



**REPORTABLE**

CASE NO: SA 72/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**COUNCIL OF THE MUNICIPALITY OF WINDHOEK**

**Appellant**

and

**NANCY LYNNE BRANDT**

**Respondent**

**Coram:** MAINGA JA, SMUTS JA and UEITELE AJA

**Heard:** 24 October 2023

**Delivered:** 22 November 2023

**Summary:** Nancy Lynne Brandt (the respondent) terminated her employment by resignation with the appellant, Council of the Municipality of Windhoek (the Municipality) on 27 June 2016 and claimed in a dispute that her termination of employment amounted to a constructive dismissal. Much of the factual matter is not in dispute. The respondent as Manager: Parks for the Municipality was in charge of overseeing a contract for the digging of graves which was awarded to a business

concern known as Utase Dynamic Enterprise CC (Utase). This contract (in particular the failure on the part of Utase to perform in accordance with its contractual obligations) became the underlying cause for the friction which developed between the respondent and Ms Mupaine (to whom the respondent reported to) and other municipal employees (ie the incident between the respondent and Mr Kazombiaze, her subordinate section head who reported to her).

What is contested between the parties is whether the circumstances culminating in the respondent's resignation amounted to a constructive dismissal. The Municipality resisted that claim and the matter proceeded to arbitration. At arbitration, the arbitrator found in favour of the Municipality, holding that the respondent had not established a constructive dismissal and that she had resigned voluntarily. The respondent appealed against that award to the Labour Court.

On appeal to the Labour Court, the Municipality raised a preliminary point against the award. The point concerned the heading of the award where the Municipality was merely referred to as the 'Windhoek City Council' in the heading. Although it was conceded that the Municipality was correctly cited in the dispute as the Council of the Municipality of Windhoek, the Municipality contended that the incorrect description of the Municipality in the heading of the award resulted in the award being a nullity. It was argued on behalf of the Municipality that the Labour Court should have dismissed the appeal without considering the merits because of this error in the heading of the award. The court *a quo* pointed out that the Municipality was correctly cited in the arbitration proceedings and its legal personality had remained the same throughout the proceedings and on appeal. The court found that the mere incorrect designation in the award's heading did not render it a nullity, finding that the incorrect description was a technical point devoid of any prejudice. The court *a quo* held that the matter fell to be determined on the real issues in dispute justly, speedily and efficiently in accordance with the overriding objects of the court. On the merits, court *a quo* considered the requirements in establishing a claim of constructive dismissal to be threefold:

Firstly, the employee bears the onus of establishing that, even though terminating the employment relationship, the termination came about due to the conduct of the

employer. Once that is established, the enquiry would shift to determine whether the conduct of the employer 'was calculated or likely to destroy the trust relationship with the employee', causing her to resign. The third leg of the enquiry, the court held, is whether the employer was culpably responsible for the intolerable conditions. The court *a quo* found that all the three requisites for a constructive dismissal had been met by the respondent. Her appeal succeeded and the Municipality was ordered to pay the respondent 24 months of her annual remuneration of N\$932 280 less statutory deductions. That court also directed the Municipality to pay the respondent severance pay representing one week's pay for each year of continuous service with the respondent. The Municipality appealed against that judgment.

In issue on appeal to the Supreme Court is whether the respondent was constructively dismissed from her employment position with the appellant. Counsel for the Municipality again raised the same preliminary point which the court *a quo* rejected. Counsel submitted that the court's finding that the mistake was a mere technicality was wrong and would have practical effect of causing 'anarchy in the administration of justice'. Counsel argued that the preliminary point should be upheld and the decision of the Labour Court should be set aside and the appeal succeed on this basis alone. The Municipality further argued that by the time the respondent resigned, the issues were resolved because the Utase contract was coming to an end and Ms Mupaine was going on retirement in the near future. The Municipality further accepted that the respondent had made out a case for constructive dismissal if she were to have resigned in April 2016, but argued that her failure to resign then and only two months later deprived her of her cause of action, particularly because the contract with Utase had by then come to an end.

The respondent argued that the Municipality failed to call material witnesses (ie Ms Mupaine and the then Mayor, given the manner in which the Mayor involved himself in the appeal against the outcome of the second grievance filed by the respondent shortly before it was heard and then served upon the panel determining the outcome of that appeal).

The court took issue with the state of the appeal record – directing a letter to the Municipality's legal practitioner of its non-compliance with rule 11(1)(h) of the Rules

of the Supreme Court and requesting the non-compliance to be rectified on 2 October 2023 before the hearing of this appeal on 24 October 2023. Despite this the Municipality's practitioner instead merely filed an affidavit seeking to explain the failure to comply with rule 11(1)(h) and the clear directive of this Court. Counsel for the Municipality acknowledged that the documents forming exhibit 'A' were not in the same sequence as filed in the record of the arbitration proceedings. It was stated that the reference to documents in counsel's heads of argument would reflect the current numbering in the appeal record and that the respondent's practitioner had not raised the issue and was not prejudiced. The court found that the Municipality's practitioner's brazen non-compliance of the rules was not limited to the appalling state of the record. Counsel's heads were 61 pages long, exceeding the 40 page limit provided for in rule 17(4)(k), in the absence of a direction by a judge permitting him to exceed that length. Counsel acknowledged that no such approach was made. The written argument was also replete with lengthy quotations from both the record and especially from authorities which is expressly proscribed by rule 7(d). Nor were any reasons provided for the citing of more than one authority for the same propositions of law as required in rule 7(c).

*Held that*, the evidence which served before the arbitrator includes a vast number of references to documents forming part of Exhibit 'A' comprising its 491 pages with reference to the page numbers in that bundle. But those page numbers do not correspond to the numbering on the documents in the appeal record. In order to prevent this highly undesirable state of affairs, rule 11(1)(h) was promulgated. It requires in peremptory terms that 'all references in the record to page numbers of exhibits must be transposed to reflect the page numbers in the appeal record'. This important provision was disregarded.

*Held that*, a court of appeal is called upon to determine a matter with reference to an appeal record. That record is prepared for the court in the first instance, although of course also for the protagonists. The respondent's counsel may not have raised the issue because he represented the respondent in the arbitration and appeared to be well conversant with all the documents in question and had not been prejudiced in preparing his argument. Members of the court are of course not in the same position and do not have that advantage. Members of the court were instead required

repeatedly to rummage through 491 pages of Exhibit 'A' to search for documents referred to in evidence, a very time consuming exercise which wasted a great deal of judicial time.

*Held that*, this Court has time and again emphasised that practitioners who take on work in this Court have a duty to acquaint themselves with the rules of this Court. This Court has also repeatedly stressed that the work of this Court is adversely affected by the abject disregard of the rules by practitioners in the preparation of appeal records. Repeated warnings have been made that adverse punitive costs orders will be made as a consequence. Unprofessional conduct of this nature will not be countenanced and the range of orders which may be given include a practitioner being precluded from charging fees for preparing and/or perusing a defective record. In the future, similar orders may also be considered in respect of written argument which comprehensively fails to comply with rule 17.

*Held that*, the Municipality had been properly cited in the proceedings as is reflected in the record and acknowledged by its counsel. The minor error made on the arbitration award did not render the entire award a nullity as was correctly found by the Labour Court. This point was devoid of both prejudice and substance.

*Held that*, dismissal is not defined in the old Labour Court Act 6 of 1992 or the new Labour Act 11 of 2007 (the Act). Under the common law of contract, which originally governed much of employment law, constructive dismissal would arise where the termination of the agreement arose from a breach of an implied term where employers, 'without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'. In the absence of a definition in the Act, the Labour Court has both under the previous Act and the current Act held that a constructive dismissal arises where an employee terminates the relationship due to the unjustified conduct of an employer driving an employee to leave.

*Held that*, in examining the legal framework and following the adoption of the Act (and its predecessor), a constructive dismissal fell within the scope and concept of an unfair dismissal in s 33 of the Act and that of its predecessor. The structure of s

s 33 contemplates that, in instances where it is in dispute that there was a dismissal, s 33(4)(a) provides that the *onus* is upon an employee to establish the existence of a dismissal, namely that the resignation was not a voluntary act and was not intended to terminate the employment relationship. Once that is established, then the onus shifts under s 33(4)(b) where it is presumed that, unless the contrary is proved by an employer, the dismissal was unfair.

