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**PROVING CONSTRUCTIVE DISMISSAL: A CRITICAL EVALUATION OF SECTION
186(1)(e) OF THE LABOUR RELATIONS ACT 66 OF 1995 AND RECENT
JUDGMENTS.**

By

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DECLARATION

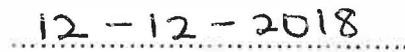
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LIST OF ABBREVIATIONS

CC Constitutional Court of South Africa

SCA Supreme Court of Appeal

LAC Labour Appeal Court

LC Labour Court

CCMA Commission for Conciliation, Mediation & Arbitration

LRA Labour Relations Act 66 of 1995 as Amended

ABSTRACT

The focus of the research is to evaluate the interpretation of section 186 (1)(e) of the Labour Relations Act of 1995 which defines a dismissal to include circumstances where an employee resigns with or without notice because the employer has made continued employment intolerable for the employee.

The purpose of the research is to set out the appropriate test to be followed in dealing with a constructive dismissal claim in terms of section 186(1)(e) and assess whether the Constitutional Court has adequately formulated a test to be applied in the case of *Strategic Liquor Services v Mvumbi* 2010 (2) SA 92 (CC) where it was held that the test for proving constructive dismissal is not whether the employee had alternatives short of resignation but only that the employer made continued employment intolerable.

The test formulated by the Constitutional Court will be revisited and the research will further evaluate if there has been progression on the approach adopted by the CC. The focus of the research will be mainly on the evaluation of recent judgments.

The significance of adopting a purposive approach when interpreting the LRA is discussed as well as the remedies which follow once an employee succeeds with a claim of a constructive dismissal.

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CHAPTER 1

INTRODUCTION

1.1 Background

The aim of this study is to evaluate the interpretation of section 186(1)(e) of the Labour Relations Act 66 of 1995 (hereafter referred to as the Act). The notion of constructive dismissal is derived from English law.¹ “It was incorporated into South African law in the 1980s”.² The notion of constructive dismissal is now codified in section 186(1)(e) of the Act. “The codification of the concept of constructive dismissal has, amongst other things, severed the link between constructive dismissal and wrongful repudiation of a contract at common law”.³

Certain requirements must be complied with where one wishes to bring a claim of constructive dismissal. Employees are required to follow the dispute resolution procedures contained in the Act in order to bring a claim or may do so by instituting a civil claim based on the law of contract.

The Act defines a dismissal to include instances where “an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.⁴ “The test for proving a constructive dismissal is objective”.⁵ “The employer’s actions must be judged objectively from a reasonable person’s perspective and in the shoes of the employee – in other words, they must be judged from the perspective of a reasonable person possessing a similar background, life experience and position”.⁶

¹ S Vettori ‘Constructive dismissal and repudiation of contract: What must be proved?’ (2011) 1 (STELL LR) 173.

² *Murray v Minister of Defence* 2008 (29) ILJ 1369 (SCA) at para 8.

³ Vettori (note 1 above; 174).

⁴ *Mafomane v Rustenburg Platinum Mines* 2003 (10) BLLR 999 (LC) at para 46.

⁵ *Mafomane* supra note 4 at 49.1.

⁶ AH Dekker ‘Did He Jump or Was He Pushed? Revisiting Constructive Dismissal’ (2012) 24 *SA Merc* 346.

The Act was enacted to protect the interests of employees when it became apparent that the common law placed employers above employees and as a result, employees suffered great prejudice because the employer could individually set out the terms which regulated the employment relationship and could also terminate the relationship at any point he chose.⁷ Before the Act came into operation, employees experienced higher levels of exploitation as they had no say in how the employment relationship was regulated. “The common law ignored the long-lasting nature of the employment relationship; it failed to afford employees legal rights to demand better conditions of employment as time passed”.⁸ They were considered to be in a far weaker negotiating position when compared to their employers. “Statutory intrusion into the common law of employment was initiated by a realisation that the law lagged behind with modern commerce and industry”.⁹ The Act was put into operation to remedy the shortcomings of the common law.¹⁰

Section 186(1)(e) of the Act gives a brief and clear definition of constructive dismissal. However, it does not specify the approach or test to be adopted when deciding such a claim. The Constitutional Court set out a test for dealing with a claim of constructive dismissal in the case of *Strategic Liquor Services v Mvumbi*.¹¹ Here, the CC held as follows:

[4]...“The test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable”.¹²

It is for this reason that the research topic aims to address the concept of constructive dismissal in light of the definition contained in the Act itself. In addition, an evaluation of the interpretation of section 186(1)(e) in light of case law will be done. Then conclusions

⁷ J Grogan *Workplace Law* 11 ed (2014) 3.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ 2010 (2) SA 92 (CC).

¹² Supra.

will be drawn on the test to be followed and a discussion on the future of constructive dismissal as contained in the Act will be conducted.

1.2 Research Questions

The main purpose of the research lies in evaluating the appropriate test that is applicable when deciding a claim of constructive dismissal. The following questions will be answered:

- 1.2.1 How will an employer be protected against disgruntled employees who resign from employment and claim that they have been constructively dismissed?¹³
- 1.2.2 Has the Constitutional Court adequately demonstrated a test to be adopted when dealing with claims of constructive dismissals?
- 1.2.3 What has been the impact of this test after the case of *Strategic Liquor Services v Mvumbi* 2010 (2) SA 92 (CC)?

1.3 Statement of Purpose

The purpose of this study is to evaluate the test for proving constructive dismissals in terms of the Act. The study will be based on a critical analysis of documentary data with the aim of creating a secondary source of employment law on the research topic. In the Constitutional Court judgment of *Strategic Liquor Services v Mvumbi*,¹⁴ it was concluded that “the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable”. The objective of this study is to establish the implications that arise as a result of adopting this test in determining a constructive dismissal.

¹³ Dekker (note 6 above).

¹⁴ *Mvumbi* supra.

1.4 Methodology

The qualitative research method was used in this study. It seeks to answer questions by making reference to the South African legislative framework, case law, journal articles and books. It focuses on reading legal writings and conducting an intensive scholarly analysis thereon. The writer will achieve the main objectives by making use of primary and secondary sources.

1.5 Rationale

The purpose of the LRA is to give a clear meaning on the rights contained in the Bill of Rights. It is imperative that “when interpreting legislation, developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.¹⁵ It is within these parameters that section 186(1)(e) of the Act will be critically evaluated and the approach adopted by the CC in *Strategic Liquor Services v Mvumbi* revisited.¹⁶ This study is significant as it:

- 1.5.1 Investigates whether the test formulated by the Constitutional Court is being applied progressively by the courts.
- 1.5.2 Interprets section 186(1)(e) of the Act in accordance with the values of the Constitution and evaluates whether amendments to the Act are necessary.
- 1.5.3 Compares a series of judgments reached by the courts and makes recommendations.
- 1.5.4 Comments on the future of constructive dismissal in South Africa.

1.6 Structure of the Dissertation

This research project consists of five (5) chapters. It is structured as follows:

Chapter one provides a brief background on constructive dismissal and the contents of this study in a nutshell.

¹⁵ Constitution of the Republic of South Africa, Act 108 of 1996; section 39(2).

¹⁶ *Mvumbi* supra.

Chapter two deals with the scope of protection afforded to employers against the misuse of constructive dismissal. It also provides a non-conclusive list of conduct that can constitute constructive dismissals.

Chapter three focuses on the test to be adopted by courts and arbitrators when dealing with a claim of constructive dismissal.

Chapter four investigates whether there has been a progression in regard to the test set out by the Constitutional Court in *Strategic Liquor Services v Mvumbi*.¹⁷ Case law is analysed.

