

**A COMPARATIVE ANALYSIS OF CONSTRUCTIVE DISMISSAL IN  
SOUTH AFRICA AND WITHIN OTHER INTERNATIONAL  
JURISDICTIONS**

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As supervisor I hereby approve this dissertation for submission

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Ms Nicci Whitear Nel

30 October 2018

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## **ABSTRACT**

This paper focuses on the legal principles of constructive dismissal within South Africa, which is compared to foreign jurisdictions. Generally, constructive dismissal in South Africa is when an employer acts in such a manner that finally leads to the employee termination of the employment relationship and or contract. The resignation by the employee must be directly caused by the actions of the employer that irreparably frustrated the relationship and made it intolerable for the employee to remain in the service of the employer.

The law of constructive dismissal requires a balance between the competing interests of employees' and employers'. The employee is the person that makes the claim that his working conditions have become intolerable and determines whether to resign and seek a claim for constructive dismissal. Although employees' have the right of recourse to raise a claim for constructive dismissal against an employer, the employer can take precautions to limit the risk of an employee from making such claim.

## **LIST OF ABBREVIATIONS**

All SA	All South African Law Reports.
AILR	Australian Industrial Law Review.
BCLR	Butterworths Constitutional Law Reports.
CanLII	Canadian Legal Information Institute.
CCC	Canadian Criminal Cases.
DLR	Dominion Law Reports.
ER	English Reports.
Ex CR	Canadian Exchequer Court Reports.
EWCA civ	England and Wales Court of Appeal (Civil Division).
FJC	Fraser's Court of Session Cases, 5th Series.
FWCFB	Fair Workman Commission - Full Bench (Australia).
JOL	Judgments Online.
L Ed	United States Supreme Court Reports, Lawyers' Edition.
Man R	Manitoba Reports.
NR	Namibia Reports.
OJ	Official Journal of the European Communities.
OR	Oregon Reports.
SALR	South African Law Reports.
SALJ	South African Law Journal.
Stell LR	Stellenbosch Law Review.
WLR	Western Law Reporter.
WWR	Western Weekly Reports.
IR	Industrial Report (Australia).

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## CHAPTER ONE

### 1. INTRODUCTION.

#### *1.1 Historical Background.*

The notion of constructive dismissal had been initially introduced into South Africa's legislation from England legal jurisprudence. This concept was first introduced 'in 1986 in *Small & Others v Noella Creations (Pty) Ltd.*'<sup>1</sup> The facts were that the employees terminated their employ as they were unwilling to work under the employment rule that stock not accounted would have to be paid from their own account. "Having resigned, the employees were reinstated under section 43 of the Labour Relation Act"<sup>2</sup> and the notion of constructive dismissal formed a part of unfair dismissal law.

When the Labour Courts introduced the notion of constructive dismissal, they applied an English approach. The English approach inferred a general term into the employment contract that the employer would not without any reasonable cause act in a manner that would seriously harm the relationship with an employee. This meant that an infringement of the working conditions would constitute a contractual breach which would support an employee's claim for constructive dismissal and compensation.<sup>3</sup>

In South Africa the concept of constructive dismissal was further developed by Cameron JA in *Murray v Minister of Defence*<sup>4</sup> as follows,

*"The term used in English law 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well established in our law. 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."*<sup>5</sup>

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<sup>1</sup>(1986) 7 ILJ 614 (IC).

<sup>2</sup>The Labour Relation Act 66 Act of 1956.

<sup>3</sup>*Malik v Bank of Credit and Commerce International SA* [1998] AC 20 (HL) para 58 – 61.

<sup>4</sup> (2009) 3 SA 130 (SCA) at para 8.

<sup>5</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) at para 8.



In weighing the respective parties interest, it is important to ensure that “a balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity.”<sup>6</sup> It is therefore important that the practices regarding unfair labour dismissal cases are mediated in line with the rights recognized under South African Constitution and its Bill of Rights.<sup>7</sup> In South Africa, constructive dismissal is a form of unfair dismissal which is recognized and defined in terms of both the Labour Relations Act<sup>8</sup> and common law.<sup>9</sup> South Africa’s employment law should be essentially based on the elements of fairness, however the “common law neither recognizes nor upholds the notion of fairness and equality in the work place.”<sup>10</sup> In most cases the employee alleges that he was dismissed unfairly and needs to show that the conduct of his employer had been the sole cause that led to his resignation. When an employee resigns because “the situation has become so unbearable that the employee cannot work”,<sup>11</sup> this is constructive dismissal.

## ***1.2 The Problem Stated.***

“At different stages in history legislation has played a major role in regulating the employment relationship.”<sup>12</sup> On some occasion when the working relationship is administered extensively by legislation, it has been expressed as a status relationship and not that of a contractual relationship. This point was shown by Justice Bristow in *Tomlinson v Dick Evans ‘U’ Drive Ltd.*<sup>13</sup>

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<sup>6</sup>Vettori S ‘The role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals’, (2012) 15 *PELJ* 42.

<sup>7</sup>The Constitution of the Republic of South Africa; Chapter 2 : Bill of Rights; s 10.

<sup>8</sup> The Labour Relations Act 66 of 1956.

<sup>9</sup>*Murray v Minister of Defence* (2009) 3 SA 130 (SCA).

<sup>10</sup>Grogan J *Dismissal, Discrimination and Unfair Labour practices* (2007) 36.

<sup>11</sup>Bedix S, *Industrial Relations in South Africa* 3 ed (2010) 108.

<sup>12</sup>Vettori S ‘Constructive Dismissal and Reputation of Contract: What must be proved?’ (2011) (1) *STELL LR* p 1.

<sup>13</sup>[1978] ICR 639 IRLR 77 (EAT) at para 639G-643A.

*“It is said that the result of employment legislature is to give the employee a protected status. While it may be convenient shorthand to say that the effects of the employment legislation is that the law is moving away from contract in this field and towards status, it is misleading if such shorthand tend to disguise the fact that it is the employee’s situation as a party to a contract of employment which is the subject of protection by the legislation which it did not enjoy under the common law. Unless he was a party to a contract of employment, the status cannot and does not give him a right not to be unfairly dismissed, or to the right to receive a redundancy payment”*

The law with regards to constructive dismissal is therefore a mixture of contract and legislation. “It has its origins in the common law and is also regulated in terms of legislation in both England and South Africa. As is the case in English, Australian, Canadian and American Law, the court has been willing to accept the notion of constructive dismissal.”<sup>14</sup> The major problem originates from the criteria one needs to adopt in order to determine if an employee was in fact constructively dismissed.

### ***1.3. The South African Framework.***

In terms of South African legislation under S186 (1) of the LRA,<sup>15</sup> dismissal is defined as being where:-

- (a) “an employer has terminated a contract of employment with or without notice;”*
- (b) “An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;”*
- (c) “An employer refused to allow an employee to resume work after she:-”*
  - (i) “took maternity leave in terms of any law, collective agreement or her contract of employment ; or”*
- (d) “An employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or”*
- (e) “An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”*

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<sup>14</sup>Le Roux et al. *The South African law of unfair dismissal* (2010) 9.

<sup>15</sup> The Labour Relations Act 66 of 1995.

(f) “An employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.”<sup>16</sup>

In terms of S 186(1)(e),<sup>17</sup> constructive dismissal takes place when “an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable.”<sup>18</sup> Therefore, constructive dismissal could not be alleged in instances when the employment conditions were not intolerable. Should an employee seek a claim for constructive dismissal an employee has to ensure “that all internal processes have been exhausted, before resignation.”<sup>19</sup> In *Aldendorf v Outspan International Ltd*<sup>20</sup> an employee who failed to lodge a grievance prior to his resignation could not convince the arbitrator that he had no choice but to terminate his employment. However, in *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others*,<sup>21</sup> the employee failed follow an employee own internal grievance procedure before she resigned, as she knew that following such internal grievance procedure would have been futile. “The Court found that the failure to institute a grievance did not influence her claim for constructive dismissal, as there would have been no sense in following a procedure where the outcome of which was pre-determined”.<sup>22</sup>

#### ***1.4 Statement of Purpose.***

In terms of common law, an employment contract has always encouraged a duty of trust and confidence between both the employers’ and employees’. The purpose of this study is to analyze the historical and modern progression of constructive dismissal within South Africa, in relation to other jurisdictions outside of South Africa. In dealing with this comparative study I will analyse the various decisions which have influenced modern employment law, in comparison with those legal decisions that fall outside our jurisdiction. In light of the aforementioned legal

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<sup>16</sup>Ibid at Section 186 (1).

<sup>17</sup>The Labour Relations Act 66 of 1995.

<sup>18</sup> Ibid at Section 186 (1) e.

<sup>19</sup>Dekker A, H, *Did He Jump or Was He Pushed? Revisiting Constructive Dismissal*. 2009. SA Mercantile Law Journal 24(3) p.349.

<sup>20</sup>(1997) 18 ILJ 810 (CCMA).

<sup>21</sup>(2008) 29 ILJ 356 (LC).

<sup>22</sup>(2009) 3 SA 130 (SCA) para 8.

decisions my study will conclude with recommendations as to what changes South African law needs adopt to ensure that employees and employers rights are evenly protected.

### ***1.5 Rationale.***

The rationale of my dissertation is to analyse constructive dismissal in South Africa and within other international jurisdictions. Although both the employer and employees' legal rights are protected by the Labour Relations Act and the Constitution of South Africa,<sup>23</sup> it is paramount that South African employment law seeks the assistance of other jurisdictions to ensure that the rights to human dignity is protected in line with international rule of law. In this respect, section 23(1) of the Constitution provides that: "Everyone has the right to fair labour practices". Section 186(1) of the Labour Relations Act, provides that "every employee has the right not to be unfairly dismissed". The international rule of law is established on the principles of fairness, which principal values are enshrined in the Constitution of South Africa.