*Held that*, the cumulative impact of Ms Mupaine's conduct, supported by subordinates and condoned by the executive management, given their failure to address the issues, amounted to the respondent experiencing intolerable working conditions. The Municipality's counsel correctly conceded that a case for constructive dismissal had been made out as of April 2016.

*Held that*, with regards to events after April 2016, the continuation of the conduct coupled with the culpable inaction on the part of the executive management which was fully conversant of the conduct, meant that the respondent established that she had been constructively dismissed and the conduct against her amounted to unfairness on the part of the Municipality represented by its executive management, including Ms Mupaine and those who failed to address her culpably unfair conduct towards the respondent. Importantly, the respondent had exhausted internal remedies available to her to address these intolerable conditions by formally lodging grievances, pursuing those procedures to finality by appealing against the outcome of the grievance which received no attention.

The appeal thus stands to be dismissed.

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### APPEAL JUDGMENT

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SMUTS JA (MAINGA JA and UEITELE AJA concurring):

[1] At issue in this appeal is whether the respondent was constructively dismissed from her employment position with the appellant (the Council of the Municipality of Windhoek – 'the Municipality'). The respondent terminated her

employment by resignation with the Municipality on 27 June 2016 and claimed in a dispute that her termination of employment amounted to a constructive dismissal. The Municipality resisted that claim and the matter proceeded to arbitration.

[2] An arbitrator found in favour of the Municipality, holding that the respondent had not established a constructive dismissal and that she had resigned voluntarily. The respondent appealed against that award to the Labour Court. Her appeal succeeded and the Municipality was ordered to pay the respondent 24 months of her annual remuneration of N\$932 280 less statutory deductions. That court also directed the Municipality to pay the respondent severance pay representing one week's pay for each year of continuous service with the respondent.

[3] The Municipality appealed against that judgment.

#### Background facts

[4] For the large part, much of the factual matter is not in dispute. What is contested between the parties is whether the circumstances culminating in the respondent's resignation amounted to a constructive dismissal. The award of compensation to her ordered by the Labour Court is also in dispute. The respondent worked for the Municipality since August 2001 until she terminated her employment by resigning on 27 June 2016. At the time, and since 2009, the respondent served as the Municipality's Manager: Parks. Her responsibilities included managing recreational and sporting facilities, cemeteries and crematoriums and implementing and enforcing the municipal park, cemetery and crematorium regulations. As Manager: Parks, the respondent was directly responsible for the appointment,

control, supervision and payment of external contractors providing services to the parks division. Exercising that function and responsibility gave rise to an ongoing dispute which is at the heart of this litigation.

[5] The respondent reported to the Strategic Executive: Economic Development Environment (the Strategic Executive). That position was occupied by Ms U Mupaine at all times relevant to this dispute.

[6] One of the contracts for the digging of graves was with a concern known as Utase Dynamic Enterprise CC (Utase). It became the underlying cause for the friction which developed between the respondent and Ms Mupaine and other municipal employees, and in particular the failure on the part of Utase to perform in accordance with its contractual obligations. In her capacity as Manager: Parks, the respondent was the officer responsible for the oversight of that contract which had been awarded by the Local Tender Board (LTB) in April 2013. Ms Mupaine had then served on the LTB and had motivated the award to Utase.

[7] From the early days of the contract, which commenced in May 2013, the respondent issued notices of non-performance to Utase because of its poor performance. The first was already on 27 May 2013. Another followed in July 2013. They continued at regular intervals over the next three years. A total of 15 warning and non-performance letters were sent by the respondent to Utase over that period.



[8] Several complaints were received from members of the public and undertakers concerning Utase's poor performance and its failure to perform its obligations. These complaints included graves not finished on time for planned funerals, graves not being dug properly or being skew or of insufficient size for the coffins – much to the distress of bereaved persons, curb stones being damaged, soil not being removed and remedial action not timeously undertaken. Some of these complaints made their way to the media and their publication damaged the image of the Municipality in overseeing contractors' work to dig graves. Members of the public also approached the respondent directly concerning these issues and held her accountable despite several efforts on her part to address Utase's poor or non-performance.

[9] As the officer charged with supervising Utase's performance, the respondent sought without success to engage Utase to comply with its obligations. The respondent did not have the power to cancel the contract. That power rested with the LTB.

[10] The respondent did however approach Ms Mupaine to bring Utase's poor performance to the attention of the LTB with a view to issuing the requisite notices under the contract to bring about its cancellation. The respondent had issued non-performance notices to Utase. In the event those instances of non-performance continuing, the next step would be the submission of an item to the LTB through Ms Mupaine for the LTB to cancel the agreement. The respondent duly provided a draft submission to this effect to Ms Mupaine. Ms Mupaine however failed to submit it to the LTB and according to the respondent exhibited a bias towards Utase. The

negative state of cemeteries in Windhoek as a consequence of Utase's non-performance meant that the respondent was, according to the dispute she reported and her evidence, prevented her from performing her duties and exercising her responsibilities for cemeteries and this in turn caused her considerable stress and frustration.

[11] The respondent eventually raised grievances against Ms Mupaine to no avail and also requested a transfer to another division. The executive management of the Municipality however declined to intervene and take the requisite corrective action. The respondent claimed in her dispute that the Municipality had made her continued employment intolerable and that it had failed to act fairly or reasonably in the circumstances. The respondent resigned her employment with effect from 31 July 2016 in a notice dated 27 June 2016 in which she stated:

'Without prejudice to any right which I may have in law I wish to record that my resignation comes as a consequence of the conditions of my employment having been made intolerable by the City of Windhoek. I have been left with no alternative but to resign as a consequence. In the circumstances I reserve all my rights in tendering my resignation.'

[12] Shortly afterwards and on 6 September 2016, the respondent caused a notice of dispute to be served on the Municipality, claiming a constructive dismissal and compensation. The matter was opposed and proceeded to arbitration which, after delays, eventually took place in early November 2018. The award was delivered on 14 December 2018.

### The arbitration process

[13] The respondent testified in support of her claim and called two other witnesses, an internal auditor in the employ of the Municipality, Ms Harases, and Ms Mupaine's predecessor as Strategic Executive, Mr George Mayumbelo to whom the respondent had reported prior to Ms Mupaine's appointment.

[14] The respondent's testimony was extensive, as was her cross examination. Much of it centred on Utase's poor and non-performance and the impact of that on her employment.

[15] In her testimony, the respondent referred to the appendix to Utase's contract which set out the latter's obligations, including being required to comply with applicable regulations relating to cemeteries which in turn set out several prohibitions relating to graves which, if not adhered to, constituted offences.

[16] The respondent gave detailed evidence as to Utase's repeated breaches of the agreement and the relevant regulations and how these negatively impacted members of the public during the sensitive time of bereavement and the numerous complaints made by undertakers concerning Utase's performance.

[17] During the course of its contract, Utase received 15 warnings and non-performance letters from the respondent. All that was required for cancellation were three such notices. The varying nature of the breaches has already been referred to.

The respondent adduced photographs in evidence which graphically served to depict and demonstrate the nature and extent of some of those breaches.

[18] As the officer responsible for the supervision of the contract, the respondent was inundated with complaints from the public. Both the respondent and one of the Municipality's witnesses, Ms Moncho, the section head for cemeteries who reported to the respondent, testified that the continual receipt of serious complaints about Utase's poor or non-performance made their positions very stressful. This was compounded in the case of the respondent because her efforts to entreat Ms Mupaine to refer the matter to the LTB were met with indifference and complete inaction and even antagonism.

[19] The respondent testified that Utase's non-performance and the resultant fall out increasingly occupied her time. She estimated that about 80 per cent of her time was taken to manage those issues.

[20] The consequences of Utase's breaches and the impact upon the public were the subject of negative publicity in a local daily newspaper. The respondent was summoned to a meeting with Ms Mupaine to discuss this. In attendance was Utase's administrator who complained about the newspaper report. After listening to that administrator, Ms Mupaine instructed the respondent to 'correct' the information in the report by stating to the media as a responsible officer that 'there was nothing wrong'. The respondent testified that she was thus required by Ms Mupaine to mislead the media and the true state of affairs.