Chapter five looks at whether amendments are necessary to section 186 of the Act, the appropriate interpretation of the Act and also makes recommendations on the test to be applied, together with the appropriate remedies to be awarded.

¹⁷ *Mvumbi supra*.

CHAPTER 2

WRONGFUL CLAIMS OF CONSTRUCTIVE DISMISSAL AND THE SCOPE OF PROTECTION AFFORDED TO EMPLOYERS.

2.1 Introduction:

Constructive dismissal involves “a unilateral termination of a contract of employment (with or without notice) because the employer has made the continued employment relationship intolerable for the employee”.¹⁸ According to section 186(1)(e) of the Act, the employee does not need to give notice prior to termination.¹⁹ However, a problem may arise where an employee resigns from employment and later claims to have been constructively dismissed without reasonable grounds for such an allegation. “The employee must be able to show that the employer was culpably responsible for the prevailing intolerable conditions”.²⁰ The employee has a duty to prove constructive dismissal. This is done in order to protect the interests of an employer against an employee who resigns from employment and uses constructive dismissal as a tool to get back at the employer.²¹ The court has further reiterated that the onus of proof is arduous.²² In employment law, the context of onus differs from other fields of the law. In terms of the Act, it is the employee who has a duty to establish that there has been a dismissal. “After having done that, the onus will be borne by the employer to prove that the dismissal was fair”.²³

¹⁸ J Grogan *Workplace Law* (2014) 11 ed at 174-179; See also *Chabeli v CCMA* 2010 (31) ILJ 1343 (LC) at para 17. The Labour Court held that in order to prove a constructive dismissal, the employee has to show that the employer had made the continued employment relationship intolerable and that, objectively assessed, the conditions at the workplace has become so intolerable that he had no option but to terminate the employment relationship.

¹⁹ Labour Relations Act 66 of 1995; section 186(1)(e) defines constructive dismissal as a situation whereby an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

²⁰ *Asara Wine Estate & Hotel Pty (Ltd) v Van Rooyen & Others* 2012 (33) ILJ 363 (LC).

²¹ Dekker (note 6 above).

²² *Old Mutual Group Schemes v Dreyer* 1999 (20) ILJ 2030 (LAC).

²³ Labour Relations Act 66 of 1995; section 192(1) provides that in any proceedings concerning any *dismissal*, the employee must establish the existence of the *dismissal*; and (2) if the existence of the *dismissal* is established, the employer must prove that the *dismissal* was fair.

This chapter will evaluate the extent and adequacy of protection afforded to employers against disgruntled employees who resign from work and claim to have been constructively dismissed. This will be done by looking at the definition of constructive dismissal both under the common law and the Act. The chapter will further look at the conduct that amounts to intolerability and focus mainly on the test that has been adopted by the courts in recent judgments.

2.2 Conduct that constitutes a claim of constructive dismissal.

As indicated above, the courts need to ensure that a dismissal has been established before proceeding any further.²⁴ It must then determine the nature of the circumstances complained of in order to ascertain whether the conduct can be deemed as being intolerable.²⁵ The courts must not err on the side of caution in making this determination as the end result of the enquiry can have a negative impact on the parties concerned. Also, the courts must guard against the misuse of the notion of constructive dismissal which refers to the “termination of the employment relationship by the employee where the employer makes the employment relationship intolerable for the employee”. This must be done in order to avoid claims brought without any foundation. This subparagraph will look at examples of direct and indirect employer conduct which has been found sufficient to constitute a valid claim of constructive dismissal.

In *Naude & Steath Marine*,²⁶ the employer was found to have made the working conditions intolerable for the employee when he failed to prevent other employees from smoking in the presence of an employee who is asthmatic. In *Pretoria Society for the Care of the Retarded v Loots*²⁷ the employee was employed as an assistant manager by the employer for the care division. The employer instituted unjustified disciplinary proceedings against the employee. In addition, the employer evidenced unrelenting

²⁴ *Mvumbi supra*.

²⁵ *Pretoria Society for the Care of the Retarded v Loots* 1977 (18) ILJ (LAC) the court held that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

²⁶ 2004 (25) ILJ 2402 (BCA).

²⁷ 1977 (18) ILJ (LAC). See also *Metropolitan Health Risk Management v CCMA & Others* 2015 (36) ILJ 958 (LAC) at para 27 where the LAC held: “It follows that it would be profoundly unfair to charge an employee twice for the same offence and then when a manifest error is raised, for the employer to seek to alter the very case which formed the basis of the charge which was invoked to summons the employee to a disciplinary hearing”.

antagonism towards the employee and certain changes were made to the way that the employee was entitled to perform her work. The court found that the changes were done to make her life so difficult that she would be forced to leave. The employee's health suffered as a result of the stress caused by the hostile working environment created by the employer. The court found that given the series of events, the employer had indeed and without reasonable and proper cause conducted himself in a manner calculated or likely to destroy the relationship of trust and confidence between the parties. In *Bonthuys and Central District Municipality*,²⁸ the employee had been pressured to sign fraudulent cheques and approve fraudulent quotations. Despite her objections, when she attempted to raise these concerns, no action had been taken and she was subjected to threats and intimidation. She claimed that this made her working conditions unbearable and she was left without any "reasonable alternative other than to effect a resignation". The Commissioner found that the employer had not fulfilled its contractual obligations and that this constituted a repudiation of the contract. As a last resort, the employee had resigned and thereby accepted the repudiation.

It has been found that conduct amounting to "abuse", "assault", "unlawful deductions on an employee's salary" "unjustified disciplinary action", "and emotional cruelty" and other generally unacceptable forms of conduct by an employer are the most obvious justifications for claims of constructive dismissal.²⁹ A demotion of an employee has also been rendered to constitute a constructive dismissal where the employer fails to conduct consultations with the employee.³⁰ In *MEC, Department of Health, Eastern Cape v Odendaal & Others*³¹ the court found that the employee was not constructively dismissed and set aside the arbitration award granted in his favour. The court did, however, make the following remarks in its decision:

²⁸ 2007 (28) ILJ 951 (CCMA).

²⁹ Grogan (note 18 at 175).

³⁰ *Van der Riet v Leisurenet t/a Health & Racquet Clubs* 1998 (5) BLLR 471 (LAC), See also *Schindler Lifts (Pty) Ltd v The Mental Engineering Industries Bargaining Councils & Others* (JR 1551/11) [2013] ZALCJHB 248 (2 October 2013). In this case the employee was found guilty of misconduct by the disciplinary committee. He was then sanctioned to a demotion with salary reduction without the necessary consultations. The court found that the employee was constructively dismissed.

³¹ 2009 (30) ILJ 2093 (LC).

"I am in agreement with the Applicant's submission that the non-payment of remuneration will not as a matter of course constitute a ground for a constructive dismissal although I do accept that in most instances it may be a significantly persuasive factor in coming to a conclusion that a constructive dismissal did, in fact, take place as the non-payment of a salary would, in most circumstances, render the continuation of an employment relationship intolerable. After all, payment of remuneration constitutes one of the *essentialia* of the contract of employment; the employee works and in return he or she receives payment. A refusal to pay will (in most cases) constitute a material breach of the contract. The latter statement, however, presupposes that there existed an obligation in the first place to pay the employee his salary. Put differently, where the employee has a right or claim to be paid, an employer's refusal to pay an employee will, in most instances (although not as a general rule), render the employment relationship intolerable".³²

It must be borne in mind that there is a variety of conduct that can render the employment relationship intolerable. The courts have dealt with quite a number of claims, some of which have been accepted and some dismissed by the courts and arbitrators.