### ***1.6 The Literature Review.***

With respect to South Africa's common law, "a repudiation of contract would have constituted insufficient grounds for resigning and bringing a case of constructive dismissal."<sup>24</sup> The position under the Labour Relations Act and the common law constitutionally can be no different.<sup>25</sup> Section 186(1) provides that constructive dismissal takes place "where an employee resigned with or without notice because the employer made continued employment intolerable."<sup>26</sup>

What an employee must prove is that the actions of an employer produced conditions that where (objectively speaking) unbearable for an employee. Changes of the conditions and circumstances of the working conditions that "are brought about with the sole aim of compelling the employee to resign constitutes unfair conduct on behalf

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<sup>23</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>24</sup> *Albany Bakeries Ltd v Van Wyk & Others* (2011) JOL 27545 (LAC), the Labour Appeal Court noted that, before section 186 (1) (e) in the Labour Relations Act, the common law had usually been invoked in cases, based on allegations of constructive dismissal.

<sup>25</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA).

<sup>26</sup> The Labour Relations Act 66 of 1995.

of the employer.”<sup>27</sup> “It is often found that the proper approach in determining whether constructive dismissal arises is whether the acts of the employer was such that the employer was guilty of a unreasonable act going to the root of the contract or whether an employer showed an intention to no longer be held by the employment contract.”<sup>28</sup>

The test for establishing if an employee had been constructively dismissed has been defined in *Pretoria Society for the Care of the Retarded v Loots*.<sup>29</sup> The LAC found that the test is

“whether the employer, without reasonable and proper cause, conducted itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.”<sup>30</sup>

A repudiation of the confidence and trust between both the parties may amount to a claim for constructive dismissal, but both elements of the ‘test’ must be satisfied for a constructive dismissal claim to succeed. In this regard it must essentially be proven that an employee resignation was as a result of an employer’s intolerable actions and or making working conditions intolerable.

In the English case of *Sharfudeen v T J Morris Ltd t/a Home Bargains*<sup>31</sup> Sharfudeen (S) applied for a transfer for the position as a manager to a new store. There were three other external candidates that applied for the managerial post. The employer decided to implement a selection process for the promotions rather than transfers. S failed the selection criteria and was unsuccessful. An external candidate, who performed well was offered the position. S’s lodged a grievance against his employer and this was rejected. S claimed that he was constructively dismissed and subsequently resigned. S alleged that the rejection of his grievance was a important repudiation of the tacit term of confidence and trust.

The Employment Tribunal accepted the selection process used by the employer and therefore rejected the employee’s claim. S appealed and the Employment Appeals

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<sup>27</sup>F van Jaarsveld; SE van Eck ‘Principles of Labour Law’ (2005) 167.

<sup>28</sup>*Western Excavating (ECC) Ltd v Sharp* (1978) ICR 221.

<sup>29</sup> (1997) 18 ILJ 981 (LAC).

<sup>30</sup>See *Malik and another v Bank of Credit & Commerce International Credit* [1997] UKHL 23, where the implied term of mutual trust and confidence was defined.

<sup>31</sup>*Sharfudeen v TJ Morris Ltd T/A Home Bargains* UKEAT/0272/16/LA

Tribunal rejected the appeal. The Employment Tribunal had correctly accepted and confirmed the *Malik* ‘test’,<sup>32</sup> which had recognized that an employee’s loss of confidence and trust is not the only requirement. An important prerequisite to asked is did an employer act without reasonable and proper cause? This question needs to be objectively answered. The Employment Tribunal was satisfied that the employer’s conduct was proper and reasonable. The employer had done so by implementing the selection process which was fair to all candidates.

Simiarly in South Africa, in *WL Ochse Webb & Pretorious (Pty) Ltd v Vermeulen*,<sup>33</sup> “the resignation of an employee after a change in his conditions of employment was found to be a fair constructive dismissal, because the change was for a sound commercial reason and his employer did consult him beforehand.”<sup>34</sup> In *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd*,<sup>35</sup> the court went further and reaffirmed that it has a duty to analyse the employer’s actions when assessing a claim for constructive dismissal. Judged reasonably and sensibly, it has to be determine whether such conduct is intolerable to the extent that the employee cannot put up with it. In doing so this will ensure that the employer’s intention with respect to the employment contract is objectively reviewed. It has been held that the employee subjective feelings by itself is not sufficient, the employee must show a reasonable belief that he had no option but to terminate the employment contract.<sup>36</sup> The “employee must also prove that the employer was in fact responsible for creating the conditions that induced this belief.”<sup>37</sup>

In *Old Mutual Group Schemes v Dreyer*<sup>38</sup> Conradie JA found “it to be onerous for an employee who terminated her employ to prove that he has actually been constructively dismissed, because the onus of proof on the employee in this regard is a heavy one.”<sup>39</sup> The fact that the employee work is insecure is not by itself enough to

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<sup>32</sup> *Malik and Anor v BCCI SA* (1997) ICR 606 HL.

<sup>33</sup> (1997) 18 *ILJ* 361 (LAC).

<sup>34</sup> Not all constructive dismissals are unfair. S 192 of the Labour Relations Act 66 of 1995 provides that the onus is on the employee to establish the existence of dismissal and further that should the dismissal be proved, the employer must prove that the dismissal is fair.

<sup>35</sup> [2010] ZALC 27 at para 30.

<sup>36</sup> Smit E *Constructive Dismissal and Resignation due to Work Stress* (unpublished LLM thesis, North-West University, Potchefstroom Campus, 2011)

<sup>37</sup> Le Roux et al, *The South African law of Unfair Dismissal* (2010) 9.

<sup>38</sup> 1999 20 *ILJ* 20 2030 (LAC) at 2036.

<sup>39</sup> *Ibid.*

determine a claim for constructive dismissal. “An employee must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.”<sup>40</sup> Once the onus is proved for by an employee, the employer than has to show that the reason for the dismissal was fair.<sup>41</sup> “The test for whether the onus had been released for by the employee is based on a balance of probabilities.”<sup>42</sup>

### ***1.5 Research Methodology.***

The research method that I have conducted is qualitative. The research study will analyse and adopt an historical progression of constructive dismissal. This research study is founded on academic materials such as case law, journals, legislation, textbooks as well as electronic sources.

### ***1.6 Scope and limitation of the study.***

This research topic is made up of five chapters. Chapter one set out both the historical foundation and the South African framework for constructive dismissal. Chapter two considers the essential factors relating to constructive dismissal. Chapter three will set out the test used to establish constructive dismissal. Chapter four will consider the international interpretation of constructive dismissal, as well as examine foreign case law. Chapter five will make recommendations and draw conclusions.

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<sup>40</sup> Jordaan v Commission for Conciliation, Mediation and Arbitration and Others (2010) 31 *ILJ* 2331 (LAC) at para 20

<sup>41</sup> Grogan J, Dismissal, *Discrimination and Unfair Labour practices* (2007) at 68.

<sup>42</sup> The Labour Relations Act 66 of 1956; s 192.

## CHAPTER TWO

### FACTORS WHICH RELATE TO CONSTRUCTIVE DISMISSAL.

#### *2.1 Introduction.*

It has been stated that “with an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as the appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.”<sup>43</sup> It is submitted that an employee should show the following:-

- a. The working conditions became so unbearable that the employee could not put up with the employers conduct.
- b. The intolerable conduct is the cause of the worker’s resigning.
- c. There was no alternative, but for the employee to terminate the employment contract in order to avoid such intolerable circumstances.
- d. The intolerable conditions must have been solely caused by the actions of the employer.
- e. The intolerable conduct must have been in the control of the employer.

#### *2.2 Common Law Definition of Constructive Dismissal.*

A dismissal is where the employer brings an end to the contract of employment. S 186(1) (e) of the LRA<sup>44</sup> provides that constructive dismissal is recognised where an employer is to blame, by making working conditions intolerable for an employee work. In the event that an employee subsequently resigns, the employer may be found accountable for termination the employment.<sup>45</sup> In *Murray v Minister of Defence*<sup>46</sup> the SCA found that Murray’s employment “was governed by the constitutional right to

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<sup>43</sup> *Jordaan v CCMA & others* (2010) 12 BLLR 1235 (LAC) at 1239.

<sup>44</sup> The Labour Relations Act 66 of 1995; s 186 (1) (e).

<sup>45</sup> The Labour Relations Act 66 of 1995; s 193 (1) (c).

<sup>46</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 44



fair labour practices, and that this right as developed under the common law included protection against constructive dismissal.”<sup>47</sup>

Murray who was Naval officer claimed that his employer constructively dismissed him. The Western Cape Town High Court dismissed the claim for constructive dismissal, but the SCA reversed the High Court judgment and upheld Murray’s claim. Before Murray’s lodged a claim he was the head of his division in Simonstown. “Members of his own unit accused him of various improprieties, which led to the navy taking protracted steps against him, including formal investigations and two court-martials.”<sup>48</sup> As the charges against Murray were withdrawn, he insisted to be repositioned to his former post. The employer refused to re-instate Murray on the basis that his working ability as a commander had already been harmed by unfounded allegations made from his colleagues. Instead Murray was given a senior staff posting in Pretoria, which was refused.

The Supreme Court of Appeal found that the employer was correct in pointing out operational reasons for refusing to return the employee to his former post. The Supreme Court of Appeal further found that the employer failed to properly explain to Murray, the post it offered to him as it had been clear that the employee was under the misunderstanding that the said post involved obligations outside his ability. Further, his employer failed to inform Murray that they would be prepared to re-train him. Instead, because of the strained relationship, the employer left him to resign. In an unanimous judgment by Cameron JA (SCA) held that the dismissal was not fair.

The employer did not make any attempt to explain the new position to its employee and further failed to engage him in a process that would enable him to assess the position. “Given the outcome of both court-martials, the decision not to return him to his post involved no fault on Murray’s part.”<sup>49</sup> In this case the law placed an obligations fully on an employer to discuss with an employee and to exchange all the facts to enable the employee to make a reasonable decision. The employer failed to satisfy this duty until after Murray’s decision to resign, which was clearly unfair. The

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<sup>47</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 44 at para 5.

<sup>48</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 44 at para 29.

<sup>49</sup> *Murray v Minister of Defence* (2009) 3 SA 130 (SCA) 44 at para 67.

decision in the Cape High Court was reversed, and Murray's claim for constructive dismissal was upheld with costs.