[21] The respondent had prepared a draft submission to the LTB for Ms Mupaine to table to the LTB so that the contract could be cancelled. It set out in detail the extensive breaches on the part of Utase. As already set out, this submission did not proceed any further than Ms Mupaine's desk.

[22] As a consequence of Ms Mupaine's inaction upon the submission and instructing the respondent instead to mislead the media concerning the position, the respondent on 15 January 2015 lodged a grievance against Ms Mupaine with the Municipality's acting Chief Executive Officer (CEO) at the time. Receipt of the grievance was acknowledged by the acting CEO.

[23] The grievance complained of Ms Mupaine's refusal to channel the submission to cancel the agreement with the LTB and recounted the events which led to Ms Mupaine instructing the respondent to mislead the media. The grievance ended with the respondent stressing the sensitive nature of funerals and that she would not be able to continue to work under the conditions set out in her grievance.

[24] Despite the serious dereliction of duty and untoward conduct on the part of Ms Mupaine highlighted in her grievance, the Municipality did nothing about it except for merely acknowledging its receipt. It elicited no further response or action at all and was simply ignored. This led to the respondent lodging a second grievance on 16 September 2015 with the then acting CEO, Mr Hambuda.

[25] The second grievance stated that it had become unbearable for the respondent to go to work every day. It detailed instances on Ms Mupaine's part to bypass her and communicate with and deal directly with her subordinates, including Ms Moncho. This, the respondent explained, prevented her from performing her functions properly as her subordinates communicated directly to her superior, Ms Mupaine, concerning grave digging and issues with Utase.

[26] The respondent requested a transfer to another division in her second grievance. She explained in her evidence that she did not wish to leave the Municipality but that her position as Manager: Parks had become unbearable.

[27] The respondent testified that in the meantime Ms Mupaine had resorted to usurp her supervisory roll and pay Utase directly. This deprived the respondent of her ability (and responsibility) to control Utase's performance. It also meant that Utase could breach the agreement with impunity yet still be paid by Ms Mupaine.

[28] Despite ignoring the first grievance, the Municipality entertained the second. The outcome of the grievance process was afterwards sent to the respondent and Ms Mupaine on 14 October 2015. It did not deal with Ms Mupaine's failure to address Utase's breaches and her instructions to the respondent to mislead the media. The committee attending to the grievance instead sought to set up a structure for the respondent to manage the Utase contract, concluding that if there were breaches, they should be dealt with under the contract. It did not respond to or deal with the request for a transfer.

[29] The respondent testified that, despite this outcome and on the very day after the outcome was provided to her and Ms Mupaine, the latter on 15 October 2015 continued to undermine her by signing off a requisition for payment to Utase instead of the respondent doing so in an instance where Utase had, according to the respondent and not disturbed in cross-examination, not complied with the contract. The respondent also testified that Ms Mupaine was not available to meet her.

[30] Dissatisfied with the outcome of the second grievance process and because she felt things were not improving (by reason of the payment by Ms Mupaine to Utase on the following day) and with Ms Mupaine not being available when the respondent requested meetings with her, the respondent appealed against the outcome of the second grievance on 16 October 2015. (She was informed that an appeal against the outcome was to be lodged within seven days).

[31] In response to the appeal, Ms Mupaine addressed an objection to it to the acting CEO on 20 October 2015. In it, Ms Mupaine stated that she could 'no longer tolerate the mentality adopted by the respondent as Manager: Parks and that (the respondent's) attitude borders to blatant insubordination' (*sic*). Ms Mupaine's objection to the appeal was said to be based upon the submission of the appeal 'with all these hearsay assumption evidence,' (*sic*) and Ms Mupaine added in her objection to the acting CEO that 'if the appeal is submitted henceforth without supporting evidence, I will regard this action from your office as bias'.

[32] Shortly after this objection, the respondent was on 23 October 2015 summoned by Ms Mupaine's secretary to a meeting at the Mayor's office. It was attended by the Mayor, Ms Mupaine and Utase's administrator as well as its principal, Ms Tjizoo and two of the respondent's subordinates, the section head of sport and administration, Mr W Kazombiaze and Ms Moncho. At the meeting, Utase's administrator complained that the respondent refused to permit them the use of heavy equipment (not permitted by the contract) which, it was said, interfered with their ability to perform under the contract. Ms Mupaine then complained to the meeting about the respondent, stating that the respondent was not working with her subordinate section heads.

[33] The respondent's two subordinate section heads who attended the meeting and who communicated directly with Ms Mupaine, also proceeded to criticise the respondent's competence as a manager at the meeting.

[34] The respondent testified that this meeting was engineered by Ms Mupaine to unduly influence the Mayor who would (and did) serve on the appeal panel shortly afterwards. Ms Mupaine inexplicably did not give evidence and this statement, like other evidence concerning Ms Mupaine such as being compelled by her to provide false information to the media and Ms Mupaine's inexplicable inaction and dereliction of duty and bias in favour of Utase, remained unchallenged in evidence.

[35] The appeal was subsequently heard shortly after this meeting on 16 November 2015 by members of the municipal council's Management Committee and



even included the Mayor, despite the meeting directed at influencing him. Some other Strategic Executives also attended the appeal.

[36] The outcome of this 'appeal', was however communicated almost four months later on 8 March 2016 according to the uncontested evidence. It was to the effect that the respondent and Ms Mupaine must continue to work together and 'sort out the problem in the division' and that they should 'meet on a regular basis in order to discuss issues concerning the division'. Ms Mupaine was also directed to 'call upon staff members to respect (the respondent) as Manager: Parks and inform them what is expected of them' and 'to take action against those not adhering to this instruction' and that the respondent should not tolerate 'insubordination from junior staff members'. Ms Mupaine was also directed to submit progress reports every month to the Management Committee concerning these issues. The acting CEO was also directed to address staff members at the Parks Division 'on the behaviour of staff members who show insubordination towards the respondent as Manager: Parks'. It concluded by stating that the case was 'internally concluded' in the hope the relationship would improve.

[37] The respondent testified that Ms Mupaine thereafter failed to provide any progress report as required. Nor did Ms Mupaine call upon staff members as directed. Nor did the acting CEO ever address staff members as directed. Her evidence on this was unchallenged.

[38] The respondent's request for a transfer was not addressed by the appeals panel.

[39] Instead of her subordinates according the respondent respect after the hearing of the appeal, the respondent testified that the position actually deteriorated. This was demonstrated by an incident in February 2015 concerning Mr Kazombiaze, her subordinate section head who reported to her. He had shouted at and acted in a threatening manner to another section head in the corridor and the respondent approached him and requested him to calm down. He responded by aggressively approaching the respondent and pointed a finger at her, directed at her face. When she withdrew, he followed her aggressively and pushed a door against her, culminating in her calling the City Police. The respondent charged him internally and he was found guilty of gross insubordination and sanctioned with a serious warning and directed to undergo an anger management course. That finding was upheld in an internal appeal. The respondent testified that she felt most intimidated by his threatening conduct as he is a physically large and strong man. It emerged from his own evidence at the arbitration that he had played lock forward for the national rugby team and is two metres tall, of muscular build and with a mass of 115 kg.

[40] Shortly after this incident, Mr Kazombiaze sent six emails to the respondent calling for a meeting of the entire parks division, complaining of a 'virus' in it which he wanted to 'get rid of' (which he acknowledged in cross-examination to be a reference to the respondent). His last email request on 6 April 2016 was copied to the entire division. The respondent was shortly afterwards booked off for two weeks with manic depression.

[41] After returning to work on 24 April 2016, the respondent provided a sick leave certificate to Ms Mupaine which stated the cause as manic depression. Upon her return, the respondent discovered that the union representing employees had at Mr Kazombiaze's instance been granted a meeting of the division on 6 June 2016. It was chaired by Ms Mupaine. Mr Kazombiaze used the occasion to criticise the respondent who testified that she was 'very disturbed' by the meeting and felt intimidated as well as being let down by the Municipality for failing to assist her, despite the presence of human resource personnel at the meeting.

[42] The respondent then resigned on 27 June 2016 with effect 31 July 2016.

[43] The respondent testified at the hearing concerning her annual remuneration and that she was 40 years old when testifying. She testified that she had unsuccessfully applied for another position and had not obtained employment in the period of more than two years since reporting the dispute (up to the hearing) and said it was unlikely that she would find other work in her field of endeavour.

