@work* (2008) at page 213 states as follows:

“The courts have endorsed the principle that that the remedy of constructive dismissal, being one, in which the employee seeks to obtain resignation, should be narrowly interpreted against the employee. This implies not only that the test should be objective but that it should be set at a high standard....”

Based on the totality of evidence led, I am not convinced that, objectively speaking, the Employer was making the Employee’s continued employment intolerable, albeit I am quick to point out that some action(s) of a manager showing the employees the middle finger, although in jest only according to him is simply not appropriate at the workplace. However, when his inappropriate conduct was brought to this particular manager’s attention, he immediately ceased in doing so. Thus, this particular offensive issue was addressed and resolved. As to the other allegations made by the Employee of being targeted,

⁸ *Smithkline Beecham (Pty) Ltd v CCMA and others* (2000) 21 ILJ 988 (LC).

⁹ *Ibid.*

I am not convinced thereof. His conduct, with others, was investigated in relation to the “tissue-issue” and therefore, I reject any orchestrated campaign of being targeted and victimized in this regard. As to alleged unfair warning issued to the Employee, he should have challenged such in terms of the unfair labour practice - jurisdiction of the bargaining council. He certainly escalated his issue to the CCMA, in relation to section 73A of the BCEA (for monies owing) and such was amicably resolved. As to the alleged vile and offensive language used by Eugene Koekemoer, neither party called him to testify at this arbitration. If I were to accept that he uttered words such as “you want to fuck my fucking operation”, such are considered highly inappropriate, to say the least. However, the use of abusive language had been addressed in the grievance hearing, as is evident from its outcome. In this regard, the Employee’s concerns were found to be reasonable and partially upheld, and management undertook to curb inappropriate language and to reinforce respectful communication. As much as I am appalled by vile and abusive language at the workplace, this particular issue was addressed and cannot be ventilated again or resuscitated to indicate a constructive dismissal. As to the failure of the Employer to issue pay slips, I agree with the Employee that the Employer is required by law to issue pay slips and not only when such is requested. However, this oversight on the part of the Employer is not indicative, objectively speaking, of a constructive dismissal.

As to the other claims, hinting at intolerable working conditions, such were not objectively indicative of intolerable working conditions either. There was no concrete evidence placed before me that the Employer is indeed a “union basher” and the Employee joining a union (with others) was indeed the reason for him being victimized and being subjected to intolerable working conditions. In any event, such a finding would deprive me of jurisdiction to arbitrate as such may be perceived as a breach of section 5-rights over which the Labour Court has exclusive jurisdiction.

The employer must have made continued employment intolerable

17. The third requirement to prove a constructive dismissal is that the circumstances that led to the employee’s resignation must have been brought about by the employer. This means that the employer must have performed actions which created intolerable circumstances. In *Pretoria Society*, the LAC held that the enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the arbitrator’s function is to look at the employer’s conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be

expected to put up with it. In *Murray v Minister of Defence*,¹⁰ the Supreme Court of Appeal (SCA) accepted that there are many things an employer may fairly and reasonably do that make an employee's position intolerable. However, the SCA confirmed that the employer must be culpably responsible in some way for the intolerable conditions. It held that:

"The mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstance "must have been of the employer's making". But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked "reasonable and proper cause".

18. In *Jordaan v CCMA and others*¹¹, the LAC approved a caution that constructive dismissal is not for the asking and held that:

"With an employment relationship, **considerable levels of irritation, frustration and tension inevitably occur over a long period. (my emphasis)**. None of these problems suffice to justify constructive dismissal."

19. In *Kruger v Commission for CCMA and another*¹² (*Kruger*), the employee did not follow a grievance procedure as she believed that the grievance procedure was no longer an option, similar to the Employee before me in not lodging another grievance. The Court in *Kruger (supra)* held that:

'... when there are remedies available to an employee which had not been exhausted, as in this case, the employee has not discharged the onus of proving that she was constructively dismissed. ... An employee may not choose constructive dismissal while other options are available. The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, is such that the employee could not have been expected to put up with it.'¹³

¹⁰ [2008] ZASCA 44; (2008) 29 *ILJ* 1369 (SCA) at para 13.

¹¹ [2010] ZALAC 10; (2010) 31 *ILJ* 2331 (LAC) at 2336D.

¹² (2002) 23 *ILJ* 2069 (LC), (2002) 11 *BLLR* 1081 (LC).

¹³ *Ibid* at para 14.

20. The judgment in *Kruger* supports the notion that an employee cannot resign and claim constructive dismissal while other options are available. As I already stated, the test is whether a reasonable alternative or alternatives existed. In *Albany Bakeries Ltd v Van Wyk and others*¹⁴ (*Albany Bakeries*), the LAC effectively took the view that an employee should make use of alternative remedies. This would obviously include lodging a formal grievance. The Court held in *Albany Bakeries (supra)* that:

“[28] How will an employee ever prove that if he has not adopted other suitable remedies available to him? **It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. (my emphasis)** Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem”

21. As is clear from the remarks above, an employee should make use of all reasonable alternatives before resigning. The resignation before me does display elements of the Employee having acted prematurely and attempting to escape the outcome of a pending disciplinary action. As previously stated, the Employee should have lodged a formal grievance before his resignation. The subjective views of any Employee that another grievance would not have heeded any results are entirely irrelevant.

The sequence of events is therefore not consistent with a resignation compelled by intolerable conditions, but with that of a voluntary resignation to escape pending disciplinary action, since the Employee did not resign at the time of lodging his first grievance, nor did he resign during the next three months, when he was allegedly waiting for the outcome of that grievance meeting, but he chose to resign on the same day he was made aware of the “tissue-issue”.

22. Therefore based on all the evidence before me, the Employee failed to establish the existence of a constructive dismissal.

AWARD:

1. For the reasons set out above, I find that the Employee failed to discharge the onus that a constructive dismissal occurred.

¹⁴ (2005) 26 *ILJ* 2142 (LAC) at paras 28 – 29.

2. Accordingly, no relief is awarded.

Signature:

A handwritten signature in dark ink, appearing to read 'Eleanor Hambidge', is written over a horizontal blue line.

Senior Commissioner: ***Eleanor Hambidge***

Sector: ***Wood and Paper***