The common law "holds that there must be circumstances amounting to a fundamental or repudiatory breach of contract by the employer"<sup>50</sup> in order for an employee to prove a constructive dismissal claim. Since the development of the common law in the Murray's case, it is submitted that "there is no difference in the circumstances that will bring about a constructive dismissal in terms of the common law and those which will result in a constructive dismissal in terms of statute."<sup>51</sup>

### ***2.3 The Statutory Nature of Constructive Dismissal.***

In *Amalgamated Beverages Industries (Pty) Ltd v Jonker*<sup>52</sup> the notion of constructive dismissal was defined as follows:

*"Unlike an actual dismissal, a constructive dismissal consists in the termination of the employment contract by reason of the employee's rather than employer's own immediate act. However, such an act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified"*<sup>53</sup>

The essential elements of constructive dismissal are that the employer repudiated the fundamental conditions of the employment contract therefore ratifying an employees' decision to bring the employment contract to an end. However, such conduct by the employer may be justified. Therefore a constructive dismissal may not be unlawful and may not be unfair, in constituting a breach of the employment contract. "Broadly it has been construed to embrace the circumstances in which the employer's conduct had made the continued and future relationship between the employee and the employee impossible."<sup>54</sup> In *Pretoria Society for the Care of the Retarded v Loots*<sup>55</sup>

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<sup>50</sup> S Vettori, 'Constructive Dismissal and Repudiation of Contract: What Must be Proved?' (2011) (1) *STELL LR*, P178

<sup>51</sup> Ibid.

<sup>52</sup> (1993) 14 *ILJ* 1232 (LAC), page 1248 at I.

<sup>53</sup> *Amalgamated Beverages Industries (Pty) Ltd v Jonker* (1993) 14 *ILJ* 1232 (LAC), page 1248 at I.

<sup>54</sup> *Farber v. Royal Trust Co* 1997(1) S.C.R. 846.

<sup>55</sup> 1997 6 *BLLR* 721 (LAC).

the LAC considered the concept of constructive dismissal under the previous LRA<sup>56</sup> which adopted the following guidelines, namely:-

(a) When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is indicating that the situation has become so unbearable that the employee cannot work. The employee is in effect saying that he would have carried on working indefinitely had the unbearable situation not been created.<sup>57</sup>

(b) The employee does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If the employee is wrong and the employer proves it then the employee has not been constructively dismissed and the employee's conduct proves that she has in fact resigned.<sup>58</sup>

(c) Where the employee proves the creation of the unbearable work environment she is entitled to say that by doing so the employer's repudiation of the contract amounted to an unfair labour practice.

d) It is the employer's unlawful act which has precipitated the refusal to work and the acceptance of the employer's repudiation. The two envisaged steps are not always easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not.

(e) In determining whether an employee was constructively dismissed the court will have to determine whether the employee's evidence of the intolerable work environment should be believed or whether the employer's evidence, which is to the effect that he actually resigned, should carry the day.

## ***2.4 Intolerable Conduct.***

In the case of *Mafomane vs Rustenburg Platinum Mines Ltd*<sup>59</sup> it had been stated that the prerequisite for an employee to establish that the employment has become unbearable, bears the following consequences.

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<sup>56</sup> The Labour Relations Act 28 of 1956

<sup>57</sup> *Pretoria Society for the Care of the Retarded vs Loots* (1997) 18 ILJ (LAC) at 948 E- F.

<sup>58</sup> Ibid.

<sup>59</sup> (2003) 10 BLLR (LC)

“the test is an objective one. It means that the employee must prove at least two things. The first is that the circumstances had become so unbearable that the employee could no longer reasonably be expected to endure them. The second is that there was no reasonable alternative to escape those unbearable circumstances than to resign. When the latter issue is considered, it must be borne in mind that the termination of an employment relationship is usually only appropriate as a remedy of last resort. An employee who resigns to escape an oppressive working environment despite the fact that there are other avenues of escape open to him or her will usually find it hard to characterize the resignation as a constructive dismissal.”<sup>60</sup>

“The actions of both the employee and employer have to be assessed fully, as well as cumulative impact.”<sup>61</sup> In *Beets v University of Port Elizabeth*,<sup>62</sup> it had been determined that constructive dismissal occurs when an employee resigns, as a result of the employer's unsympathetic and or unreasonable actions. A constructive dismissal can only take place in circumstances where, objectively speaking, the employer's intolerable conduct forced the employee to resign. The subjective perceptions of the employee are not permitted to colour the assessment or otherwise of the employer's action.<sup>63</sup> In each case the courts have to evaluate the facts to determine whether the said conduct was unbearable.

In *Murray v Minister of Defence*<sup>64</sup> the SCA “developed the common law to incorporate the concept of constructive dismissal.”<sup>65</sup> This case expressly included the notion of ‘employer's culpability’ or ‘blame-worthiness’ to the prerequisites for a constructive dismissal claim.<sup>66</sup> Where the common law had been developed to incorporate the concept of constructive dismissal, the Court stated the concept of

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<sup>60</sup>*Mafomane vs Rustenburg Platinum Mines Ltd* (2003) 10 BLLR (LC) at page 1012; See also *Old Mutual Group Schemes vs Dreyer* (1999) 20 ILJ (LAC) at para 9 to 18.

<sup>61</sup>*Beets v University of Port Elizabeth* 2000 8 BALR 871 (CCMA).

<sup>62</sup>2000 8 BALR 871 (CCMA).

<sup>63</sup>*Smithkline Beecham (Pty) vs CCMA & Others* (2000) 3 BLLR 344 (LC); See also *Lubbe vs ABSA BANK Bkp* (1998) 12 BLLR 1224 (LAC).

<sup>64</sup>2008 6 BLR 513 (SCA).

<sup>65</sup>*Murray v Minister of Defence* 2008 6 BLR 513 (SCA) at para 9.

<sup>66</sup>*Murray v Minister of Defence* 2008 6 BLR 513 (SCA) at para 13.

constructive dismissal must be developed in so much as it must promote the spirit, purport and objects of the Bill of Rights.<sup>67</sup>

In *Strategic Liquor Services v Mvumbi NO and Others*,<sup>68</sup> the SCA emphasized that when an employee resigns as a result of the work becoming intolerable, this does not alone prove a constructive dismissal claim. The employer has to be solely to blame for the intolerable working conditions. The employer's conduct should lack proper cause and reason. Culpability itself does not entail that the employer intended to terminate the employment contract, as in certain circumstances it may appear that an employer could not have control of what made the working conditions unbearable. "So the most fundamental position must have been of the employer's doing, even if the employer is not solely to blame."<sup>69</sup>

### ***2.5 Essential Considerations of constructive dismissal.***

The initial factor is aimed at the employment contract and whether the employer's actions indicates an intention to be bound by the important terms and conditions. An clear apprehension of the relevant written contract and its important terms and conditions is essential. It is further submitted that for a claim for constructive dismissal, one of more of these important terms and conditions should be premised on a change and or breach thereof. "The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or a unilateral change of a significant term of that employment."<sup>70</sup>

### ***2.6 Conclusion.***

Employment contracts have both explicit and tacit clauses and provisions, which will most likely include factors such as job occupation, salary, working hours and annual leave. The explicit terms and conditions assist the courts with a coherent understanding of the pre-change state of the employment contract. A constructive dismissal claim premised on any breach to a tacit terms and conditions set out in an employment contract may be fairly difficult to prove. It is therefore submitted that

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<sup>67</sup>The Constitution of South Africa Act 108 of 1996; Chapter 2, Bill of Rights s 39 (2): When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

<sup>68</sup>2009 30 ILJ 30 1526 (CC).

<sup>69</sup>*Asara Wine Estate & Hotel (PTY) LTD v JC Van Rooyen and others* (2012) 33 ILJ 363 (LC).

<sup>70</sup> John C.F, *Recent Developments in the Law of Constructive Dismissal* (2010) p2

tacit terms are often disputed in any constructive dismissal claim. Tacit terms can set out important policy considerations and or evidence leading to the intentions of the employee and employer at the stage of entering into the contract.

## CHAPTER 3

### THE TEST TO DETERMINE CONSTRUCTIVE DISMISSAL.

#### *3.1 Introduction.*

A dismissal of an employee and establishing a claim constructed on constructive dismissal can be procedurally and substantially difficult to prove. In most cases ignorant employers believe that their employee's resignation is reasonable and fair. "It is trite law that legal rules not only give rise to rights and duties of the employer and employee before and during the course of employment, but it also seeks to provide provisions governing the process of termination and dismissal."<sup>71</sup>

In *Strategic Liquor Services v Mvumbi NO and others*<sup>72</sup> it was found that such criteria for constructive dismissal claim requires merely that the employer should have made continued working conditions unbearable. The standards for determining whether an employee may be constructively dismissed is partly subjective, as well as objective. "Due regard must be had to the perceptions of the employee at the time of the termination of the contract, as well as to the circumstances in which the termination took place."<sup>73</sup>

In this case the employer alleged that the "CCMA and the Labour Courts misinterpreted the jurisdictional requirements for constructive dismissal, since on the employee's own account he had a option whether to terminate the employment contract or be subjected to poor performance procedures."<sup>74</sup> The Court found the employer's acceptance to be subjected to a poor performance procedures and misconceived the criteria for constructive dismissal. This meant that it did not mean

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<sup>71</sup> The Labour Relations Act 66 of 1995; s 191.

<sup>72</sup> (2009) 30 ILJ 30 1526 (CC) at para 3.

<sup>73</sup> Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2010) 199.

<sup>74</sup> (2009) 30 ILJ 30 1526 (CC) at para 3.

that the worker had no option but to resign, but only that an employer should have made the working conditions unbearable.<sup>75</sup>

The prerequisite for a constructive dismissal claim should also be ascertained by the employment contract, its terms and conditions, that is did an employer's actions result in a fundamental breach of the employment contract which caused an employee to terminate his employment? "The breach of the employment contract must be significant and go to the root of the contract."<sup>76</sup> Where an employee resigns with no notice and is in a position where she is entitled to end the employment contract because of the employers actions, this would amount to constructive dismissal. "It is in fact the employers conduct which amounts to a repudiation of the contract and the employee accepts such repudiation by resigning and terminating the contract."<sup>77</sup>

The fact that there is a claim for constructive dismissal is no indication that such constructive dismissal was unfair.<sup>78</sup> In *Albany Bakeries Ltd v Van Wyk & Others*<sup>79</sup> it was found that where an employer made continued working condition unbearable, such aspect of intolerability is a significant when considering a constructive dismissal claim. The Court found that the employer has a grievance process in place, which should have been followed before resigning. The employee had further failed to dispute the demotion in terms of the provisions of the Labour Relations Act. As such it appeared that dismissal was not as a last resort option. Therefore the Court determined that the employee did not prove his claim for constructive dismissal.