[44] After the respondent had submitted her second grievance in October 2015, the internal audit department of the Municipality delivered a detailed report to the acting CEO on Utase's performance and recommended that the LTB should cancel the contract.

[45] An internal auditor in the service of the Municipality, Ms Harases, was called by the respondent to give evidence concerning this report. An internal audit into Utase's performance had been instructed by the acting CEO after his office had been inundated with complaints from the public concerning the unavailability of graves. The report detailed several breaches of tender conditions by Utase. The report was dated 22 October 2015 and recommended that prompt action be taken to remedy Utase's non-performance described in the report as being 'beyond acceptable levels'.

[46] The report was forwarded to the LTB by the acting CEO with a request that Utase's contract be cancelled. Ms Mupaine chaired the LTB at the time. The respondent prepared an urgent submission to the LTB on 29 October 2015. Despite the report, the LTB did not cancel the agreement and instead resolved – only on 31 March 2016 – to let the contract with Utase run its course until May 2016.

[47] The respondent's final witness was Mr George Mayumbelo who had previously occupied Ms Mupaine's position. He testified that the respondent was a 'hands-on' employee who delivered results expected of her and was professional.

[48] The Municipality called three witnesses. The first was Ms Moncho, the section head: funerals and cremations who reported to the respondent as her immediate senior.

[49] The second witness was Mr Hambuda who was acting CEO who had instructed the internal audit department to investigate Utase's performance following complaints received from the public. After receiving the internal audit report, he confirmed that he forwarded it to the LTB with the request to cancel Utase's contract in line with the report's recommendation. He explained that the LTB was the body with the power to terminate the contract.

[50] The last witness called by the Municipality was Mr Kazombiaze, a section head who reported to the respondent. After her departure, he had succeeded to the respondent's position as Manager: Parks. He confirmed his presence at the meeting at the Mayor's office preceding the appeal hearing, although he could not explain why his presence was warranted, as grave digging did not fall within his section although the minutes reflected that he repeatedly referred to Utase's administrator with familiarity, on his first name only.

[51] Mr Kazombiaze confirmed that he had instigated the convening of the meeting of the division on 6 June 2016 to discuss what he termed 'operational issues'. He stated that he had resorted to request it through the union because the respondent had failed to convene it when he had requested her to do so. He confirmed that he had also had a 'heated exchange' with the respondent concerning a request for a vehicle. He also confirmed that he had pushed a door against the respondent and had been disciplined for that. He also admitted under cross-examination that he had on an occasion bypassed the respondent by going directly to Ms Mupaine on a specific issue.

[52] Despite her central role in the issues raised by the respondent, the Municipality failed to call Ms Mupaine as a witness. No explanation was given for this.

#### The approach of the arbitrator

[53] The arbitrator found that at the time the respondent had resigned all the issues raised by her complaints had by then become resolved, primarily because the Utase contract had come to an end and was not renewed and that Ms Mupaine, according to the arbitrator, was nearing retirement although neither counsel was able to point out any evidence in the record from which this appeared. The arbitrator concluded that the respondent failed to establish that she was constructively dismissed and found that she had resigned voluntarily. The respondent's dispute was dismissed.

#### The appeal to the Labour Court

[54] The respondent appealed against the award, filing a lengthy and discursive notice of appeal.

[55] The Municipality however also raised a preliminary point against the award, despite its success. The point concerned the heading of the award where the Municipality was merely referred to as the 'Windhoek City Council' in that heading. Although it was conceded that the Municipality was correctly cited in the dispute as the Council of the Municipality of Windhoek, the Municipality contended that the incorrect description of the Municipality in the heading of the award resulted in the award being a nullity. It was argued on behalf of the Municipality that the Labour

Court should have dismissed the appeal without considering the merits because of this error in the heading of the award.

[56] The Labour Court, per Angula DJP, pointed out that the Municipality was correctly cited in the arbitration proceedings and its legal personality had remained the same throughout the proceedings and on appeal. He held that the mere incorrect designation in the award's heading did not render it a nullity, finding that the incorrect description was a technical point devoid of any prejudice. The Court held that the matter fell to be determined on the real issues in dispute justly, speedily and efficiently in accordance with the overriding objects of the Court. The Court accordingly dismissed the Municipality's preliminary point.

[57] Turning to the merits, the Labour Court, after reference to authority, essentially held that the requirements in establishing a claim of constructive dismissal are threefold. Firstly, the employee bears the onus of establishing that, even though terminating the employment relationship, the termination came about due to the conduct of the employer. Once that is established, the enquiry would shift to determine whether the conduct of the employer 'was calculated or likely to destroy the trust relationship with the employee', causing her to resign. The third leg of the enquiry, the court held, is whether the employer was culpably responsible for the intolerable condition.

[58] After a detailed analysis of the facts and the award, the Court concluded that the only reasonable inference to be drawn from the facts was that the respondent's resignation was because her employment conditions had become intolerable. The

court found that the undisputed evidence was to the effect that Utase's poor and non-performance justified the termination of its contract with immediate effect which is what the respondent, an internal auditor and the then acting CEO had recommended. The court found that, despite this, Ms Mupaine, for 'some suspicious reasons' did not want the contract to be terminated by effectively preventing the matter properly serving before the LTB. The court referred to the fact that the respondent was held to account by members of the public for Utase's poor service delivery and was compelled to continue to manage a contract which should have been cancelled. The court found that this led to the respondent being oppressed and becoming depressed in her position and that she did not receive support from the acting CEO and executive management, even after raising grievances and appealing against the outcome of her second grievance.

[59] The court found that the respondent was not only ill-treated by Ms Mupaine but that her subordinates also undermined her. The court further referred to the conduct of those subordinates and Ms Mupaine undermining the respondent by bypassing her.

[60] The court concluded that the respondent had discharged the onus on her and established that her resignation came about due to the conduct of the Municipality and was not voluntary.

[61] As to the question whether the Municipality conducted itself in a manner calculated or likely to destroy the employment relationship, the court concluded that



the evidence established that the executive management of the Municipality conducted itself in such a manner. The court found that the respondent's intolerable working environment resulted in her diagnosis of major depression and being booked off by a clinical psychologist for some 10 days during May 2016. Her condition was known to her superior, Ms Mupaine. On her return from her sick leave, the respondent was required to attend a meeting instigated by Mr Kazombiaze and intended to undermine her and criticize her before all the employees in the division. The court found that he was supported in that regard by Ms Mupaine. The court also referred to the respondent being undermined in the meeting with the Mayor and also being required to mislead the media by Ms Mupaine.

[62] In addressing the third requirement as to whether the Municipality was culpably responsible for the intolerable conditions experienced by the respondent, the court concluded that the conduct of Ms Mupaine representing executive management culpably contributed to the intolerable conditions. The court also referred to the respondent's grievances and the appeal which arose from the second grievance and found that there was slovenly failure on the part of the executive management to address the intolerable conditions whilst being conversant with them.

[63] The court concluded that the three requisites for a constructive dismissal had been met by the respondent.

[64] Turning to the question of compensation, the court referred to the respondent's measures to mitigate her losses by applying for another position and to the fact that by the time the hearing took place, the respondent had been without work for two years. The court awarded compensation in the form of payment of her salary for two years and severance pay of a week's pay for each year of completed service as provided for in s 34 of the Labour Act 11 of 2007 (the Act).

#### Submissions of the parties in this Court

[65] Counsel for the municipality again raised the preliminary point on appeal which had been so roundly rejected by the court below. Counsel persisted with the point that the shortened reference to the Municipality as 'the City of Windhoek' in the heading of the arbitrator's award was a mistake, which was not corrected and rendered the award materially defective. He submitted that the court's finding that the mistake was a mere technicality was wrong and would even have the practical effect of causing 'anarchy in the administration of justice'.

[66] Counsel referred to a judgment of the Labour Court<sup>1</sup> which counsel understood to hold that if there was something wrong with an award, such as the name of the party having been wrongly recorded, the proper forum to correct that mistake was the arbitrator's office. This characterisation of the approach of the court oversimplifies what occurred there. A wrong party had in fact been cited and the Labour Court rightly held that it was not the right forum to address that.

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<sup>1</sup> *Ashikoto v The Lighthouse Group (Pty) Ltd* (LC 13-2015) NALCMD 16 (9 July 2020) para 24.