2.3 Protection of employers against wrongful claims of constructive dismissal.

"The test for proving constructive dismissal remains an objective test".³³ "A two-stage enquiry must be followed in the determination of whether an unfair constructive dismissal has taken place".³⁴ In some instances, apart from the employee's subjective impression which has led to resignation because of the employer's conduct, it can be concluded that the employer's conduct, when judged objectively, has rendered the continued employment relationship intolerable.³⁵ It has been accepted that the test is a

³² *Odendaal* supra (note 31 at 65).

³³ *Mafomane v Rustenburg Platinum Mines* 2003 (10) BLLR 999 (LC) at para 49; *Grogan* (note 18 above); *Lubbe v ABSA Bank Bpk* 1998 (12) BLLR 1224 (LAC) at para 8 & *Jordaan v CCMA* 2010 (31) ILJ 2331 (LAC).

³⁴ N Whitear-Nel, B Grant & L Jansen Van Rensburg 'Is An Attempted Retraction of a Resignation Consistent With a Claim for Constructive Dismissal?' (2012) 2 *ILJ* 2309.

³⁵ M Solomon 'The Question of Constructive Dismissal: A review of some recent developments' (1999) 1 *JBL* 15. See also *Puren v Victorian Express* 1998 (19) ILJ 404 (CCMA).

two-stage enquiry.³⁶ An employee must first prove a dismissal and that such a dismissal was unfair.³⁷ The court in the *Pretoria Society for the Care of the Retarded v Loots*³⁸ held that “the function of the court is to look at the employer’s conduct in totality and look at whether the effect thereof, when judged reasonably and sensibly is such that the employee cannot be expected to tolerate it”. Steenkamp J in *Asara Wine Estates & Hotel Pty (Ltd) v Van Rooyen & Others*³⁹ held:

“when an employee resigns as a result of a constructive dismissal, such an employee is, in fact, demonstrating that the situation has become so unbearable to such an extent that the employee can no longer fulfil his or her duties as a result of the conduct of the employer”.⁴⁰

In this sense, the court must look at the employer’s conduct holistically.⁴¹ It must be noted that not all courts dealing with claims of constructive dismissals have arrived at a similar conclusion regarding the application of an appropriate test for proving a claim of constructive dismissal. In *Jooste v Transnet Ltd t/a South African Airways*, it was held that “the employee must not have intended to terminate the employment relationship”.⁴²

It has become apparent that some courts seem to have formulated a more stringent test while others have formulated a more reasonable test which favours quite extensively the interests of employees and employers on a proportional basis.

The Constitutional Court in *Strategic Liquor Service v Mvumbi*⁴³ laid down the test to be adopted when dealing with claims of constructive dismissals as follows:

³⁶ *Foschini Group v CCMA* 2008 (29) ILJ 1515 (LC); *Asara Wine Estate Hotel supra & Value Logistics (Pty) Ltd v Basson & Others* 2011 (32) ILJ 2552 (LC).

³⁷ *Foschini Group supra*.

³⁸ 1997 (18) ILJ 981 LAC.

³⁹ 2012 (33) ILJ 363 (LC).

⁴⁰ *Asara Wine Estates supra* note 39 at 26.

⁴¹ *Murray v Minister of Defence* 2008 (29) ILJ 1369 (SCA) at para 12.

⁴² 1995 (16) ILJ 629 (LAC).

⁴³ 2010 (2) 92 SA (CC) at para 4.

“...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 the continued employment intolerable”.⁴⁴

A once-off incident may not be sufficient to establish a valid claim for constructive dismissal. The employee may still be required to adduce more evidence in order to succeed with a claim. Where an employer has a grievance procedure in place, it is advisable for the employee to exhaust that procedure to successfully claim constructive dismissal unless the circumstances of a particular case are too extreme and do not warrant the employee to resort to internal grievance procedures.⁴⁵ This will ordinarily depend on the circumstances surrounding the resignation. The Commissioner or presiding officer will have the discretion in that regard as to whether the conduct of the employee was justifiable when she opted for resignation.

Bassoon J, in *Eagleton & Others v You Asked Services*⁴⁶ formulated a similar test like that emphasized by the CC in *Mvumbi*. It held that the employee must prove three things when claiming constructive dismissal:

- (a) The employee must have terminated the contract of employment;
- (b) The continued employment relationship must have become intolerable; and
- (c) The employer must have made the continued employment intolerable.

A mere claim by an employee that he believed that there was no point in continuing with the employment relationship will be insufficient. The belief formed must be reasonable.⁴⁷ According to *Grogan*, “intolerable is a strong word, and the choice of such a term by the legislature indicates that where a claim lacks a firm conviction, it will be insufficient”.⁴⁸

⁴⁴ *Mvumbi* supra.

⁴⁵ N Whitear-Nel & M Rudling ‘Constructive Dismissal: A Tricky Horse to Ride’ (2012) 198 *Obiter*; See also *Smith v Magnum Security* 1997 (3) BLLR 336 (CCMA). The arbitrator found that “the dismissed employee should establish that there was no reasonable alternative to resignation”. See also *Aldendoff v Outspan International* 1997 (1) CCMA at para 6.13.1.

⁴⁶ 2009 (30) ILJ 320 (LC) at para 22.

⁴⁷ Supra.

⁴⁸ Supra.

One cannot resign solely by relying on a trivial conflict that occurs in a working environment as a basis for the dismissal. This is because generally there is bound to be conflict in a working environment particularly due to the nature of the work that is being done. One must present sound and reasonable grounds for electing to resign. The courts and arbitrators must also guard against the adoption of a literal approach when interpreting the relevant provision of the Act. Instead, a purposive approach must be adopted.

There is no conclusive list in terms of what may constitute a valid claim for constructive dismissal. "There is a variety of employer actions that can give rise to a claim of constructive dismissal".⁴⁹ "It is not possible to draw up a closed list of examples of employer conduct that render the situation intolerable for employees".⁵⁰ It has further been extended to situations where the employer unilaterally alters the terms of the employment relationship by reducing an employee's salary.⁵¹ As previously stated the instances resulting in a constructive dismissal are not exhaustive, "they are widely infinite that there can be no rule of law saying what circumstances justify and what do not".⁵² The circumstances may include but are not limited to: forced transfers, failure by employers to adhere to the contract, spurious allegations of misconduct, forced resignations in the face of unacceptable alternatives, and sexual harassment by employees' superiors. "These have all been accepted as justifying claims of constructive dismissal".⁵³ "It is a question of fact for the tribunal".⁵⁴ Furthermore, a failure to consider both stages of the enquiry has been held to be a reviewable irregularity by the decision maker.⁵⁵

⁴⁹ *Eagleton* supra; See also *Minister of Home Affairs v Hambidge* 1999 (20) ILJ 2632 (LC) at para 12. The concept of constructive dismissal is flexible because the circumstances that may give rise to it are so infinitely various".

⁵⁰ Grogan (note 18 above).

⁵¹ *Riverview Manor (Pty) Ltd v CCMA* (2003) 24 ILJ 2196 (LC).

⁵² Grogan (note 18 above).

⁵³ *Ibid.*

⁵⁴ *Jooste v Transnet t / a South African Airways* 1995 (16) ILJ 629 (LAC); *Asara Wine Estates Hotels* supra note 36 at 21. The LAC held that the onus is on the employee to prove that his resignation amounted to a dismissal. In order to decide whether there was a dismissal, the commissioner has to investigate the full merits of the case.

⁵⁵ *Foschini Group v CCMA & Others* 2008 (29) IL J 1515 (LC) para 39. See also *Value Logistics Ltd v Basson & others* 2011 (32) ILJ 2552 (LC).