In *Pillay v Old Mutual Property (Pty) Ltd*<sup>80</sup> the Commissioner found that the employee could not have a claim for constructive dismissal, where an employee laid a prior case of sexual harassment against an employer and it was found him not to be guilty. It was further determined that the employee cannot resign and thereafter claim that the continued working conditions was unbearable. In this case the arbitrator established that there had been no link between the employee's resignation and the employer's actions. Similarly in *Volschenk v Pragma Africa (Pty) Ltd*<sup>81</sup> the Labour

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<sup>75</sup>(2009) 30 *ILJ* 30 1526 (CC) at para 4.

<sup>76</sup>Zimmerman R, Whittaker, S, *Good faith in European contract 14th ed* (2006) 334.

<sup>77</sup>Selwyn, N *Law Of Employment 2nd ed* (2003) 399.

<sup>78</sup>*Ibid.*

<sup>79</sup>(2011) JOL 27545 (LAC).

<sup>80</sup>(2015) 36 *ILJ* 1961 (CCMA).

<sup>81</sup>(2015) 36 *ILJ* 494 (LC).

Court found that where an employee continued to work after his notice period, it would be hard for the employee to advance for a claim based on constructive dismissal.

### ***3.2 Challenges in determining Constructive dismissal.***

The challenges in determining constructive dismissal can be reviewed from the outcomes of arbitration cases. By the utilisation of binding and persuasive case studies, commissioners will be guided into taking the correct decisions. Although the burden of proof is on an employee to ascertain a constructive dismissal claim, employers should refrain from unreasonable actions that could renders the working relationship intolerable. In *Bandat v De Kock & another*<sup>82</sup> employee's first cause of actions was that his dismissal was automatically unfair in terms of s 187(1)(f) of the LRA. The employee's other cause of action was that she had been discriminated against by her employer, in that she was subjected to sexual harassment by her employer. The employee further contended that the sexual harassment alone rendered the working relationship intolerable, thus forcing her resign and claiming constructive dismissal. The employee did not want to be reinstated, but instead wanted to be substantially compensation in terms of S 194 of the LRA and S 50 of the EEA.<sup>83</sup> The court held that "the catalyst for the employee's resignation was the written warning issued to the employee for poor performance."<sup>84</sup> Under the circumstances the Court found that the employer was reasonably entitled to issue the warning letter as the employee failed to prove a claim of constructive dismissal, which was constructed on her earlier contentions with regard to the inappropriate sexual conduct of the employer.<sup>85</sup>

It appears that there must exist some blameworthy conduct on behalf of the employer that essentially forces an employee to resign. In *Western Cape Educational Department v General Public Service Sectional Bargaining Council and Others*<sup>86</sup> the LAC found that an employer's unreasonable actions by not addressing the employee's ill health retirement applications and incapacity leave for over two years amounted to

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<sup>82</sup>(2015) 36 ILJ 979 (LC).

<sup>83</sup>Employment Equity Act 55 of 1998; s 50.

<sup>84</sup>*Bandat v De Kock & another* (2015) 36 ILJ 979 (LC) at para 59.

<sup>85</sup>*Bandat v De Kock & another* (2015) 36 ILJ 979 (LC) at para 61.

<sup>86</sup>(2014) 35 ILJ 3360 (LAC).



constructive dismissal.<sup>87</sup> In *Metropolitan Health Risk Management v Majatladi and Others*<sup>88</sup> the Court found that holding a second disciplinary enquiry and charging an employee with the same charge (in which the employee was initially found not guilty) amounted to constructive dismissal.<sup>89</sup>

It is submitted that in principle, an unfair action by an employer which essentially forces an employee to resign is universally applied to other foreign jurisdictions. In *Western Excavating (ECC) Ltd V Sharp*,<sup>90</sup> an employee had been fired for taking unauthorized time off from his work. He appealed the decision and in turn he was penalised with a five days suspension and without pay. Although he did not dispute this penalty he did not have the money to pay. He then asked his employers for an advance pay on his annual leave and this request was declined. Subsequently, he terminated his employ and persued a claim for wrongful dismissal, stating that he had been forced to resign as a result of the employer' actions. In assessing the employee's claim based on constructive dismissal, Lord Denning MR stated that there are two views on the interpretation of paragraph 5(2) (c). The first idea is known as "the contract test" and the second school of thought he referred to as "the unreasonableness test."

The Judge analysed 'the contract test' as follows:-

"On the one hand, if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once." "Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length

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<sup>87</sup> *Western Cape Educational Department v General Public Service Sectional Bargaining Council and Others* (2014) 35 ILJ 3360 (LAC) at para 31 to 34.

<sup>88</sup> (2015) 36 ILJ 958 (LAC).

<sup>89</sup> *Metropolitan Health Risk Management v Majatladi and Others* (2015) 36 ILJ 958 (LAC) at para 32.

<sup>90</sup> 1978 ICR 221.

of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”<sup>91</sup>

With regard to the ‘unreasonableness test,’ Lord Denning MR stated as follows:

“They introduce a new concept into contracts of employment. It is that the employer must act reasonably in his treatment of his employees. If he conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, the employee is justified in leaving. He can go, with or without giving notice, and claim compensation for unfair dismissal.”

The contractual test which had been applied in *Western Excavating (ECC) Ltd v Sharp*<sup>92</sup> appears to be a significant restriction on constructive dismissal as it is narrower than the reasonableness test. However, it is submitted that this is not the case for two reasons. The first reason is that the Court of Appeal, whilst establishing the law of contract, did not intend to set out a rigid test. This can be noted from the judgment of Lawton LJ where he state as follows:<sup>93</sup>

“I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of an employers conduct. Sensible persons have no difficulty in recognising such conduct when they hear about it. Lay members of the employment tribunals do not spend all their time in court and when out of court they may use, and certainly will hear, short words and terse phrases which describes clearly the kind of employer of whom an employee is entitled without notice to rid himself. This is what constructive dismissal is all about; and what is required for the application of this provision is a large measure of common sense”

In the South African case of *Murray v Minister of Defence, supra*, the Court considered the development of a constructive dismissal claim. Although the Labour Relations Act was not applicable to this case (because SANDF members are specifically not included in the LRA) it was common for the matter to be measured in accordance with the constitutional rights to fair labour practices (s. 23 of the Constitution) and to human dignity. Cameron JA accordingly found:

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<sup>91</sup>*Western Excavating v Sharp* 1978 ICR 221 at para 717C – E.

<sup>92</sup>1978 ICR 221.

<sup>93</sup>Smith I, Baker A, *Employment Law* 11ed (2010) p482.

“However, it is in my view best to understand the impact of these rights [the Constitutional rights to fair labour practices and human dignity] on this case through the constitutional development of the common-law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees - even those the LRA does not cover.”<sup>94</sup>

The Court in *Murray v Minister of Defence* accepted the analysis applied by Myburg J in *Jooste's* case from English jurisprudence in which Cameron JA made two points.

“First, the intolerable work situation must be one which is of the employer’s making or over which the employer has control.”<sup>95</sup> Secondly, the employer must be culpably responsible for the intolerable situation. In other words, the employer must have lacked reasonable and proper cause.”<sup>96</sup>

With due regard to the aforementioned the object of s 186(1) (e) is to purport that the rights of the workers are not to be unfairly dismissed (a fundamental right which is entrenched in the LRA and s. 23 of the Constitution). The facts mentioned in *Murray's* case were included to give effect to the provisions of s 186(1) (e) of the LRA.

### ***3.3 Constructive Dismissal and The Last Straw Situation.***

Constructive dismissal can be determined from a last straw situation and or event pertaining to the employer actions. In *Lewis v Motorworld Garages Ltd*<sup>97</sup> it is stated that a repudiation of tacit duties of confidence and trust may amount to string of events (by the employer) which in effect may develop to a repudiation of the fundamental working conditions. The last straw situation cannot alone be a repudiation of the tacit terms of trust and confidence. In *Bezuidenhout v Metrorail*<sup>98</sup> the employee resigned after being charged with various misdemeanours which he

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<sup>94</sup> *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) at 627F.

<sup>95</sup> *Murray v Minister of Defence* 2008 6 BLR 513 (SCA) at 138C.

<sup>96</sup> *Murray v Minister of Defence* 2008 6 BLR 513 (SCA) at 138D.

<sup>97</sup> 1985 IRLR 46.

<sup>98</sup> 2001 9 BALR 926 at para 6.

contended that he was falsely accused of. A few days before his employment contract expired the employee resigned. As a result of resigning, the employer conducted a disciplinary hearing and terminated his employ. The mediator found that, although the breach of employment contract amounted to a dismissal in terms of S186 (1) (a),<sup>99</sup> this did not itself prohibit Mr. Bezuidenhout from seeking a constructive dismissal claim. The mediator found that Mr. Bezuidenhout's termination of employ was a unilateral act by the employer which clearly induced an intention not to be bound by the employment contract. Resignation in this event resulted in ending the employment contract in terms of S186 (1)(e).

In *Van der Merwe v Becker*,<sup>100</sup> the facts were that the employee was informed that her remuneration could be reduced. In the event that her salary could not be reduced she would be retrenched. Subsequently, Ms. Becker resigned and contended that she was constructively dismissed due to the employer unreasonable conduct. The commissioner held that the resignation from employment itself constituted dismissal in terms of S186 (1)(e), as a result thereof she could not have terminated her employ and allege constructive dismissal after her dismissal. The commissioner was guided by the fact that, after Ms Becker received the termination notice from the employer she "could have referred her dismissal to the CCMA in terms of Section 191(2A)."<sup>101</sup>

### ***3.4 The Objective Test To Determine Constructive Dismissal.***

In *Jooste v Transnet Ltd t/a SA Airways*<sup>102</sup> the CCMA held that where the subjective onus of prove was satisfied, the employer thereafter needs to show objectively, that an employee's reaction was unreasonable. Each case has its own particular set of circumstances and must be decided on its own facts. An employer has the right to be critical of his employee's poor work and generally can such such necessary steps in order to rectify the position. However there must be limit. In the event that the employer's actions goes beyond the boundary of reasonableness in which an employee reasonably finds the working conditions unbearable, this should constitute constructive dismissal. Should this intolerability continue the worker can pursue a claim or constructive dismissal where the worker resigns. In *Watt v Honeydew*

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<sup>99</sup> The Labour Relations Act 66 of 1995; s 186 (1) (e).