[67] Counsel argued that the preliminary point should have been upheld and that the decision of the court below should be set aside and the appeal succeed on this basis alone.

[68] Counsel for the Municipality also advanced argument of the merits.

[69] Counsel's written argument addressing the 17 grounds raised in the notice of appeal at times did so with reference to documents which had not been adduced in oral evidence during the proceedings but had merely formed part of a lengthy discovery bundle of some 490 pages which had been handed in as Exhibit "A" at the outset of the arbitration proceedings. The documents relied upon by counsel which had not been adduced in evidence are to be disregarded. Even if a bundle of documents is handed in, as had occurred at the arbitration, documents sought to be adduced in evidence would still need to be proved. A large portion of exhibit 'A' did not constitute evidence and thus could not be relied upon.

[70] The reference to documents which were adduced was however selective and in a fragmented manner and at times were referred to in support of positions not even raised in cross-examination with the respondent and with little reference to the oral evidence given at the arbitration. These contentions were also focused on findings of the court below in an isolated manner without an appreciation of the evidence viewed as a whole. This was a justifiable criticism which the court below directed at the approach of the arbitrator.

[71] Included in argument advanced by counsel for the Municipality was that the court *a quo* misdirected itself or erred in finding that ‘the cause of dispute or disharmony between the respondent and appellant did not centre around the Utase contract and that at the time of her resignation all issues were resolved’ (sic). The court did not make a finding to this effect. What the court stated was that it did not agree with the arbitrator’s finding that all the respondent’s issues were resolved because the Utase contract was coming to an end and the (unsupported) reference by the arbitrator that Ms Mupaine was going into retirement in the near future. The court below in fact explained why that finding was incorrect.

[72] In his oral argument counsel contended that all issues relating to the Utase contract were resolved by the time the respondent resigned, as found by the arbitrator, because the contract with Utase had by then come to an end on 6 May 2016 and that the respondent had not established intolerable conditions when she resigned more than a month after that.

[73] During the course of oral argument, counsel for the Municipality conceded that the respondent would have made out a case for constructive dismissal as at April 2016 but that her failure to resign at that stage meant that she had not discharged the onus upon her because her complaints were addressed by the Management Committee and the Utase contract came to an end after that.

[74] On the other hand, counsel for the respondent essentially supported the judgment of the Labour Court, both in respect of the approach to the facts and the

legal principles governing constructive dismissal and their application to the respondent's position.

[75] Counsel for the respondent also pointed out that Ms Mupaine was a material witness to the Municipality's case. Yet she did not testify. It had nowhere been stated that she was not available to testify. Counsel also submitted that the then Mayor was also a material witness, given the manner in which he involved himself in the appeal against the outcome of the second grievance filed by the respondent shortly before it was heard and then served upon the panel determining the outcome of that appeal. Counsel submitted that an adverse inference should be drawn from the failure to call these witnesses.

[76] Counsel argued that the respondent had exhausted all internal remedies available to her prior to resigning. He also contended that the respondent had established her entitlement to the compensation awarded to her by the court *a quo*.

#### The state of the record

[77] Before turning to the issues raised by this appeal, the parlous state of the appeal record needs to be addressed.

[78] On 20 September 2023, the registrar of this Court directed a letter to the Municipality's legal practitioner concerning the state of the record. It was pointed out:

'As you would be aware rule 11(1)(h) explicitly requires that 'all references in a record to have page numbers of exhibits must be transposed to reflect the page numbers of such exhibits in the appeal record'.

Exhibit A which spans some 491 pages is referred to in evidence with reference to page numbers which, despite the very clear terms of rule 11(1)(h) are not reflected in the record. It is accordingly not possible for members of the court to locate the reference of those portions of exhibit A referred to in evidence in the record. The record must be rectified forthwith. Kindly attend to replacing pages 752 to 1243 forming Exhibit A so that those pages reflect the numbering referred to in evidence. This exercise should be completed no later than 2 October 2023.'

[79] Despite the clear terms of rule 11(1)(h) and what was explicitly directed in the letter, the position was not rectified on 2 October 2023 or at all before the hearing of this appeal on 24 October 2023. The Municipality's practitioner instead merely filed an affidavit seeking to explain the failure to comply with rule 11(1)(h) and the clear directive of this Court. In the affidavit, the practitioner acknowledges that the documents forming exhibit 'A' were not in the same sequence as filed in the record of the arbitration proceedings. It was stated that the reference to documents in counsel's heads of argument would reflect the current numbering in the appeal record. It was said that this amounted to a reasonable explanation for the failure to comply with rule 11(1)(h). It is however very far from that.

[80] The respondent's legal practitioner filed an affidavit in response, demonstrating that, apart from being a far less than reasonable explanation, the Municipality's practitioner's affidavit contained factual inaccuracies, amounting to an inexcusable failure to properly attend to the filing of a record in compliance with the rules. The Municipality's practitioner filed a yet further affidavit in response on the eve of the hearing. But it failed to address the fundamental failure to rectify the deficiencies squarely raised more than a month before the hearing.

[81] The evidence which served before the arbitrator includes a vast number of references to documents forming part of exhibit 'A' comprising its 491 pages with reference to the page numbers in that bundle. But those page numbers do not correspond to the numbering on the documents in the appeal record. In order to prevent this highly undesirable state of affairs, rule 11(1)(h) was promulgated. It requires in peremptory terms that 'all references in the record to page numbers of exhibits must be transposed to reflect the page numbers in the appeal record'.

[82] This important provision was simply disregarded. Even after the non-compliance was pointed out by the registrar some five weeks before the hearing, the appellant's legal practitioner's dismally failed to rectify the position. The explanation tendered for this failure itself fails to address why that portion of the record could not be renumbered or why an index to exhibit 'A' with its current numbering could not have been provided as is required by rule 4(b). This latter possibility could have alleviated the lamentable state of the record.

[83] Rule 4(b) provides:

'A copy of a record must –

- (a) . . .
- (b) Contain a correct and complete index of the evidence, all documents and evidence in the case, together with a brief statement in the index indicating the nature of the exhibits.'

[84] When pressed at the hearing concerning the inadequacy of the explanation provided, counsel for the Municipality appeared to consider there was little wrong with the record. His repeated refrain was that the respondent had not been prejudiced and had not raised the issue. This approach fails to appreciate the nature and purpose of the rules directed at securing a proper appeal record. A court of appeal is called upon to determine a matter with reference to an appeal record. That record is prepared for the court in the first instance, although of course also for the protagonists. The respondent's counsel may not have raised the issue because he represented the respondent in the arbitration and appeared to be well conversant with all the documents in question and had not been prejudiced in preparing his argument.

[85] Members of the court are of course not in the same position and do not have that advantage. Members of the court were instead required repeatedly to rummage through 491 pages of Exhibit 'A' to search for documents referred to in evidence, a very time consuming exercise which wasted a great deal of judicial time.

[86] The frequent consequence of this bungling ineptitude, compounded by the comprehensive failure to address the problem in the more than adequate time, would be striking the appeal from the roll with an appropriately crafted punitive order as to costs, including where appropriate, an order directing that costs be paid by the legal practitioner. In this instance, members of the court went to great length to search for and locate the relevant documents referred to and did so at considerable inconvenience in order to bring this appeal to finality rather than having it struck from the roll and being put off to a subsequent date and wasting yet more judicial time.



This wastage of scarce judicial resources would be compounded if a different panel were to be constituted to hear the appeal, if reinstated.

[87] The conduct of the Municipality's practitioner in failing to comply with rule 11(1)(h) is deplorable and warrants severe censure and will attract an adverse cost order as is reflected in the order of this Court. The failure to comply with rules 11(1)(h) and 11(4)(b) was compounded by a feeble and unacceptable excuse for failing to rectify the position after it was pointed out, despite the adequate opportunity provided to do so.

[88] The Municipality's practitioner's brazen non-compliance of the rules was not limited to the appalling state of the record. Counsel's heads were 61 pages long, thus exceeding the 40 page limit provided for in rule 17(4)(k), in the absence of a direction by a judge permitting him to exceed that length. Counsel acknowledged that no such approach was made. The written argument was also replete with lengthy quotations from both the record and especially from authorities which is expressly proscribed by rule 7(d). Nor were any reasons provided for the citing of more than one authority for the same propositions of law as required in rule 7(c).