When one looks at the current status of the concept of constructive dismissal, it becomes apparent that the onus to be discharged is not an easy one. The enquiry adopts an objective test. "The adoption of such a test means that the employee's perception of the events which establish intolerability due to the employer's conduct must be viewed in an objective sense".⁵⁶ This was confirmed in *Old Mutual Group Scheme v Dreyer*.⁵⁷ Conradie JA cautioned that "it is generally difficult for an employee who resigns to show that he has been constructively dismissed because the onus of proof rests on the employee and is very onerous to discharge". "There must be unfair or wrongful conduct on the part of the employer that drives the employee out".⁵⁸ The employee must formulate a reasonable apprehension that the employer will not stop creating an intolerable working environment.⁵⁹ In *Murray*, Cameron AJ argued that "the employer may not have control over what renders the employment intolerable and even if the employer is responsible it may not be to blame". Therefore, "the employer must be culpably responsible in some way for the intolerable conditions: the conduct must lack reasonable and proper cause".⁶⁰ The SCA in *Murray v Minister of Defence*⁶¹ held that "where an employee resigns because work has become intolerable, that does not by itself make for constructive dismissal."

As already discussed above, the employee has a duty to establish that there has been a dismissal. It is, therefore, a requirement that the employee proves that he has actually resigned.⁶² This may be with or without notice.⁶³ One would however argue that the tendering of a resignation as per the wording of the Act makes it highly probable that a party may on reasonable grounds draw an inference that the continued employment relationship between parties had not reached such a state in which the employee could be deemed to no longer be able to work for the employer. In *Eastern Cape Tourism*

⁵⁶ *Eastern Cape Tourism Board v CCMA & Others* 2010 (11) BLLR 1161 (LC) at para 18.

⁵⁷ 1999 (20) ILJ 2030 (LAC) at para 18.

⁵⁸ D Du Toit...et al *Labour Relations Law* 4 ed (2003) 376.

⁵⁹ *Pretoria Society for the Care of the Retarded v Loots* 1997 (18) ILJ 981 LAC.

⁶⁰ *Asara Wine Estate & Hotel (Pty) Ltd supra* note 40 at 35.

⁶¹ 2008 (29) ILJ 1369 (SCA) at para 13; see also *Asara Wine Estate & Hotel (Pty) Ltd supra* note 60 at 34.

⁶² *Asara Wine Estate & Hotel (Pty) Ltd supra*; Dekker (note 6 above).

⁶³ Labour Relations Act 66 Of 1995; section 186(1)(e).

*Board v CCMA*⁶⁴ the court found that the situation could not have been intolerable where an employee was willing to work her notice period. The court held that this amounted to a resignation and not constructive dismissal. In *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen*⁶⁵ the court held that the same conclusion is drawn where an employee wishes to revoke a letter of resignation after having claimed constructive dismissal. The Labour Court has also held that a resignation becomes effective once it has been tendered and it cannot be withdrawn unless the employer agrees to the withdrawal.⁶⁶

In some cases, an employee resigns due to conduct that does not emanate directly from the employer or his control. In the event of such circumstances, the court has held that a resignation of that nature does not warrant a claim for constructive dismissal.⁶⁷

Some employers prefer to give employees a choice to either resign or face disciplinary action. A dispute is then created when the choice is left to an employee to choose between the two options. The employer cannot purport to conduct itself in a manner that is not acceptable with the hope of giving an election to employees to condone the unreasonable conduct or opt for resignation. That, in law, may attract a claim of a constructive dismissal. In *FAWU & Others v Rainbow Chicken Farms*,⁶⁸ the employer made an offer to his employees between a dismissal and a final warning which resulted in a claim for an unfair dismissal. Revelas J held as follows:

“Firstly, the fact that the employer gave the employees a choice between dismissal and a final warning (without an appeal) was ambiguous and unfair in the circumstances. It

⁶⁴ 2010 (11) BLLR 1161 (LC) at para 53.

⁶⁵ *Asara Wine Estate & Hotel (Pty) Ltd* supra note 60 above; see also *Eastern Cape Tourism Board v Commission for Conciliation Mediation and Arbitration* 2010 (11) BLLR 1161 (LC). The court held that the employer may not have control over what makes the conditions intolerable. The employer must be culpably responsible in some way for the intolerable conditions.

⁶⁶ *Lottering v Stellenbosch Municipality* 2010 (12) BLLR 1306 (LC) at para 15.

⁶⁷ *Daymon Worldwide SA Inc. v CCMA* 2009 (30) ILJ 575 (LC) at para 41; *Murray* supra note 61 at 13. The Supreme Court of Appeal held that “the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal”.

⁶⁸ 2000 (1) BLLR 70 (LC) at para 27.

cannot be argued that the individual applicants had only themselves to blame for their predicament because they chose dismissal (with an appeal)".

However, "the outcome differs where the employee is set to undergo a disciplinary hearing, but subsequently resorts to resignation, then, there can be no constructive dismissal".⁶⁹ Alternatively, the Commissioner has held that where an employee is being constantly subjected to threats of a disciplinary action which do not materialise and subsequently resigns after tendering sufficient evidence to that effect, such an employee is, in fact, constructively dismissed.⁷⁰

The commissioner has a duty to exercise care when dealing with claims of constructive dismissals and to ensure that the concept is not misused by employees. This includes situations where an employee resigns from employment, then, after a few years brings a claim that she was constructively dismissed, or attempts by employees to retract a letter of resignation and if the employer rejects the retraction of the resignation then decides to bring a claim of constructive dismissal. Under these circumstances, it is apparent that the court will be reluctant to find in the employee's favour.⁷¹ Also, in cases where the employer has formal grievance procedures in place, the employee is required to exhaust such procedures before resigning in order to successfully claim constructive dismissal.⁷² In addition, where there is an alternative to dismissal, the Labour Court held that "such resignation is deemed to be premature and could not be interpreted as a constructive dismissal".⁷³ This is done to prevent a flood of employees resigning and claiming protection from the Act.⁷⁴ What would be expected is for the employee to report the intolerable conduct to senior management and lodge a formal grievance so that the dispute can be amicably resolved.⁷⁵ The failure of the commissioner to move to the

⁶⁹ *Asara Wine Estate & Hotel* supra note 65 at 3; *Old Mutual Group Schemes v Dreyer & Another* 1999 (20) ILJ 2030 (LAC) at para 18 & *Dallyn v Woolworths (Pty) Ltd* 1995 (16) ILJ 696 (IC).

⁷⁰ *Makua v the Department of Education* (Case No. PSES647-13/14LP) 19-07-2014 at para 15.

⁷¹ *Murray* supra (note 61 at 31). The SCA held: "the employee should not delay too long in the terminating of the contract in response to the employers conduct".

⁷² N Whitear-Nel, B Grant & L Jansen Van Rensburg 'Is an Attempted Retraction of a Resignation Consistent with a Claim for Constructive Dismissal?' (2012) 2 *ILJ* 2313.

⁷³ *Asara Wine Estates Hotel* supra note 69 at 4.

⁷⁴ *Loubser v PM Freight Forwarding* 1998 (7) CCMA.