<sup>100</sup> 2004 25 ILJ 1349 (CCMA).

<sup>101</sup> The Labour Relations Act 66 of 1995;

<sup>102</sup>(1995) 16 ILJ 629 (LAC).

*Dairies (Pty)*<sup>103</sup> the abitrator analysed the difficulty incurred by an employee who sought to bring a constructive dismissal claim. It had been held that the employee bears the onus when persuing a constructive dismissal claim, however the risk that the employee takes is his resignation. In the event that an employee is unable to prove that the working conditions rendered the continued employment unbearable, the resignation remains valid.

Where the employee fails to disclose his reasons for resigning, the employee's runs the risk of losing his claim of constructive dismissal against the employer.<sup>104</sup>In *Chabeli v CCMA & Others*<sup>105</sup> the employee failed to give any reasons for his termination notice. Only upon filing his review application and supporting affidavit did the employee contend that the continued employment was unbearable due to his employer making unilateral decisions which effected his position severely. The Court held that the employee fail to set out the basis for his allegation that the employer made his employment unbearable and as a result thereof the employee's application was dismissed.

The principles to be exacted from this case are that in order for a dismissal to fall within the ambit of S 186 (1) (e) and to be considered as constructive dismissal, the facts must prove that the sole reason the employee left his employment was due to an intolerable employment relationship caused by the employer. Continuing in the employment relationship following the incident or conduct giving rise to the alleged intolerablility may invalidate a claim of constructive dismissal, especially where the intolerablity was not raised with the employer to give him an opportunity to address the situation.<sup>106</sup>

"In assessing whether there has been a constructive dismissal, the terms and conditions of the employment between the parties must be clearly ascertained."<sup>107</sup>

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<sup>103</sup>(2003) 24 *ILJ* 466 (CCMA).

<sup>104</sup>*Chabeli v CCMA & others* (1995) 16 *ILJ* 629 (LAC) at para 21.

<sup>105</sup>(2009) BLLR 389 (LC).

<sup>106</sup> Whitear N, 'Can you claim constructive dismissal without proof of an intolerable employment relationship' (2017) 24 May 2017 <http://www.hrpulse.co.za/legal/235877-can-you-claim-constructive-dismissal-without-proof-of-an-intolerable-employment-relationship>. (Accessed 24 October 2018).

<sup>107</sup>Janice Payne and Sonia Virc, 'Nelligan Constructive Dismissal Executive Employment Newsletter – (VolumeVIII, No. 1, 2001)' [http://www.nelligan.ca/e/pdf/Constructive\\_Dismissal\\_%28JBP%29.pdf](http://www.nelligan.ca/e/pdf/Constructive_Dismissal_%28JBP%29.pdf) (Accessed on 15 August 2018).

The test from an objective point of view questions the conduct of the employer against these terms and conditions. If such conduct is found to breach the nature of the employment relationship, it may amount to a constructive dismissal claim. If an employee succeeds in proving a constructive dismissal claim, such employee is entitled to receive an appropriate award.<sup>108</sup>

### ***3.5 Two Stage Enquiry To Determine Constructive Dismissal.***

As the merits of each case needs to be established it appears that there is no clear rules and or principals defining when constructive dismissal occurs. “The facts of each case must be established, interpreted and measured to determine whether the requirements for constructive dismissal have been met.”<sup>109</sup> The SCA found that a narrow assessment must be adopted to proof a claim for constructive dismissal, as it is not easily found in situations complained of by employees.<sup>110</sup>

“It is further well established that a two-stage enquiry is necessary to determine whether an unfair constructive dismissal has occurred.”<sup>111</sup> The first stage requires the employee to prove that she resigned due to the fact that her employer made her continued working condition unbearable.<sup>112</sup> The Constitutional Court stated in *Strategic Liquor Services v Mvumbi NO & others*<sup>113</sup> that such criteria for constructive dismissal requires an employer to have made continued employment intolerable. An employee must further prove that such working relationship had become so unbearable that she had no option but to terminate her employ.<sup>114</sup> In this case the CCMA concluded that the worker had been constructively dismissed. The employer appealed and averred that both Labour Courts and the CCMA (in refusing to review), misjudged the jurisdictional requirements to establish a claim for constructive dismissal. This was because of the fact that employee’s submission of her own

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<sup>108</sup> The Labour Relations Act 66 of 1956; S 194.

<sup>109</sup> Whitear-N and Matthew R, ‘Constructive Dismissal: A tricky horse to ride’ (2012) 1 January 2012 [http://reference.sabinet.co.za/webx/access/electronic\\_journals/obiter/obiter\\_v33\\_n1\\_a13.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/obiter/obiter_v33_n1_a13.pdf) (Accessed on 24 October 2018).

<sup>110</sup> *Murray v Minister of Defence* (2006) 27 ILJ 1607 (SCA) par 29.

<sup>111</sup> A, A Robinson, ‘Resignation and constructive dismissal’ (2003) Issue 21 March 2003. <https://www.allens.com.au/pubs/pdf/wr/fowrmar03.pdf> (Accessed on 24 October 2018).

<sup>112</sup> The Labour Relations Act 66 of 1956; S 192.

<sup>113</sup> (2009) 30 ILJ 1526 (CC)

<sup>114</sup> The position of the SCA was confirmed the decision held in *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 ILJ 575 (LC) at paras 27 and 40.

version alleged that she did have an option whether to tender her resignation or be subjected to a poor performance process.

The Constitutional Court held that there were two reasons why the employer's contentions could not stand.<sup>115</sup> The first was that the employer's contentions did not rebut the employee's evidence, in that her work situation had become unbearable. Although the employee had a choice to resign, this alone was a pretence, since in any event the employer would find any reason to terminate her employ. The second is that it misinterpreted "the test for constructive dismissal, which does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable."<sup>116</sup>

The second step requires that a dismissal of the employee be ascertained to not be fair. An example of a constructive dismissal that is deemed to be reasonable will be where the employee showed his working conditions to be unbearable however such employer was not to blame for any action relating to the unbearable working condition.<sup>117</sup> In *Lang v GJP Services*<sup>118</sup> the arbitrator affirmed that the term intolerability by itself is not unfair as this depends on the party responsible for the intolerability and for how long it continues. Where the employer tried his best to remedy an incidental event of intolerability, an employee should try his best to remedy the situation before he resigns. In this case the employee without any fair reason threw his keys to his co-worker and informed them that he will not be coming back to work. The employee failed to seek any advice from his director. While the employee's act was unreasonable, a single occurrence of this event was insufficient to prove that the working relationship was unbearable.

In *Pretoria Society* the LAC confirmed that the question is whether the employer:

'without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract; the court's function is to look at the

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<sup>115</sup>*Liquor Services v Mvumbi NO & others* (2009) 30 ILJ 1526 (CC) at para 4.

<sup>116</sup> Compare *Murray v Minister of Defence* [2008] ZASCA 44; [2008] 3 All SA 66 (SCA); [2008] 6 BCLR 513 (SCA) at paras 12 and 67.

<sup>117</sup>*Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311.

<sup>118</sup>(2010) 19 CCMA 6 at para 13.

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.’<sup>119</sup>

In *Murray v Minister of Defence*<sup>120</sup> the SCA accepted that an employer may reasonably cause an employee's position to become intolerable. With that being said the SCA further confirmed that an employer must be blameworthy for the unbearable working situation. It has been “accepted that the employer may not have control over what makes conditions intolerable and even if the employer is responsible, it may not be to blame.”<sup>121</sup>

### **3.5 Conclusion.**

In determining a constructive dismissal claim, a court should analyse the employer's conduct which gave rise to the unbearable working condition as a whole. The reason would be to determine whether such (objectively speaking) working condition had been so unbearable to such an extent that any employee would not have reasonably been expected to put up with the unbearable situation, which led to the employee's forced resignation. The test for constructive dismissal is therefore analysed from an objective view. An employee's subjective feeling that led to the resignation can never be fully decisive on their own. It is therefore submitted that an employee's own feelings must be objectively reasonable when assessing a claim for constructive dismissal.

Determining that an employee was constructively dismissed can be a highly fact-driven exercise. Should the factual enquiry show that reasons for the constructive dismissal was in terms of s 187 of the LRA, a claim for constructive dismissal can be held to be automatically unfair. Whilst the principles concerning constructive dismissal have been established from the above cases are not new, they ensure that the employer and employee duties and obligations are protected and practically enforced in terms of our legislation and supports modern law when facing fundamental changes.

## **CHAPTER 4**

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<sup>119</sup> *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at page 985.

<sup>120</sup> 2009 (3) SA 130 (SCA); (2008) 29 ILJ 1369 (SCA) at para 13.

<sup>121</sup> Ibid.



## 4. INTERNATIONAL PERSPECTIVE ON CONSTRUCTIVE DISMISSAL.

### 4.1 Introduction.

Constitutional and other statutory enactments have codified the values, principles and a dispensation of “rights and duties of parties involved in the employer-employee relationship.”<sup>122</sup> Previously some of these important rights and duties could only be measured against the approach of general common-law principles, the positive law and international labour conventions. The right to fair labour practices is an important constitutional labour right<sup>123</sup> that has received the attention of the courts as it has been decided that the common law employment contract should be developed to give recognition to this basic right as part of the common-law contract of employment.<sup>124</sup> Consequently and justifiably so, the constitutional rights to fair labour practices has been expanded to advance the common-law to recognise:<sup>125</sup>

- a. “the right to fair dealing;”<sup>126</sup>
- b. “the right to a disciplinary hearing before dismissal;”<sup>127</sup>
- c. “the doctrine of constructive dismissal;”<sup>128</sup>
- d. “the right to fair suspension;”<sup>129</sup>

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<sup>122</sup> MEC, *Department of Education KZN v Khumalo* 2010 ILJ 2657 (LC).