[89] This Court has time and again emphasised that practitioners who take on work in this Court have a duty to acquaint themselves with the rules of this Court. This Court has also repeatedly stressed that the work of this Court is adversely affected by the abject disregard of the rules by practitioners in the preparation of appeal records. Repeated warnings have been made that adverse punitive costs orders will be made as a consequence. Unprofessional conduct of this nature will not

be countenanced and the range of orders which may be given include a practitioner being precluded from charging fees for preparing and/or perusing a defective record,<sup>2</sup> as is reflected in this Court's order. In the future, similar orders may also be considered in respect of written argument which comprehensively fail to comply with rule 17, as had occurred in this instance.

#### The Municipality's preliminary point

[90] This point can be briefly disposed of.

[91] The Municipality had been properly cited in the proceedings as is reflected in the record and acknowledged by its counsel. The abbreviated reference to it in the heading of the award made by the arbitrator did not change that. This was a minor error, if at all, and did not even require the parties formally to seek its correction by the arbitrator, as was argued on behalf of the Municipality. Either party taking steps to address the award – either by enforcement (which would not have arisen) or by appeal would merely provide the correct reference to the Municipality when doing so. That is what occurred in this instance. Quite how this minor and inconsequential error would result in the entire proceedings being a nullity and cause 'anarchy' in the courts, as extravagantly contended by counsel for Municipality, was not explained. Nor could it be.

[92] The authority relied upon by the Municipality does not assist it. The *Ashikoto* matter concerned the wrong legal personality cited which the Labour Court found was to be addressed by the arbitrator, if there were to be an attempt to rectify that.

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<sup>2</sup> *WP Transport (Pty) Ltd v G4S Namibia (Pty) Ltd & another and a similar case* 2023 (1) NR 9 (SC) para 19.

*Essence Lading*<sup>3</sup> concerned a matter where the plaintiff cited the wrong defendant and sought to substitute that party by way of a notice of amendment instead of by properly substituting that party with another and where that latter party was not even served with the notice to amend. Both matters do not remotely find application. The Municipality had been correctly cited and was properly before the arbitrator.

[93] The minor error did not of course render the entire award a nullity. As was correctly found by the Labour Court, the point was devoid of prejudice. To this can be added that it is also devoid of any substance. It was rightly brushed aside. The less said on such inconsequential and maladroit point taking, the better, except to deprecate the waste of valuable court time taken to address it.

Did the respondent establish a constructive dismissal?

[94] In examining the applicable legal framework, the starting point is s 33 of the Act.

[95] Section 33 is contained in Part F of Chapter 3 of the Act which concerns basic conditions of employment. The title of Part F is 'Termination of employment'. Section 33 in turn is entitled 'Unfair dismissal'. The relevant portion provides:

- (1) An employer must not, whether notice is given or not dismiss an employee –
- (a) Without a valid and fair reason.'

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<sup>3</sup> *Essence Lading CC v Infiniti Insurance Ltd Mediterranean Shipping Company (Pty) Ltd* [2023] ZAGPJHC 676 (9 June 2023).

[96] Also relevant for present purposes is s 33(4):

‘(4) In any proceedings concerning a dismissal –

(a) if the employee establishes the existence of the dismissal;

(b) it is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.’

[97] In instances of constructive dismissal, an employee terminates the contract of service by resigning. In this instance, the respondent resigned but stated that this was a consequence of her conditions of employment being made intolerable by the Municipality.

[98] As has been repeatedly held by the Labour Court, the form in which a termination of services was clad would not necessarily deprive an employee of an unfair dismissal cause of action under s 33.<sup>4</sup>

[99] Dismissal is not defined in the Act. Under the common law of contract, which originally governed much of employment law,<sup>5</sup> constructive dismissal would arise where the termination of the agreement arose from a breach of an implied term where employers, ‘without reasonable or proper cause, conducted themselves in a

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<sup>4</sup> *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) para 6 followed by the Labour Court in *Kavekatora v Transnamib Holdings Ltd & another* 2012 (2) NR 443 (LC), *Kasuto v Namibia Wildlife Resort* (LCA 23-2013) [2023] NALCMD 37 (6 November 2013) para 28, *Banda v Namibia Training Authority* (LC 170/2015) [2018] NALCMD 15 (6 July 2018).

<sup>5</sup> Outside of legislation governing basic conditions of employment prior to the Labour Court Act 6 of 1992 replaced by 11 of 2007.

manner calculated or likely or destroy or seriously damage the relationship of confidence and trust between employer and employee'.<sup>6</sup>

[100] In the absence of a definition of dismissal in the Act, the Labour Court has both under the previous Labour Act<sup>7</sup> and the current Act held that a constructive dismissal arises where an employee terminates the relationship due to the unjustified conduct of an employer driving an employee to leave.<sup>8</sup>

[101] This development was thus lucidly summarised by Cameron JA in *Murray*:

'In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.'<sup>9</sup>

[102] Following the adoption of the Act (and its predecessor), a constructive dismissal fell within the scope and concept of an unfair dismissal in s 33 of the Act and its predecessor.<sup>10</sup> The structure of s 33 contemplates that, in instances where it is in dispute that there was a dismissal, s 33(4) provides that the *onus* is upon an

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<sup>6</sup> *Albany Bakeries Ltd v Van Wyk & others* (2005) 26 ILJ 2147 (LAC) paras 18 – 21 and the authorities collected there.

<sup>7</sup> Act 6 of 1992.

<sup>8</sup> *Cymot v McLoud* 2002 NR 391 (LC), *Kavekotora, Kasuto, Banda*.

<sup>9</sup> Para 8.

<sup>10</sup> *Cymot* read with section 45 of Act 6 of 1992.

employee to establish the existence of a dismissal, namely that the resignation was not a voluntary act and was not intended to terminate the employment relationship.<sup>11</sup>

[103] Once that is established, then the onus shifts under s 33(4)(b). It is then presumed, unless the contrary is proved by an employer, that the dismissal was unfair.

[104] Once an employee establishes that the resignation was not voluntary, the further enquiry was succinctly explained in *Murray*:

‘Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer’s conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.’<sup>12</sup>

[105] It was also stressed in *Murray*<sup>13</sup> that the mere fact of an employee’s resignation because work has become intolerable does not by itself make for constructive dismissal. That court held that the critical circumstances ‘must have been of the employer’s making’ and that the employer is ‘culpably responsible in some way for the intolerable conditions’.<sup>14</sup>

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<sup>11</sup> *Murray* para 12. Followed by the Labour Court in *Kavekatora v Transnamib Holdings and Kasuto v Namibia Wildlife Resort* para 28.

<sup>12</sup> Para 12.

<sup>13</sup> Para 13.

<sup>14</sup> Para 13.

[106] Similar sentiments were expressed in *Jordaan*.<sup>15</sup> Essentially, the court in *Jordaan* cautioned that constructive dismissal is not for the asking and stressed that ‘the inevitable levels of irritation, frustration and tension which occur in employment, even over an extended period’, do not suffice to justify constructive dismissal. An employee must show that the employment relationship has become so intolerable (and caused by the employer) that no reasonable option save for termination is available to her.

[107] To sum up, the provisions of s 33 in my view contemplate a two-stage enquiry. Firstly, an employee who resigns and claims a constructive dismissal would need to establish that the employer effectively dismissed her by making her continued employment intolerable. This would entail showing that the conduct of the employer and its cumulative impact, viewed objectively was such that the employee could not be expected to put up with it. Secondly, once a dismissal is thus established, the court will then evaluate whether the dismissal was unfair, with the onus resting upon the employer as provided for in s 33(4)(b). It is to be stressed that the two stages are not independent stages to be viewed in isolation. Facts which are relevant for the first may also be relevant for the second stage.<sup>16</sup>

#### Application of principles

[108] Counsel for the Municipality rightly conceded that the respondent had made out a case for constructive dismissal if she were to have resigned in April 2016, but argued that her failure to resign then and only two months later deprived her of her

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<sup>15</sup> *Jordaan v CCMA & others* (2010) 31 ILJ 2331 (LAC).