⁷⁵ *Albany Bakeries Ltd v Van Wyk and Others* 2005 (26) ILJ 2142 LAC para 28.

second leg of the test, which is, assessing whether the dismissal was fair, constitutes a reviewable irregularity in the proceedings.⁷⁶

2.4 Conclusion

This chapter deals with different types of conduct which have been found sufficient to constitute the basis of a claim of constructive dismissal. In addition, it makes a distinction between acceptable and wrongful claims of constructive dismissals and explores the scope of protection afforded to employers against wrongful claims. In conclusion, it appears that if the courts are not careful in granting the remedy, they will be faced with many claims of constructive dismissal which lack a legal basis. Alternatively, such unreasonable claims will lead to the employer's detriment. Therefore, the test for constructive dismissal must remain objective. A reasonable man test must be used when weighing the seriousness of the conduct. This is because there are various forms of employer conduct that may fairly constitute a claim of constructive dismissal.

⁷⁶ *Value Logistics (Pty) Ltd v Basson & Others* 2011 (32) ILJ 2552 (LC) at para 64.

CHAPTER 3

HAS THE CONSTITUTIONAL COURT ADEQUATELY DEMONSTRATED A TEST TO BE FOLLOWED WHEN DEALING WITH CLAIMS OF CONSTRUCTIVE DISMISSAL?

3.1 Introduction

It has become apparent that the law of constructive dismissal has been codified. The Act makes provision for the termination of employment by the employee where they can no longer put up with the conduct of the employer. Such termination can be effected with or without notice and the employee can bring a claim of constructive dismissal based on intolerability.

This chapter will discuss the different tests which have been applied by the courts when deciding claims of constructive dismissal. This will be achieved by making a comparison of these findings against the Constitutional Court judgment of *Strategic Liquor Services v Mvumbi*.⁷⁷ The approach that has been adopted by the Constitutional Court will be dealt with in detail and scrutinised in light of previous and recent court judgments. Section 186(1)(e) will be analysed in consideration of case law. The impact of the findings made by the Constitutional Court is of great significance since lower courts are generally bound by the decisions of higher courts.

3.2 A critical analysis of the wording of Section 186(1)(e) of the LRA

Section 186(1)(e) of the LRA provides that a dismissal means that "an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee". Generally, "in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal".⁷⁸

When dealing with constructive dismissals the employee must show to the court or arbitrator that the conduct of the employer led to his resignation. The conduct alleged

⁷⁷ *Mvumbi* supra.

⁷⁸ Labour Relations Act 66 of 1995; section 192.

must be objective.⁷⁹ The employer must then show that the conduct complained of is fair. Claims of constructive dismissal are not easily ascertainable as employees would ordinarily suggest. There are various factors to be taken into consideration. The courts will generally analyse the circumstances of each case and arrive at a conclusion. In *National Health Laboratory Services v Yona & Others*⁸⁰ the LAC found that “constructive dismissal occurs when an employee resigns from employment under circumstances where he or she would not have resigned but for the unfair conduct of the employer towards the employee, which by its nature renders continued employment intolerable for the employee”. It was further held that “the test for proving a constructive dismissal is an objective one and that a resignation must have been a reasonable step for the employee to take in the prevailing circumstances”.

3.3 The definition of an employer within the context of constructive dismissal

In lay man’s terms, an employee is generally known as a person who offers services under the control of an employer in return for remuneration. However, for the purposes of the LRA, in order to claim that you have been constructively dismissed, you must be able to show that you were in an employment relationship and have satisfied the requirements of section 200A of the LRA.⁸¹

The term employer is a broad construction.⁸² One must bear in mind that the conduct which has led to resignation must be of the employer’s making. The provisions of section 186(1)(e) are clearly set out and state that it must be an employer that made continued employment intolerable.⁸³ It is a fundamental requirement for an employer-employee relationship to be established in order to successfully claim constructive dismissal. Modern undertakings are run and managed in such a way that various people through their titles and positions within those undertakings qualify as an employer and

⁷⁹ Grogan (note 18 above).

⁸⁰ (PA2/13) [2015] ZALCPE 32 (12 May 2015) at para 30.

⁸¹ Labour Relations Act 66 of 1995; section 200A.

⁸² Nkosi ‘*The President of RSA v Reinecke* 2014 3 SA 205 (SCA): Constructive dismissal and the changing identity of the employer: A critique of some of the findings made by the Supreme Court of Appeal’ (2015) *De jure* 232-243 available at <http://dx.doi.org/10.17159/2225-7160/2015/v48n1a15>, accessed on 17th April 2017.

⁸³ *Ibid.*

that is the reality courts need to be aware of.⁸⁴ This is because modern times have changed; the end result has been that an employer is no longer always an individual or a natural person. It is now often a juristic person, a corporation of one form or another managed by a collective group calling itself “the management” of the enterprise.⁸⁵ The most important thing is that the conduct complained of must be of the employer’s making. A complaint of a conduct that emanates from the actions of fellow employees may still be sufficient to justify a claim; particularly where the employer has the means to stop such a conduct from taking place but elects not to do so. The employer can make employment intolerable by way of an act or omission.⁸⁶ The same principle applies where, for example, the employer allows a regular client to make indecent sexual remarks to an employee and does not assist the employee when she complains about it. This would mean that the intolerability was partly the fault of the employer.

In *Vorster and BMC Management Trust*,⁸⁷ the employer did not directly make employment intolerable, but it did so indirectly by allowing the friction to continue without attempting to mediate the dispute or empower the employee to defend herself against the third party. In *Daymon Worldwide SA Inc. v CCMA*⁸⁸ it was held that “if the employer fails to act (for example against a third party) and this results in damage to the relationship of employment, this should amount to culpability”. This is when the employer has failed to act positively to protect the employment relationship between the parties. It has also been accepted that whether or not the employer intended to repudiate the contract is irrelevant.⁸⁹ In *National Health Laboratory Services v Yona & Others*,⁹⁰ the court found that the employee resigned because the employer had failed

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Dekker (note 13 at 352).

⁸⁷ 2009 (30) ILJ 1421 (CCMA).

⁸⁸ 2009 (30) ILJ 575 LC at 590A.

⁸⁹ *Pretoria Society for the Care Of the Retarded v Loots* 1977 (18) ILJ 981 (LAC) at 985A-C.

⁹⁰ (PA2/13) [2015] ZALCPE 32 (12 May 2015) at para 35. See also *Murray v The Minister of Defence* 2008 (29) ILJ 1369 SCA at para 13, The SCA held that “... the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may have no control over what makes conditions intolerable. So the critical circumstance must have been of the employer’s making. But even if the employer is responsible it may not be to blame. There are many things an employer may fairly and reasonably do to make an employee’s position intolerable. More is needed; the employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked reasonable and proper cause.”

to assist her when she was in direct need of assistance due to suffering from depression and generalised anxiety disorder. It was found that the employer's failure to assist the employee in applying for extended sick leave and in addition, placing her on leave without pay and effecting deductions on her monthly salary resulted in the "psychological and traumatic degradation of her human dignity". As a result, the court found that the employee's resignation was neither voluntary nor intentional. The court confirmed that she had been constructively dismissed.

3.4 The impact of tendering a resignation notice on a claim of constructive dismissal

A resignation is generally "a declaration which an employee undertakes in order to dissolve the employment relationship between the parties". Employees often resign in the heat of the moment and later regret their irrational decisions. In *Lottering v Stellenbosch Municipality*,⁹¹ the Labour Court set out the principles of a resignation. It held that a resignation must be unequivocal. It is a unilateral act that does not require acceptance by the employer. Even though in practice, employers will normally accept a resignation. A resignation takes effect upon being tendered, and not upon acceptance by the employer. Once a resignation has been given, it cannot be withdrawn unless the employer consents to the withdrawal of the resignation. In other words, an employer is not obliged to accept a withdrawal of a resignation. "If a resignation is tendered with notice, the contract of employment only terminates once the notice period expires". In *CEPPAWU & Another v Glass & Aluminium*,⁹² the court held that "a resignation brings the contract of employment to an end if it is accepted by the employer". However, in *Eagleton v You Asked Services (Pty) Ltd*⁹³ the LC held that "a clear distinction must be drawn between a voluntary resignation which will bring the contract to an end and one which will not be regarded as a 'dismissal' in terms of section 186(1)(e) of the LRA and from the circumstances in which the employee resigns not because she voluntarily wishes to bring the contract to an end, but because she has no other alternative but to resign".