<sup>123</sup> See Constitution of the Republic of SA 108 of 1996 s 39(2); *NEHAWU v University of Cape Town* 2003 2 BCLR 154 (CC); 2003 ILJ 95 (CC); *Dendy v University of Witwatersrand* 2007 ILJ 2125 (SCA); *Old Mutual Life Assurance Co SA v Gumbi* 2007 ILJ 1499 (SCA); MEC, *Department of Roads & Transport, Eastern Cape v Giyose* 2008 5 BLLR 472 (E); 2008 ILJ 272 (E); *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 ILJ 1426 (E); *Murray v Minister of Defence* 2008 ILJ 513 (SCA).

<sup>124</sup> See *Old Mutual Assurance Co SA v Gumbi* supra; *Boxer Superstores Mthatha v Mbenya* 2007 ILJ 2209 (SCA); *Murray v Minister of Defence* supra; *Mogothle v Premier of Northwest Province* 2009 4 BLLR 331 (LC); 2009 ILJ 605 (LC); “Kylie” v CCMA 2010 ILJ 1600. (LAC); *Universal Church of the Kingdom of God v Myeni* 2015 9 BLLR 918 (LAC); 2015 ILJ 2832 (LAC); Cohen 2009 ILJ 2271; contra: *SAMSA v McKenzie* 2010 ILJ 529 (SCA).

<sup>125</sup> *Murray v Minister of Defence* supra; *Mogothle v Premier of Northwest Province* supra. Contra: *SAMSA v McKenzie* supra; *Mahlalela v Office of Pension Funds Adjudicator* 2011 ILJ 1932 (LC); Cohen 2009 ILJ 2271.

<sup>126</sup> *Murray v Minister of Defence* supra; *Mogothle v Premier of Northwest Province* supra. Contra: *SAMSA v McKenzie* supra; *Mahlalela v Office of Pension Funds Adjudicator* 2011 ILJ 1932 (LC).

<sup>127</sup> *Old Mutual Assurance Co SA v Gumbi* supra; *Boxer Super Stores, Mthatha v Mbenya* 2007 ILJ 2209 (SCA).

<sup>128</sup> See *Murray v Minister of Defence* supra.

<sup>129</sup> See *Mogothle v Premier of North-West Province* supra.

e. “the right to dignity.”<sup>130</sup>

In most countries, the rights of employees and employers are equally regulated and protected by both the common law and legislature. The underlying need for protection from unfair labour practices is important, which ensures that the relationship between the employee and employer are both respected and equal. The rights not to be dismissed unfairly are entrenched under South Africa’s constitutional labour legislation. The ILO Convention C158 provides guideline and adopted certain standard with respect to the dismissal of an employee’s employment. In retrospect the ILO standards are considered and measured under various foreign jurisdictions such as the United Kingdom, United States of America, Netherlands and South Africa.

#### ***4.2. Legislative framework.***

It is no doubt that the employee and employer relationship is recognised on a national and international level, which relationship is respected and governed by the legislature, customs and case authorities. The foreign jurisprudence and case authorities has to be considered when comparing South Africa’s stance on constructive dismissal. The purpose of the Labour Relation Act is to further “give effect to the public international law obligations of the Republic relating to labour relations.”<sup>131</sup>

##### ***4.2.1. Legislative framework for United State of America.***

The USA by many has been known as the most resourceful developed country in the world and “it could be argued that no other country has had a more significant influence on developments in the global economy over the last two centuries.”<sup>132</sup> It is therefore suitable to analyse whether such unfair dismissal law in the USA is in line with provisions of the ILO Convention C158. “In the USA there are fifty states, each with its own executive, lawmaking and judicial power, that share sovereignty with the

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<sup>130</sup>See “*Kylie*” v *CCMA* supra; *University of Venda v M* 2017 ILJ 1376 (LC).

<sup>131</sup> The Labour Relations Act 66 of 1965; s 1.

<sup>132</sup> S Bendix, *Industrial relations in South Africa* (2010) 762. The governments of the day, in keeping with the principle of voluntarism, left it to the unions and employers to reach agreements on labour issues. at p 755.

federal government of the country.”<sup>133</sup> The USA has no federated laws with respect to the termination of workers’ contracts of employment. “Hence, it would be accurate to refer to fifty-one legal systems in the USA, namely the fifty states and the federal state.”<sup>134</sup>

“At the beginning of the twentieth century the doctrine of employment at will was well established throughout the USA and still prevails in virtually every state in the USA.”<sup>135</sup> The notion of employment at will had been initially introduced by Wood in 1877.<sup>136</sup> Wood’s gave special important to the value that an employee must have the right to terminate his employment at any time. In *Peterman v International Brotherhood of Teamsters*,<sup>137</sup> the California District Court of Appeal determined the public policy deviation to Wood’s concept of employment at will. Under the exception to Wood’s policy at will, the District Court found that a worker should not be fairly dismissed due to his refusal to commit an act of perjury for his employer.

The notion of “wrongful discharge” and “public policy diviation” resulted in different provisions which carved away at the common employment at will concept. Thereafter, the term ‘constructive discharge’ was referred to as the general term used for the involuntary resignation of an employee. Constructive discharge happens when a worker is coerced to terminate his employ because the working conditions have become so intolerable that it violates the employment relationship. The Equal Employment Opportunity Commission provides a three stage enquiry to discharge constructive dismissal. They are as follows:-

- (a) “would a reasonable person in the complainant’s position have found the working conditions intolerable.
- (b) Did the conduct that constituted discrimination against the complainant created the intolerable working condition.
- (c) Did the employee’s involuntary resignation result from the intolerant working condition?”<sup>138</sup>

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<sup>133</sup> J KLIK *Onderzoek na de Amerikaanse recht* (1994) 11.

<sup>134</sup> G van Arkel *A just cause for dismissal in the United States and the Netherlands* (2007) 17.

<sup>135</sup> RC Busse *Your rights at work* (2005) 3.

<sup>136</sup> Wood *Master and servant* (1877) 272–273.

<sup>137</sup> (1959) 344 P 2d (Call App).

<sup>138</sup> John V, ‘Constructive Discharge for federal employee’ (2017) *Federal Employee Law Blog* July. 2017 <https://federalemployeeelawblog.com/2017/07/10/constructive-discharge-for-federal-employees/> (Accessed 25 October 2018).

In California, the Californian Supreme Court explicitly explained constructive discharge as follows

‘In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realise that a reasonable person in the employee’s position would be compelled to resigned’<sup>139</sup>

It appears that in order limit that number of cases for constructive discharge, an employee must also show that the employer knew about the poor working conditions and could have remedied the situation.

#### ***4.2.2. Legislative framework for Canada.***

The provisions laid out in section 240 of the *Canada Labour Code*<sup>140</sup> covers unjust constructive dismissals made by the open unambiguous action of the employer. These provisions are fairly wide and provide as follows: -

“240 (1) Subject to subsection (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and”

(b) “who is not a member of a group of employees is subject to a collective agreement, May make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.”<sup>141</sup>

In terms of the above provisions the court recognise that there are circumstances where the employer may alter the employment relationship position to such an extent that an worker would be able to deem the employer’s act as a breach and allege unlawful dismissal. In this instance it would appear that the employee had been let go with no pay pay or termination notice. This essentially means that constructive dismissal may arise from the failed actions of an employer to uphold his duties and obligations of the working relationship, irrespective of the fact that the employee

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<sup>139</sup>*Turner v Anheuser-Busch, Inc*, 7 Cal 4<sup>th</sup> 1238,1251,876 P.2D 1022 (1994).

<sup>140</sup>R.C.S., 1985, c. L-2.

<sup>141</sup>*Canada Labour Code* R.C.S., 1985, c. L-2.

agreed to a written labour contract. Should an employee wish to be successful on his constructive dismissal claim, an employer's breach has to be detrimental to the conditions stemming from such employment contract. An employer's repudiation of the working conditions depends on circumstances of an employer's breach in each case.

The claim of constructive dismissal has therefore been proven to be an analytical framework designed to provide a reasonable remedy to those employees found to be constructively dismissed. In *Potter v New Brunswick Legal Aid Services Commission*<sup>142</sup>, an employee was suspended indefinitely with monthly remuneration, while both parties were negotiating a buyout in terms of the employment agreement. Negotiation were made before employees returned from his ill health leave. The worker contended that such suspension itself resulted in a claim for constructive dismissal. The employer contended that his worker's withdrawal from negotiations resulted in the employee's resigning.

The Trial and Appellant Division upheld the employer's contention, supporting such view that the worker had resigned and could not have been constructively dismissed. It was further found that the employer did not have the explicit authority to suspend the employee, as the employer had failed to provide any administrative reasons for the employee's suspension.<sup>143</sup> The suspension was determined not to be reasonable and under the circumstances this constituted constructive dismissal. The SC found that constructive dismissal can occur in the following ways, namely: -

- (a) "a single unilateral act by the employer that breaches an essential term of an employee's employment contract, or
- (b) a series of acts by the employer that, taken together, show the employer no longer intends to be bound by the employment contract."<sup>144</sup>

The first stage in relation to constructive dismissal needs a detailed study of the employee's contract of employment. A breach of an working contact usually occurs where an employer unilaterally decides to change his worker's salary, responsibilities and or position. In order to succeed on a claim for constructive dismissal an employee

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<sup>142</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10.

<sup>143</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10 at para 59.

<sup>144</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10 at para 34.

must show on a balance of probabilities that his worker repudiated the implied and explicit terms, which substantially altered the employment agreement. The next stage happens when an employer's action indicates an intention by way of his conduct that he does not intend to uphold such employment agreement. An employer's unilateral conduct must make the continued employment unbearable to the extent that any worker can no longer put up with it.

In making a decision a Court must take into account the history of the employer actions towards his employee. Thereafter, the test is whether (with regard to the facts) a reasonable person would come to the conclusion that an employer did not intend to be bound by the obligations of the agreement. Should a reasonable person conclude that the employer conduct repudiated the conditions of the agreement to such extent that the employer no longer intended to be bound by such agreement, then it can be said that this evidently gives rise to a constructive dismissal claim.