<sup>16</sup> See *Sanlam Life Insurance Limited v Mogomatsi & others* CA 12-2022 [2023] ZALAC 15 (17 August 2023), *Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake NO & others* (1998) 19 ILJ 1240 at 1250.

cause of action, particularly because the contract with Utase had by then come to an end.

[109] This concession is correctly made because the evidence up to April 2016 viewed holistically, established a course of conduct on the part of the Municipality and its executive management which was calculated and likely destroy or seriously damage the relationship of confidence and trust with the respondent.

[110] Given this concession concerning the events prior to April 2016, it is not necessary to canvass them in any detail. But reference to them is necessary in order to assess the events which followed April 2016 in their context including the cumulative impact of events before April 2016.

[111] There is thus brief reference to the key events pertinent to the deterioration of conditions in the respondent's employment relationship prior to April 2016. The central thread running through most of the events was the grave digging contract awarded to Utase by the LTB. As Director: Parks, the respondent was responsible for its oversight and to ensure that the regulations relating to cemeteries and the contractual provisions were complied with by Utase.

[112] From the very outset, the uncontroverted evidence was to the effect that Utase consistently performed poorly and in conflict with its contractual obligations, a trend which persisted throughout its duration. As the officer responsible for the oversight of the Utase contract, the respondent repeatedly raised its poor and non-performance with it and was required to resort to warning and non-performance



letters. The first was issued in its first month. They followed at regular intervals, culminating in 15 such letters being issued. Only three such letters were contractually required for cancellation. The wide ranging nature of the breaches have already been set out.

[113] The respondent repeatedly raised Utase's breaches with her immediate superior, Ms Mupaine. Despite doing so, Ms Mupaine consistently sided with the defaulting Utase instead of backing her subordinate whose duty it was to supervise the contract. When media reports highlighted the poor performance of Utase, Ms Mupaine's action was to compel the respondent to falsely deny Utase's poor performance, even threatening to cancel the respondent's study leave if the latter did not do so.

[114] When the respondent prepared a submission for Ms Mupaine to put to the LTB to cancel the contract, the latter inexplicably declined to act on it.

[115] The picture which emerged from the respondent's uncontroverted evidence in this regard is at best for Ms Mupaine a gross dereliction of duty. At worst, it raises questions concerning an untoward favouritism towards Utase whose contract she had championed and then turned a blind eye to its egregious breaches and, even when they were exposed, then to cover up for them. The Municipality chose not to call her as a witness, even in the face of such damning uncontroverted evidence against her. An adverse inference is to be drawn by reason of this failure. In the circumstances, Angula DJP was justified in terming Ms Mupaine's conduct in this regard as 'suspicious'.

[116] The uncontroverted evidence was also that the respondent bore the brunt of public ire at Utase's repeated breaches and poor performance.

[117] When considered in the context, her repeated attempts to address those breaches which were consistently thwarted by Ms Mupaine, the respondent's frustration in seeking to discharge her duties mounted.

[118] After being required to mislead the media by Ms Mupaine, the respondent was moved to file her first grievance against her with the acting CEO in January 2015. This grievance was however ignored – apart from a mere acknowledgement of its receipt.

[119] Utase's breaches continued unabated and Ms Mupaine took to bypassing the respondent and communicating directly with the respondent's subordinates, thus undermining her position. Her bypassing of the respondent included Ms Mupaine authorising payment of Utase's accounts which was the respondent's function which was to be done only after being satisfied as to Utase's performance.

[120] This continuing conduct and the failure to act upon the first grievance resulted in the respondent lodging a second grievance against Ms Mupaine with the then acting CEO on 16 September 2015. In this second grievance, the respondent stated that it had become unbearable to come to work. It was stated that Ms Mupaine's

bypassing of her, prevented her from being able to exercise her employment duties and responsibilities.

[121] The respondent sought a transfer in her second grievance.

[122] The outcome of this grievance was provided to the respondent and Ms Mupaine on 14 October 2015. The outcome sought to provide a structure to manage the Utase contract which the respondent was enjoined to do in accordance with the terms of the agreement and if there were breaches, they were to be addressed in terms of the contract. Her request for a transfer was not dealt with.

[123] On the day after the outcome was made known, Ms Mupaine on 15 October 2015 signed off a payment requisition for Utase provided by the respondent's subordinate, thus flagrantly persisting in bypassing the respondent to the detriment of the Municipality's position under the contract and violating the terms of the outcome of the grievance. To compound matters, Utase's work had again not been performed properly, disentitling it to payment. This sparked the respondent to appeal against the outcome the next day, on 16 October 2015. Her appeal elicited a vitriolic response from Ms Mupaine on 20 October 2015, objecting to the appeal and stating that she could 'no longer tolerate the mentality of the respondent' and that the respondent's attitude 'is bordering on blatant insubordination'.

[124] Ms Mupaine followed up on her angry objection of 20 October 2015 by summoning the respondent without forewarning to a meeting at the Mayor's office a few days later on 23 October 2015 to face complaints from Utase's principal Ms Tjizoo and her administrator in the presence of the respondent's subordinates Ms Moncho and Mr Kazombiaze. The latter had nothing to do with grave digging, yet at the meeting was on first name terms with Utase's administrator. Ms Mupaine and the two subordinates used that opportunity to criticise the respondent before the Mayor. The respondent's fear that the meeting was engineered by Ms Mupaine to improperly influence the Mayor who sat on the appeal soon afterwards was well founded and was uncontradicted by Ms Mupaine and the Mayor.

[125] The hearing of the appeal followed shortly afterwards on 16 November 2015. It was heard by the Management Committee and the Mayor who inexplicably failed to recuse himself from that appeal.

[126] The outcome of this seriously flawed appeal process was only provided to the respondent and Ms Mupaine on 8 March 2016. The attempt by counsel for the Municipality to suggest that the panel disclosed the outcome to the parties on the same day – with reference to subsequently prepared minutes (themselves undated) and not dealt with in evidence is to be roundly rejected as it is in direct conflict with the uncontested oral evidence at the arbitration, supported by the email of 8 March 2016 embodying the terms of the outcome.

[127] That imperfect process was compounded by the failure to inform the parties of the outcome within a reasonable time.

[128] The outcome itself perpetuated the untenable position for the respondent, although exhorting her and Ms Mupaine to work together. Ms Mupaine was required to call upon staff members to respect the respondent and also directed that she should meet regularly with the respondent. Ms Mupaine was also directed to take action against those not adhering to her instruction to this effect and to submit monthly progress reports. The acting CEO was tasked to address staff members in the Parks division concerning their insubordination towards the respondent.

[129] In the month preceding the appeal outcome, Mr Kazombiaze behaved in a grossly insubordinate and threatening manner to the respondent in February 2016. This resulted in him being disciplined for insubordination.

[130] It would appear that Mr Kazombiaze then called for a staff meeting of the division to vent his anger against the respondent, plainly actuated by vindictiveness. He conceded that his reference to a 'virus' concerned the respondent in an email calling for the meeting and circulated to all staff members in the division. The last of his email requests for a meeting was made on 6 April 2016.

[131] The persistent and ever worsening approach of Ms Mupaine to the respondent is graphically represented in these events preceding April 2016. Not only did Ms Mupaine directly thwart and obstruct the respondent's repeated efforts to do her duty to address Utase's persistent non-performance, but Ms Mupaine became increasingly hostile to the respondent's actions by deliberately undermining her

position by bypassing her and compelling her to make false statements to the media about the true position concerning Utase's serial non-performance.

[132] When the respondent sought to address Ms Mupaine's palpably untoward conduct, she was again thwarted by a comprehensive failure on the part of executive management to deal with that. Her first grievance was inexplicably ignored. That alone represents a failure of executive management. After the passage of a further nine months, the respondent lodged another grievance. The panel dealing with it glossed over the real issues but at least insisted that Utase's contract should be enforced by the Municipality but failed to address Ms Mupaine's conduct. But Ms Mupaine however defiantly acted against that outcome on the day after it was announced, persisting with bypassing the respondent and authorising payment to Utase for another instance of defective work.

[133] The respondent did not give up on the Municipality's internal processes, despite the persistent improper conduct perpetuated by Ms Mupaine and appealed against the outcome. Ms Mupaine's response against the respondent was swift and consistent with her prior conduct – an angry threatening objection addressed to the acting CEO and engineering a meeting to discredit the respondent before the Mayor who would be and did form part of the appeal panel. Ms Mupaine was aided and abetted in her campaign against the respondent by the latter's subordinates, particularly Mr Kazombiaze. The court below justifiably characterised their conduct as 'ganging up' against the respondent. It may also be termed a form of bullying.