⁹¹ 2010 (12) BLLR 1306 (LC).

⁹² 2000 (CC) [2002] 5 BLLR 3(LAC) at para 35.

⁹³ 2011 (32) ILJ 2552 (LC) at para 30.

Ordinarily, “employees who resign are obliged to provide the employer with notice of their intention to do so”. “The employee may do this either in terms of the contract of employment, the Basic Conditions of Employment Act or in terms of the common law”.⁹⁴ However, an employee who is constructively dismissed is directly or indirectly forced to resign because of the nature of the intolerable conduct.

Section 186(1)(e) of the LRA provides that resignation can be effected with or without the tendering of a notice. In *Value Logistics Ltd v Basson & Others*,⁹⁵ the court had to investigate whether the employee's conduct in purporting to retract a resignation negated his contention that the employment was intolerable. The employee submitted a letter of resignation in which he stated that the resignation was effected as a result of unfair and extreme pressure placed on him by the employer. Four days later, the employee sent an email to the employer in which he stated that he wished to withdraw his resignation. The employer declined to accept the employee's withdrawal of the resignation and as a consequence, the dispute was referred to the CCMA. The Commissioner found that “the employee had been constructively dismissed due to the oppressive and unreasonable work environment created by the employer leaving the employee with no alternative other than to resign”.⁹⁶ The employee was awarded compensation equivalent to five months remuneration.⁹⁷ In *Strategic Liquor Services v Mvumbi*,⁹⁸ it was noted that notwithstanding the fact that the employee had tendered his resignation, the CCMA held that he was constructively dismissed. The employer took the decision of the arbitrator for review and the CC upheld the decision of the arbitrator and dismissed the appeal.

The main issue that remains unresolved, in spite of what has already been discussed above, is the impact of tendering a notice of resignation on the element of intolerability.

⁹⁴ Act 75 of 1977.

⁹⁵ 2011 (32) ILJ 2552 (LC); See also N Whitear-Nel, B Grant & L Jansen Van Rensburg ‘Is an Attempted Retraction of a Resignation Consistent with a Claim for Constructive Dismissal?’ (2012) 2 *ILJ* 2309.

⁹⁶ *Value Logistics Ltd* supra.

⁹⁷ *Supra*.

⁹⁸ *Mvumbi* supra (note 77 at 1).

In simple terms, intolerability involves a situation which a person cannot bear because the entire employment relationship is rendered unpleasant. "It includes actions on the part of the employer which drives the employee to leave (whether or not there is a form of resignation)".⁹⁹ The actions of the employer can take different forms. In *Value Logistics v Basson*,¹⁰⁰ the court arrived at its conclusions with reference to *Pretoria Society for the Retarded v Loots*¹⁰¹ and held that "when resigning in the context of constructive dismissal, the employee is indicating that she or he believes that the employer will never abandon the pattern of creating an unbearable work environment". As a consequence, the court found that because the employee wanted to retract his resignation, the employment relationship had not become intolerable.

This chapter addresses possible disadvantages which can be associated with the wording of section 186(1)(e). The decision in *Value Logistics Ltd v Basson*¹⁰² suggests that where an employee seeks to retract a resignation that will be treated in itself as showing that a constructive dismissal did not take place. It is apparent that the court made this finding in light of having made a critical evaluation of the word "intolerability". It suggests that if the situation had been that of an unpleasant nature, the employee can never be expected to wish to return to the employ of the employer. Intolerable working conditions in the context of a dismissal suggest that the employment relationship has broken down to such an extent that there are no prospects of the normal restoration of the employment relationship. "As a consequence, a claim of constructive dismissal and a request to be reinstated by the arbitrator are normally regarded as mutually destructive".¹⁰³ The overall impact of these decisions is that where an employee claims constructive dismissal, the courts will be reluctant to find in favour of the employee where he wished to retract the resignation.

⁹⁹ Du Toit, D... et al. *Labour Relations Law: A Comprehensive Guide* 4 ed (2003) 370.

¹⁰⁰ *Value Logistics Ltd* supra (note 95 at 30).

¹⁰¹ *Pretoria Society* supra (note 89 above).

¹⁰² *Value Logistics Ltd* supra (note 95 above).

¹⁰³ Grogan (note 18 above).

3.5 Should an employee exhaust alternative grievance procedures prior to resignation?

As already pointed out, constructive dismissal is no exception to being a “hybrid of legislation and contract since it has its origins from the common law.”¹⁰⁴ If the dismissal is one envisioned by the LRA, there is no need to invoke the common law.¹⁰⁵ The reason behind this is because the LRA has codified the laws regulating constructive dismissals. It is a statute that regulates the employment relationship between the parties.

Over the years, different courts have set out their own requirements for dealing with claims of constructive dismissals. However, there has not yet been consistency regarding the test to be followed when dealing with claims of constructive dismissals. In *Mafothane v Rustenburg Platinum Mines*,¹⁰⁶ the court held that “there are three requirements to be proved in order to successfully claim constructive dismissal”. These requirements were listed as follows:

- (a) “Firstly, the employee must have terminated the contract of employment;
- (b) Secondly, the reason for the termination must be that the continued employment relationship has become intolerable for the employee; and
- (c) Thirdly, it must be the employer who has rendered employment intolerable”.

In *Jordaan v CCMA*,¹⁰⁷ the LAC held that “an employee must give evidence to justify that the employment relationship has indeed become so intolerable that no reasonable option, save for termination is available to her”. In *Smith v Magnum Security*,¹⁰⁸ the arbitrator found that “a dismissed employee has a legal duty to establish a lack of reasonable alternatives to resignation. In addition, the court noted that mere unreasonableness or illegitimate demands by the employer, according to this approach, do not amount to constructive dismissal as long as the employee retains a remedy

¹⁰⁴ Vettori (note 1 at 173).

¹⁰⁵ Vettori (note 1 at 177).

¹⁰⁶ 2003 (10) BLLR 999 (LC) at para 50.

¹⁰⁷ 2010 (31) ILJ (LAC); See also *Old Mutual Group Schemes v Dreyer* 1999 (20) ILJ 2013 (LAC) 2036.

¹⁰⁸ 1997 (3) BLLR 336 (CCMA).

against the employer's conduct short of terminating the employment relationship".¹⁰⁹ A similar approach was adopted in *Aldendorff v Outspan International Ltd*¹¹⁰ where it was held that where an employee resorts to a resignation rather than seeking to resolve the problem informally or making use of the company's grievance procedure, such an employee had not been constructively dismissed. The court adopted a similar approach in *Smith v Magnum Security*.¹¹¹ The arbitrator found that the dismissed employee should establish that there was no reasonable alternative short of resignation.

Normally employers have grievance procedures inside the workplace which are to be followed by an aggrieved party before resorting to external bodies. Such a procedure may be in a form of a code of conduct or a provision in the employment contract. Generally speaking, it would be appropriate to resolve a dispute instead of resigning immediately. A resignation is an option which should be exercised as a measure of last resort because it normally has a negative impact on the personal circumstances of the employee.