In the *Potter* case, the Supreme Court of Canada elected not to adopt a strict framework for establishing whether a suspension is justified<sup>145</sup> as this depended on the conditions of the suspension. In doing so the Supreme Court further presented three guidelines to consider whether such suspension in terms of the tacit authority is reasonable, which are as follow, namely:

- (a) "the duration of the suspension.
- (b) whether the suspension is with pay; and
- (c) whether the employer demonstrated good faith, including the demonstration of legitimate business reasons for the suspension."<sup>146</sup>

In considering the good faith assessment outlined above, the Supreme Court found that the employer does not act in good faith, where an employer does not provide sufficient reasons to the employee for the suspension.<sup>147</sup> The *Potter case* and *Bhasin* case both supported the good faith provisions, which "meant that all parties in an employment law contract are expected at law to be honest, reasonable, candid and forthright in executing the contract."<sup>148</sup> Similarly, in South Africa an employee may

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<sup>145</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10 at para 97.

<sup>146</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10 at para 86.

<sup>147</sup>*Bhasin v Hrynew* 2014 SCC 71 [2014] 3 S.C.R. 494.

<sup>148</sup>*Potter v New Brunswick Legal Aid Services Commission* 2015 SCC 10 at par 99.

litigate the fair reasons for the suspension and or constructive dismissal by referring the employer to CCMA or bargaining council.

In *Mabitsela v SAPS*<sup>149</sup> an employee was suspended with no pay whilst on charge for murder. The employee was also a policeman and in terms of the police regulations, such suspension was enforced without pay. The employee contended that such suspension could not be fair as he was not paid for over five months. The commissioner held that a suspension issued against the employee was fair, however such suspension was not fair to implement without any pay. This case proves that even where lawful provisions allow employers to suspend their workers without any pay, this is unfair. Unlike Canadian law of good faith, if a suspected murderer can be successful, it would be very easy for a worker whom may have committed lesser offences to win his cases.

#### ***4.2.3. Legislative framework for the United Kingdom.***

In terms of the legislative framework in the United Kingdom, constructive dismissal is set out under the Employment Right Act of 1996,<sup>150</sup> which provides that

“The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”<sup>151</sup>

The “circumstances” mentioned above by which the employee has the right to terminate the employment had been developed by our common law. The concept of constructive dismissal emerges from an important repudiation of the conditions of trust found in all working contracts. To prevent a repudiation,

“(a) an employer must not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.”<sup>152</sup>

In the United Kingdom with respect to a claim based on constructive dismissal an employee's must “allege that their employer had breached the implied terms of

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<sup>149</sup>(2004), 8 BALR 969.

<sup>150</sup> Employment Right Act of 1996, (Chapter 18).

<sup>151</sup> Employment Rights Act 1996; section 95(1) (c).

<sup>152</sup> *Malik & anor v Bank of Credit and Commerce International SA* 1997] UKHL 23; [1998] AC 20.

mutual trust and confidence in the employment contract.”<sup>153</sup> This can result by way of a serious breach or a number of little breaches that culminates to a serious breach. “There is no particular timescale within which the various incidents culminating in a last straw must take place.”<sup>154</sup> In the event that the employee does become aware of the breach, this does mean that the employee needs to have resign as soon as possible. A worker should be allowed a rational time period to evaluate their position. “However, if they wait too long, they are regarded as having waived the breach and therefore would be unable to claim constructive dismissal.”<sup>155</sup>

The final straw situation may not be used in events which occurred well before the employee signed the agreement. In *Kaur v Leeds Teaching Hospital NHS Trust*<sup>156</sup>, an employee resigned on the basis that her appeal in respect of her penalty she received from the disciplinary hearing had no valid prospect of success in her constructive dismissal claim. According to the Court, the final issue she had stated was not harmful or offensive and did not breach her contract. The facts were that Ms Kaur was employed as a nurse and was subjected to a formal ability test, which she contended was unnecessary. Ms Kaur also contended that she was a victim of bullying by one of her colleagues, which led to an altercation, thus resulting the disciplinary proceedings against Ms Kaur. Ms Kaur was initially found her guilty of inappropriate behaviour and given a final written notice. Her appeal against this initial decision was rejected some fifteen months after the altercation. Ms Kaur resigned the next day and instituted constructive dismissal’s proceedings .

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<sup>153</sup> *Malik & anor v Bank of Credit and Commerce International SA* 1997] UKHL 23; [1998] AC 20.

<sup>154</sup> Bennett D, *Employment law Hand Book* 4th ed (2008) p181.

<sup>155</sup> Constructive Dismissal and Repudiation of Contract: What Must be Proved? (2011) (1) *STELL LR*, P180, See for example *Pretoria Society for the Care of the Retarded v Loots* 1997 6 BLLR 721 (LAC) 725 where Nicholson JA stated that in establishing if there has been a constructive dismissal: “The enquiry then becomes whether the appellant, 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 employer and employee ...”.Also “in *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 12 Cameron JA states that with constructive dismissal, once the employee has proved that resignation was not voluntary the enquiry is whether the employer ...” had without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust withthe employee.” “Regarding England, see the comments of Lord Justice Sedley in *Paul Buckland v Bournemouth University Higher Education Corporation* [2010] WL 605762 paras 27-28.”

<sup>156</sup>[2018] EWCA Civ 978.



With regard to the last straw event which led to Ms Kaur's resignation, the employment tribunal held that her employer did act fairly and properly throughout the disciplinary process. The tribunal held that she waited too long to resign and had in effect allegedly breach of contract. The matter was taken to appeal and the Employment Appeals Tribunal and Court of Appeal concurred that an old breach of contract can be revived, if another breach of contract occurs much later. However in this particular case (the altercation between employees) destroyed the trust and confidence between the parties.

#### ***4.2.4. Legislative framework for Australia.***

In terms of Australian law "Constructive dismissal" is the common-law notion which is the result of a worker accepting an employer's breach of the working conditions. The repudiation must be 'conduct which is serious breach which goes against the employment contract and which indicates that an employer does not intend to be held by the conditions of the employment agreement.

The general legislative framework is that an employee needs to respond to the termination of employment, which had come about as a result of an employer's conduct. The Fair Work Act 2009 defines whether an employee had been dismissed, namely, if:

- a) "the person's employment with his or her employer has been terminated on the employer's initiative; or
- b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."<sup>157</sup>

The second part of the definition as per Australia's legislature refers to constructive dismissal. Although the employee resigned, the position is that the employment relationship must have been terminated by the employer's conduct. If this is indeed the position the employee resignation can be treated as a dismissal. The use of the word 'forced' in terms of the Fair Work Act indicates the high standards which have to be met, in order for the employee to establish that she or he had no option but to resign. Whether a constructive dismissal can be proved, will have to be established from the merits and or circumstances of each case.

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<sup>157</sup>Fair Work Act 2009, s386(1).

The leading case in Australia for constructive dismissal is *Mohazab v Dick Smith Electronics*.<sup>158</sup> The facts were that Mohazab had been a worker for Dick Smith Electronics. As a result of the disappearance of stock, he was requested to resign or deal with a police inquiry. The employer prepared the letter of resignation and handed to the employee to append his signature. Subsequently, the employee lodged a claim for unlawful termination. The employer contended that the employee had voluntarily resigned as a result of his concerns with respect to the police investigation. The court found the worker's resignation had been due to the sole cause of the employer. This was because the employee did not have any option but to resign, which had resulted from his employer's conduct.

The case of *O'Meara v Stanley Works Pty Ltd*<sup>159</sup> laid out the legal criteria to be adopted in assessing if a resignation constitutes constructive dismissal, certain elements need to be presence, namely:-

'some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the employee had no effective or real choice but to resign.'<sup>160</sup>

With respect to the aforementioned the Fair Work Commission had considered numerous applications with regard to the issue of constructive dismissal. The most noteworthy of those was the case of *Kylie Bruce v Fingal Glen Pty Ltd T/A Comfort Inn Adelaide Riveriera (Fingal Glen)*.<sup>161</sup>, the facts were that an employee was employed as a receptionist for a period of a year. The worker shared her grievance that her salary was paid late and that she was never remunerated for superannuation during her employment. Despite complaining to interstate based senior management about the superannuation, she resigned because of the late wages.<sup>162</sup>

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<sup>158</sup>(1995) 62 IR 200.

<sup>159</sup>(2006) 58 AILR 100 at par 20.

<sup>160</sup>*O'Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 at par 20.

<sup>161</sup>[2013] FWCFB 5279.

<sup>162</sup>[2013] FWCFB 5279 at para 2.

Senior Deputy President O'Callaghan considered and decided that the late payments of her salary were not entirely a failure to pay. The employee should have handled the employer's conduct in a different manner either by referring the matter to the Fair Work Ombudsman or the relevant union. The employee failed to prove to the Court that she had no option other than resignation. The judge found that the worker's resignation was "*perfectly reasonable* but the employer's non-compliance was not of such a magnitude that it could be found she had no choice but to resign. A Full Bench of the Commission then found that the Senior Deputy President had applied the correct legal test and refused permission to appeal."<sup>163</sup>

#### **4.3. Conclusion**

This chapter has analysed the legal principals of various foreign jurisdictions when the employee institutes legal proceedings against the employer for a claim of constructive dismissal. Although each matter has its own circumstances, there are many types of actions which can breach the confidence and trust of the working relationships. These include intolerable working conditions, and where the employer changes the working relationship and condition to such an extent that an employee has the right to regard the employer's actions as unbearable.

It is further stated that when an employee tenders his resignation as a result of constructive dismissal, "such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill his/her duties."<sup>164</sup> It can be submitted that from the aforementioned legislative framework and case studies that elements to satisfy a claim based on constructive dismissal remain universally common. Despite the circumstances involving the case of constructive dismissal may differ, it can be submitted that if each of the jurisdiction applies it own legislative framework outlined above, one would arrive at the same conclusion.

The Australian and United State framework of constructive dismissal happens when the employee is coerced into resigning because of the unbearable employment

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<sup>163</sup>[2013] FWCFB 5279 at para 32.

<sup>164</sup>*Asara Wine Estate & Hotel (PTY) LTD v JC Van Rooyen and others* (2012) 33 ILJ 363 (LC) at para 26. "wherein it was held that if the employee is too impatient to await the outcome of the employer's attempts to find a solution to the perceived intolerable solution, and resigns, then constructive dismissal is almost always out of the question." See also: *Smith v Magnum Security* [1997] 3 BLLR 336 (CCMA) 341G.

conditions that violates the employment legislation. Similarly, the intolerable working condition may be considered as a fundamental repudiation of the terms and condition of an employment contract when compared with the Canadian framework for constructive dismissal. It is submitted that both the United Kingdom and the South African support the aforementioned framework. S 186(1)(e) of the LRA therefore affirms that South Africa's Legislature is in accordance with foreign jurisdictions. In the next chapter to follow, recommendations for employers will be discussed in which claims of this nature can be reduced.