[134] Clearly the cumulative impact of Ms Mupaine's conduct, supported by subordinates and condoned by the executive management, given their failure to address it, amounted to the respondent experiencing intolerable working conditions. The Municipality's counsel correctly conceded that a case for constructive dismissal had been made out as of April 2016.

#### Events after April 2016

[135] What transpired after April 2016 until the respondent's resignation in June 2016?

[136] After the spate of email requests by Mr Kazombiaze for a meeting of the division, the respondent was booked off in April 2016 with manic depression. When she returned to work on 24 April 2016, the respondent was met with the news that Mr Kazombiaze had succeeded through the union in instigating a meeting scheduled for 6 June 2016. It was chaired by Ms Mupaine who was aware of the respondent's condition of depression. Ms Mupaine, aware that Mr Kazombiaze had been disciplined for insubordination of the respondent, permitted and chaired the meeting where the respondent 'in her state of depression' was subjected to vindictive criticism by Mr Kazombiaze before a meeting of the division and some union officials.

[137] The respondent's uncontested evidence was further that Ms Mupaine had not only failed to call upon staff members to respect the respondent as required by the appeal outcome, but had knowingly permitted and condoned this further humiliating public attack upon the respondent by a subordinate. Nor had Ms Mupaine been available to meet the respondent, as also directed. Nor had the acting CEO addressed staff members in the division, as directed.

[138] These further events are to be considered in the context of the cumulative impact of the prior events which preceded April 2016.

[139] The prior trend of Ms Mupaine's unacceptable conduct thus continued unabated after April 2016 and the comprehensive failure of the executive management to rein her in and address her conduct likewise continued. It follows that the further events leading to and culminating in the meeting of 6 June 2016 perpetuated what had preceded April 2016 which, as was rightly conceded amounted to intolerable conditions giving rise to establishing a constructive dismissal. Importantly, the respondent had exhausted internal remedies available to her to address these intolerable conditions by formally lodging grievances, pursuing those procedures to finality by appealing against the outcome of the grievance which received attention.

[140] The continuation of that conduct coupled with the culpable inaction on the part of executive management which was fully conversant of the conduct, meant that the respondent established that she had been constructively dismissed and the conduct



against her amounted to unfairness on the part of the Municipality represented by its executive management, including Ms Mupaine and those who failed to address her culpably unfair conduct towards the respondent.

### Compensation

[141] Turning to the compensation of two year's pay awarded to the respondent by the court below, counsel for the Municipality argued that it was excessive and unfounded and without evidence to support it.

[142] The court found that the respondent had taken measures to mitigate her loss by trying to find other employment without success. The court found that it would be fair and equitable to award the respondent her remuneration as from that of her constructive dismissal until the date the arbitrator dismissed her claim and proceeded to award her 24 months' pay and severance pay for one week for each completed year of service.

[143] It is well settled that a complainant in a dismissal dispute bears the burden of establishing her losses and an entitlement to compensation under s 86(15)(e) of the Act.<sup>17</sup> It has also been held that an arbitrator may award an amount of compensation which is fair and reasonable, regard being had to all the circumstances of a particular case.<sup>18</sup> The Labour Court has also held that in determining what is fair, reasonable and equitable, the extent to which the employee's conduct contributed to the

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<sup>17</sup> *Namdeb Diamond Corporation (Pty) Ltd v Coetzee* 2022 (2) NR 578 (SC) para 157; *Pinks Family Outfitters (Pty) Ltd t/a Woolworths v Hendriks* 2010 (2) NR 616 (LC) para 8, see also *Chevron Engineering (Pty) Ltd v Nkambule & others* 2004 (3) SA 495 (SCA) para 31-32.

<sup>18</sup> *Management Science for Health v Kandungure & another* (LCA 8-2012) [2012] NALC 39 (15 November 2012).

dismissal is a factor to be taken into account and that an award of compensation must not be calculated or aimed at punishing an employer or enriching a claimant.<sup>19</sup> It is also to be noted, as was stressed in *Janse van Rensburg*,<sup>20</sup> that arbitration proceedings under the Act are designed to be less formal and less onerous than civil proceedings.

[144] It is also the respondent's duty to show that she attempted to mitigate her damages, given her duty to do so.<sup>21</sup> Although unfair dismissals take on various forms, in determining compensation the primary enquiry would be to determine what loss has been sustained which must be causally connected to the unfair dismissal, taking into account the duty to mitigate that loss so as to ensure that the award is reasonable to both the employer and the employee.<sup>22</sup>

[145] The respondent's testimony on compensation was surprisingly scant. There was her unchallenged evidence of only one employment application made by her in the period of two years from her constructive dismissal to the arbitration hearing. The respondent's testimony to the effect that it was unlikely for her to find employment comparable in responsibilities and compensation with her position held with the Municipality was also not challenged. One would have expected more evidence about the state of the employment market in her field of endeavour and some assessment of how long it would take for a person in her position to be rehabilitated in the employment market and at what level in terms of responsibility and

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<sup>19</sup> Para 94 with reference to s 86(7) of the Act, *Novanam Ltd v Rinquest* 2015 (2) NR 447 (LC) para 23.

<sup>20</sup> *Janse van Rensburg v Wilderness Air Namibia (Pty) Ltd* 2016 (2) NR 554 (SC) para 93.

<sup>21</sup> *Rossam v Kraatz Welding Engineering (Pty) Ltd* 1998 NR 90 (LC) at 95.

<sup>22</sup> *Chevron Engineering* para 31 approving *Camdons Realty (Pty) Ltd & another v Hart* (1993) 14 ILJ 1008 (LAC) at 1018-1019.

remuneration. The only challenge to her evidence on compensation was being asked if the respondent was involved at all in her husband's construction business. When this was answered in the negative, the issue was not taken any further.

[146] Did the Labour Court misdirect itself in the exercise of its discretion in awarding two year's pay? In view of the respondent's unchallenged evidence about being unemployed and having difficulty in securing equivalent or other employment, I think not. It was open to the Municipality to take up those issues in cross-examination as well as the state of the employment market. It was represented by an in-house legal practitioner in those proceedings and those aspects of the respondent's evidence were not contested or put in issue at all.

[147] Counsel for the Municipality contended that the award was excessive and unreasonable because the respondent had contributed to the circumstances leading to the termination of her services. This contention has no merit as it has no basis in fact.

[148] Although the award of compensation is on the outer limits of what would be granted in dismissal cases, I am not persuaded that the Labour Court exercised its discretion improperly or upon a wrong principle in determining the quantum of that award and I am unpersuaded that it is to be interfered with. The court made the best use it could of the sparse evidence before it on compensation in making its assessment of what is fair and reasonable in the circumstances.<sup>23</sup> The award itself

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<sup>23</sup> *Namdeb* para 158 approving of *Jo-Mari Interiors v Mouton NLLP* 2004 (4) 53 (NLP) at 57 following *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969E-G.

contained in the court order contains an error in referring to the value of the respondent's annual salary package x 24 months instead of ordering 24 month's pay with reference to her annual salary, as was made plain in that court's judgment. That error is corrected in the order made below.

[149] The order directed at the payment of severance pay was not questioned in the event of the appeal on the merits failing and correctly so. It follows from the wording of s 35(1)(a) of the Act in the event of an unfair dismissal.

### Conclusion

[150] It follows that the appeal is dismissed with costs which include a further order made in respect of the record. The order of the Labour Court is furthermore to be rectified in the respect set out in this order.

### Order

[151] The following order is made:

- (a) The appeal is dismissed with costs.

(b) The appellant's legal practitioner is precluded from recovering any costs from his client in respect of the preparation and perusal of the appeal record.

(c) Paragraph 2 of the order of the Labour Court is corrected to state:

'The first respondent is to pay the appellant 24 months' remuneration less statutory deductions calculated with reference to her annual remuneration of N\$932 280.'

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**SMUTS JA**

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**MAINGA JA**

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**UEITELE AJA**

APPEARANCES

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RESPONDENT:

S Vlieghe

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