The LRA, however, protects the interests of an employee who finds him or herself in a situation which is unbearable. The employee has the power to terminate the employment relationship and invoke the provisions of section 186(1)(e). In *Salstaff & Another v Swiss Port South Africa*,¹¹² a pregnant personal assistant of a company CEO resigned because she suffered insults, threats and humiliation in the workplace. The court found that she had been constructively dismissed.

The employee must be able to show before the court that his or her choice to resign immediately was not unreasonable and premature. As stated in *Loots*, "it is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it

¹⁰⁹ *Supra*.

¹¹⁰ 1997 (18) ILJ 810 (CCMA); see also *Albany Bakeries v Van Wyk and others* 2005 (26) ILJ 2142 (LAC) at para 28. The LAC held that "it would be opportunistic for an employee to resign and claim that the resignation was a result of intolerable conditions when there was an avenue open to solve his problem which he did not utilize".

¹¹¹ 1997 (3) BLLR 336 CCMA.

¹¹² 2003 (3) BLLR 298 (LC).

is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it". The courts have implemented this approach to guard against wrongful claims of constructive dismissal and alternatively to also assist the courts in the determination of claims where "the employee could not reasonably have been expected to put with the conduct of the employer".

It is submitted that "intolerable should not be interpreted as meaning that no alternative to resignation exists".¹¹³ The CC in *Strategic Liquor Services v Mvumbi*¹¹⁴ was faced with a claim of constructive dismissal. "The employee was given a choice between resigning (with one month's salary and good reference), and being warned and placed on a poor work performance programme with training after one of the employer's biggest customers complained about him". The employee held that "the complaints against him were unfairly instigated and false". He accepted the offer made by the employer and resigned. He contended that there was no point in continuing to stay if he was going to get fired anyway. Shortly after, he initiated legal proceedings for unfair dismissal. The Constitutional Court in dealing with the matter held as follows:

"There are two reasons why the invitation cannot be accepted. The first is that the employer's submission overlooks the employee's uncontested evidence to effect that his work situation had become intolerable and that the alternative to resignation was a sham since the employer would find a reason to dismiss him anyhow. This means there was no "choice". The second is that it misconceives 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 the continued employment intolerable."¹¹⁵

3.6 Conclusion

The finding of the court in *Mvumbi* concurred with the view that "an employee can resign and claim constructive dismissal regardless of the availability of alternative measures short of dismissal". In the earlier decision of *Wulfsohn Motors (Pty) Ltd t/a Lionel Motors*

¹¹³ Grogan (note 18 above).

¹¹⁴ *Mvumbi* supra.

¹¹⁵ *Mvumbi* supra (note 114 at 4).

v Dispute Resolution Centre and Others,¹¹⁶ “the employee failed to follow the relevant grievance procedure before resigning and she claimed constructive dismissal because she knew it would be futile to follow such a procedure”. The court held that “failure to institute a grievance did not negate a claim for constructive dismissal because there would have been no sense in following a procedure the outcome of which was pre-meditated”.

The rationale behind the decision of the Constitutional Court in *Mvumbi*¹¹⁷ was to clarify that there is a wide variety of conduct that can render the employment relationship intolerable. “The employee’s perceptions must be tested against the actual reasons for their resignation”.¹¹⁸ As already pointed out, in some instances, the working conditions may be too extreme that a reasonable employee cannot reasonably be expected to tolerate the employer’s conduct and the circumstances demand an immediate resignation. “The employee must prove that such a belief was reasonable”. “Reasonableness in this context means that any other reasonable person under similar circumstances would have drawn a similar conclusion that the conduct was indeed intolerable and; secondly, that the circumstances in fact existed”.¹¹⁹ Such circumstances will probably be rare, and the employee will have a duty to prove that there were urgent and compelling reasons for failing to exhaust alternatives before terminating the employment relationship.¹²⁰ In the CC judgment, it became obvious that “the employer made the continued employment intolerable for the employee by giving him a choice between the lesser of two evils”.¹²¹

However, it must be pointed out that the CC, in this case, introduced an element of subjectivity in arriving at its decision. The test can be easily misinterpreted. An inference that the employee would be dismissed was drawn in the absence of objective factors before the court that the employee was indeed going to be dismissed even if he had

¹¹⁶ 2008 (28) ILJ356 (LC).

¹¹⁷ *Mvumbi supra*.

¹¹⁸ Grogan (note 18 above).

¹¹⁹ *Ibid*.

¹²⁰ N Whitear-Nel & M Rudling ‘Constructive Dismissal: A Tricky Horse to Ride’ (2012) *Obiter* 200.

¹²¹ Dekker (note 6 above at 350).

opted to be placed on a poor work performance programme. It is unknown if the nature of the relationship would have changed after the completion of the programme and training, had the employee elected the latter. In my view, the motive of the employer could have been to advance the employee in his line of work by placing him in the performance programme and training. Hence, the outcome would have been fruitful for all we know. This, in my view, is a subjective factor that must not be disregarded once a competent court finds itself in a situation where it considers the subjectiveness of the factual circumstances of the case before it. Once this happens, the court must then be open-minded about all other subjective factors that come into play, in order to arrive at a reasonable decision. Fairness demands this kind of approach.

CHAPTER 4

WHAT HAS BEEN THE IMPACT OF THE TEST SET OUT IN *STRATEGIC LIQUOR SERVICES v MVUMBI* ON RECENT CLAIMS OF CONSTRUCTIVE DISMISSAL?

4.1 Introduction

Prior to the decision of the CC in *Strategic Liquor Services v Mvumbi*,¹²² the courts previously adopted different approaches when dealing with claims of constructive dismissal. The focus of this chapter is to evaluate whether the cases brought after this judgment have adopted the test formulated by the Constitutional Court when interpreting section 186(1)(e). This will be achieved by critically analysing a series of court decisions which have been decided after *Mvumbi*.

4.2 The test for constructive dismissals

In *President of the Republic of South Africa v Reinecke*,¹²³ it was found that Mr Reinecke (the employee) had resigned from employment as a magistrate and alleged that Mr Booie (the employer), who was superior, made his working conditions intolerable. The SCA held that it was not satisfied that the employee had no other remedy available to him other than resignation in response to the employer's conduct. The SCA held that he could have sought an interdict in the High Court restraining the employer from implementing a decision to have him removed from doing relief work and to prevent any deductions which he believed were wrongfully being made in his salary.

In *Value Logistics Ltd v Basson*,¹²⁴ the Labour Court, in this case, concurred with the findings made by the Constitutional Court in *Mvumbi*. The court held that "when an employee terminates the contract of employment as a result of constructive dismissal, such employee is, in fact, indicating that the situation has become so unbearable that the employee cannot fulfil his or her duties. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been

¹²² *Mvumbi* supra.

¹²³ 2014 (35) ILJ 1485 (SCA).

¹²⁴ *Value Logistics Ltd* (note 100 above).

created. The employee resigns on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If the employee is wrong in this assumption and the employer proves that his or her fears were unfounded, then there is no constructive dismissal and his or her conduct proves that he has in fact resigned.”

In *Moaka v General Public Services Sectoral Bargaining Council and Others*,¹²⁵ the applicant (the employee) was employed by the Department (the employer) to fill a vacant post. The applicant was, however, placed in other positions that he had not applied for and, as a result, he resigned and claimed constructive dismissal. In dealing with the appropriate test to be followed by the courts in review proceedings, the court held that there is only one test that needs to be applied when dealing with constructive dismissals. The test which was used by the SCA in *Murray* is the same test that has been used by the LC and the LAC over the years and is based on the provisions of section 186(1)(e) of the LRA.