## CHAPTER 5

### 5. CONCLUSIONS AND RECOMMENDATIONS.

#### 5.1 Introduction.

It is submitted that not every event of unreasonable behavior from the employer leads to termination of the employment agreement. Employers' who have acted in good faith but have made fundamental errors are less likely to harm the trust of those employers who have intentionally acted in bad faith. However, if an employee terminates his employ due to the fundamental breach of the tacit terms of the employment contract and of confidence and trust of the employment relationship, this could amount to a claim for constructive dismissal. This sort of conduct from the employer usually involves hostility, sabotage, victimisation, bullying, falsely accusing an employee of misconduct or incompetence, changing an employee's job description, undue demotion<sup>4</sup> or changing an employees working location on short notice.<sup>165</sup>

In order to test whether constructive dismissal is applicable as described in *Jooste v Transnet Ltd t/a SA Airways*,<sup>166</sup> one must have regard as to when an employee resigns, that there was no other reason for the said termination, apart from the fact that an "employee would have continued the employment relationship eternally had it not be for the employer's unreasonable conduct."<sup>167</sup> In practice, constructive dismissal is regarded as the same as unfair dismissals, and such contention may be abitrated by the CCMA or a bargaining council. Where the circumstances were so unbearable that the employment is no longer manageable<sup>168</sup> the court would have to consider the following, namely:-

- (a) If the sole cause of the termination of an employee was due to the unbearable working circumstances;
- (b) If the employee had no other alternative than to resign;

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<sup>165</sup> *Van der Riet v LeisureNet t/a Health and Racquet Club* (1998) 5 BLLR 471 (LAC).

<sup>166</sup> *Jooste v Transnet Ltd t/a South African. Airways* (1995) 16 ILJ 629 (LAC).

<sup>167</sup> The South African Labour Guide "Constructive Dismissal."

<http://www.labourguide.co.za/constructive-dismissal> (Accessed 4 October 2018).

<sup>168</sup> *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 ILJ 629 (LAC).

- (c) such intolerable working condition was caused by an employer who is in control of the unbearable circumstances and did not affect any change thereto to improve it.

If this is in fact the case the employee will most evidently have grounds for a claim of constructive dismissal and he should be entitled to an appropriate remedy.

### ***5.2. Appropriate remedy for constructive dismissal.***

In South Africa and as per of S 193 of the LRA, if the arbitrator and or the Labour Court holds that a dismissal is unfair, the Court or the arbitrator may:

- (a) “order the employer to re-instate the employee from any date not earlier than the date of dismissal;”
- (b) “order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal” or
- (c) “order the employer to pay compensation to the *employee*.”
- (2) “The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless”—
  - (a) “the employee does not wish to be re-instated or re-employed;”
  - (b) “the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;”
  - (c) “it is not reasonably practicable for the employer to re-instate or re-employ the employee;” or
  - (d) “the dismissal is unfair only because the employer did not follow a fair procedure.”
- (4) ‘An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.’<sup>169</sup>

In usual circumstances, when an unfair labour dispute is successfully proven, the employee will be awarded compensation, alternatively, retrospective re-instatement. In *Western Cape Education Department v Julian John Gordon & Others*,<sup>170</sup> the court decided the question as to whether reinstatement will not defeat the essence of

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<sup>169</sup> The Labour Relations Act 66 of 1965; s 193.

<sup>170</sup>(2013) ZALCCT 5.

constructive dismissal due to intolerable working conditions. The facts were that the employee worked for the Western Cape Education Department. During her employ she became sick and applied for temporary incapacity. The employer failed to process her application for temporary incapacity. “When the application for temporary incapacity was eventually processed by the employer, it was declined because the employee failed to obtain the relevant signatures of two witnesses.”<sup>171</sup>

As a result of the rejection of the employee temporary application, the employee returned to her employ. Subsequently, the employee was informed by the employer that they would deduct from his salary, monies which were owed to the employer. The deductions were in effect a substantial portion of his salary and the employee resigned.<sup>172</sup> A claim for constructive dismissal was referred to the CCMA by her employer.

The CCMA’s Commissioner found that the employer did make the employee’s working relationship unbearable and that the employee was constructively dismissed.<sup>173</sup> The Commissioner found that her employer should reinstate the employee. The Commissioner’s decision was taken on review, therefore leaving the court to decide as to whether the remedy for re-instatement was compatible with the ruling. The Court accepted the Commissioner’s view that reinstatement at first glance would have been destructive for an employee, particularly with respect to a constructive dismissal claim. The decision for reinstatement essentially turned on the employer’s failure to give proper evidence that the position would remain the same, if the employee were to be reinstated.

The court found that the arbitrator would have to accept the employee’s evidence alleging that were he to return to the employ he would not be subjected to the same circumstances that occurred before his resignation. The court was also found that the employer did nothing to rebut the worker’s evidence and concluded that the employee’s intention to be re-instated was essentially not entirely destructive.<sup>174</sup> The Labour confirmed the Commissioner in his analysis of s 193(2)(b) which specifically focused on the circumstances surrounding the employee’s dismissal. It was held that

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<sup>171</sup> *Western Cape Education Department v Julian John Gordon & Others* (2013) ZALCCT 5 at para 5.

<sup>172</sup> *Western Cape Education Department v Julian John Gordon & Others* (2013) ZALCCT 5 at para 21.

<sup>173</sup> *Western Cape Education Department v Julian John Gordon & Others* (2013) ZALCCT 5 at para 12.

<sup>174</sup> *Western Cape Education Department v Julian John Gordon & Others* (2013) ZALCCT 5 at para 29.

that such working conditions at the period of the arbitration were not the same that led to the employee's dismissal. Since they would not be the same circumstances into which the employee would be have been reinstated into, the Commissioner held re-instatement was the most suitable remedy.<sup>175</sup>

The court indicated that the decision to reinstate an employee was restricted to very peculiar situations. This was because of the employer's refusal to refute the employees' evidence that such workplace had changed to the extent that the circumstances would no longer be intolerable. It is therefore clear that reinstatement would be an available remedy for a worker who had been held to be constructively dismissed where circumstances permit. In most cases however where confidence and trust between the employment relationship has been destroyed, it is preferable to offer compensation, to avoid any further conflicts.

### ***5.3 Recommendations.***

CCMA Commission's hearings can be time-consuming, consume business resources and be very stressful for all parties involved. This should be avoided and employers should ensure that they have measures in place to prevent such claims from employees. To reduce the risk of constructive dismissal claims, a written employment contract between the employer and employee should be agreed to as this will limit the number of constructive dismissal claims.<sup>176</sup> The conditions of the written agreement should be properly explained to an employee. After the employee has read the conditions of the agreement, it may be prudent to test the employees' understanding on what has been read and or explained.

It is vital that the employer and employee communicate in a decent and respectful manner to ensure that there is no misunderstanding and or miscommunication, with regard to the employee and employment relationship. Should there be any substantial changes with regards to the conditions of the employment, employers' needs to obtain the employee's consent of the employee being affected by such change. Employers should ensure that the changes affecting their employees are made honestly and for

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<sup>175</sup> *Western Cape Education Department v Julian John Gordon & Others* (2013) ZALCCT 5 at para 33



legitimate business reasons and this should to be communicated to an employee. Should the employee need assistance with respect to the change of conditions, the employer should provide such assistance to reasonably accommodate the employee.

An employment contract may allocate for changes with regards to responsibilities, duties, salary and re-location. A potential worker could be unwilling to negotiate an employment relationship that would permit strict terms and conditions, which may inevitably become a matter of conflict. Discussing these terms and condition at the onset with an employee may avoid conflict. Employers should aim to resolve constructive dismissal disputes as soon as possible to avoid facing future financial implications. This would in effect limit an award where constructive dismissal is held to be procedurally and substantively unfair.

#### ***5.4 Conclusion***

Constructive dismissal claims have created challenges in human resource management and have become a significant emerging patterns of employment relations within South Africa and other foreign jurisdiction. The decisions and recommendations provided from case study will be a helpful guide to minor and major organizations within South Africa, which will no doubt limit the amount of constructive dismissal claims. They will also reduce some of the common mistakes made by employers, which can be inferred from the decisions of the case law relating to constructive dismissal. With a clear interpretation of the remedies awarded, employers should be able to avoid constructive dismissals claims. This will assist to develop and enable pleasant working relationship both on a national and international arena.

In regard to the international arena, “the ILO has recognised a few core agreements which it considers as important changes in employment contracts.”<sup>177</sup> The governing body of the ILO did not regarded the ILO Convention C158 as important enough to elevate it to a fundamental elements. Although thirty-four countries have consented to

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<sup>177</sup> The conventions are the Freedom of Association and the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Forced Labour Convention, 1930 (No 29); Abolition of Forced Labour Convention, 1957 (No 105); Minimum Age Convention, 1973 (No 138); Worst Forms of Child Labour Convention, 1999 (No 184); Equal Remuneration Convention, 1951 (No 100); and Discrimination (Employment And Occupation) Convention, 1958 (No 111).

the ILO Convention C158, USA, Netherlands, UK and the South Africa have not signed as yet. This does not mean that other nations are prevented from implementing the principles adopted by the non-ratified conventions. It can be said that South Africa's unfair dismissal law and UK's protection provided to their workers supports all three of the major principles adopted by the ILO Convention C158. The three essential core principles in ILO Convention C158, are namely:

- (a) "that employers must have a valid reason before terminating a contract of employment;
- (b) that the worker must be given the opportunity to defend him or herself against the allegations made by the employer and;
- (c) that there must be an opportunity to appeal against the decision to an impartial external body."<sup>178</sup>

When comparing dismissal law of the USA with the exception of the UK, South Africa's unfair dismissal's law does differ tremendously from the approach of the USA. It is also found that South Africa's unfair employment law does adopt and adhere to the labour practises established by the ILO, which is in uniformity with the employment legislature in the UK. It is therefore submitted that South African employment law have adhered to such international core values and standards.

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