In *Conti Print CC v CCMA*,¹²⁶ the LAC found that “the assessment required from the arbitrator was to determine if there was evidence to establish that there was:

- (1) “A termination of employment by the employee;
- (2) Intolerability of continued employment; and
- (3) The intolerability was the fault of the employer.”¹²⁷

In this matter, the LAC made reference to Constitutional Court jurisprudence on the requirements of a constructive dismissal.¹²⁸

The LC in *Schindler Lifts (Pty) Ltd v The Mental Engineering Industries Bargaining Counsels & Others*¹²⁹ held that “the principles governing the approach to be adopted

¹²⁵ (JA14/2012) [2014] ZALAC 28.

¹²⁶ 2015 (9) BBLR 865 (LAC).

¹²⁷ *Conti Print CC* supra (note 126 at 9).

¹²⁸ Supra.

¹²⁹ (JR 1551/11) [2013] ZALCJHB 248 (2 October 2013).

when dealing with claims of constructive dismissal is set out in *Loots*,¹³⁰ where the court held that “the test in proving constructive dismissal was to assess whether the employer’s conduct which led to the resignation of the employee was calculated and serious enough to destroy the confidence and trust between the two parties”.

In the matter between *UNISA v Nowosenetz N.O. and Others*,¹³¹ the Labour Court was of the view that in a case of an alleged constructive dismissal, the enquiry is centered on whether or not there was a dismissal. And that this question must be determined prior to looking into the fairness thereof. The court went further and held that “where an alleged constructive dismissal is concerned, the onus rests squarely on the shoulders of the party alleging it and that such a party must prove that the resignation was not voluntarily made and that she did not intend to terminate the employment relationship. Once this onus has been discharged, then the conduct of the employer must be assessed and the question is whether the employee could reasonably have been expected to put up with the conduct of the employer. The mere fact that an employee has resigned because work became intolerable does not, in and by itself, make for a constructive dismissal”. The Labour Court, in this case, took a different approach than that suggested by the Constitutional Court. The LC, in this case, found that “it is not sufficient to only prove that the employment relationship has become intolerable”. This suggests that the court was not willing to confirm a claim by relying solely on the element of intolerability. The court held as follows:

[56] “It is trite in our law that where alleged constructive dismissal is concerned, the onus rests squarely on the shoulders of the party alleging it and that such a party must prove that her resignation was not voluntary and not intended to terminate the employment relationship. Once this onus has been discharged, the conduct of the employer must be assessed and the question then is whether the employee could reasonably have been expected to put up with the conduct of the employer. The mere fact that the employee

¹³⁰ 1997 (18) ILJ 981 (LAC) at 985 A-C.

¹³¹ (JR 2519/14) [2017] ZALCJHB 95 (23 March 2017).

resigns because work became intolerable does not, in and by itself, make for a constructive dismissal".¹³²

In *Turbofluid v Ngobeni N.O and Others*,¹³³ it was discovered that "the employee resigned after the employer had been screaming at her and making unpleasant remarks for a period leading up to the termination of her employment". The court held that "it was satisfied that the employee had established that it was intolerable for her to continue employment with the employer". The intolerable conduct was found to be at the hands of the employer. The court then stated that "the LRA only requires that an employee terminates her employment with or without notice". The court when arriving at this decision made reference to the case of *Mvumbi and Conti Print CC v CCMA*.

In the case of *South African Police Services v Safety and Security Sectorial Bargaining Council and Others*,¹³⁴ the court, in formulating a test for constructive dismissal, held that it concurs with the findings made by the arbitrator in that "the South African Police Services was primarily responsible for making the employment relationship intolerable for the employee; and that in light of *Murray*, it was culpably responsible". The Court went on and stated that "in *Mvumbi*, the Constitutional Court stated that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer made the employment intolerable and that had been the main issue in the matter before it".

In *Regent Insurance Company Ltd v CCMA*,¹³⁵ in deciding the correct approach, the court held that "in respect of the first stage, the onus is borne by the employee to demonstrate that the employer rendered the employment relationship so intolerable that no other option was reasonably available to the employee, save for the termination of the employment relationship". In addition, the court remarked that "the onus is an onerous one and clearly constitutes a cautious reminder that the test may be satisfied in only the rarest of cases". It further held that the test it had formulated was in line with

¹³² *Supra*.

¹³³ (JR 3040/10) [2016] ZALC JHB 224 (30 June 2016).

¹³⁴ (C118/07) [2011] ZALCCT 61 (26 August 2011).

¹³⁵ 2013 (34) ILJ 410 (LC).

the test formulated by the CC in *Strategic Liquor Services v Mvumbi NO & others*,¹³⁶ in which it was held that “the test for constructive dismissal does not require that the employee should have no choice but to resign, but only that the employer should have made continued employment intolerable”.

In *Metropolitan Health Risk Management v Majatladi & Others*,¹³⁷ the employer unlawfully forced the employee to accept a demand, under a threat of being disciplined, each time that the employee refused to continue serving in an acting position which was vacant. Disciplinary proceedings were instituted against her and later withdrawn on two occasions. She then resigned and claimed constructive dismissal. In evaluating whether there was constructive dismissal, the LAC made reference to the *Loots* decision where it stated that “when an employee proves that intolerable working conditions prevailed, the employee has a choice either to stand by the contract or accept the repudiation”. As a result, the LAC ruled in favour of the employee and found that she had been constructively dismissed.

The case of *Western Cape Education Department v General Public Services Sectoral Bargaining Council & Others*¹³⁸ is another recent case decided after *Mvumbi*. The court, in this case, had to look at whether there had been a dismissal. It questioned whether Mr Gordon’s (the employee) work environment was in fact “intolerable” and if so, whether the intolerability was caused by the employer. The court noted that “as was pointed out in the *Murray* judgment, the enquiry is whether the employer had, without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee”. The court held that the principles set out in *Murray* applied equally to the case before it and found that there was a link between the conduct of the department towards the employee and his resignation. As a consequence, it was found that he was constructively dismissed.

¹³⁶ *Mvumbi* supra.

¹³⁷ 2015 (36) ILJ 958 (LAC).

¹³⁸ 2014 (35) ILJ 3360 (LAC).

The court went further and made the following finding:¹³⁹

“...An employee that avers that he/she was constructively dismissed must prove that at the time of termination of the employment contract he/she was genuinely under the impression that the employer had rendered the continued employment relationship intolerable”.¹⁴⁰

In *Fakude v Spoornet & Others*,¹⁴¹ the court held that an objective enquiry is necessary in determining whether or not the dismissal was constructive. The enquiry, at this stage, involves a determination of whether or not the facts, when objectively assessed, prove that it cannot be expected of the employee to have continued with the employment relationship as a result of the conduct of the employer. The conduct of the employer is assessed in its totality. It has to be noted that “the enquiry goes beyond the conditions at work being intolerable but include whether or not, upon the facts of the case, it can be said that the employer behaved in a deliberate manner to induce the resignation of the employee”.

In other words, an employee claiming a constructive dismissal must be able to show that “the circumstances that made the employment relationship intolerable were of the employer’s making” and it was because of those circumstances that he or she had to leave. “Put differently, the employee in a constructive dismissal claim must establish the nexus or link between the conduct of the employer which created the intolerable circumstances and a resignation”.¹⁴²

In the *Eastern Cape Tourism Board v CCMA*¹⁴³ decision, the court made reference to the findings in *Loots*. Molahlehi J held that “the onus in a constructive dismissal claim lies with the employee who has to prove that the working environment has been made intolerable and s/he could therefore not be expected to continue being in an

¹³⁹ Supra.

¹⁴⁰ 2014 (35) ILJ 3360 (LAC) at para 34.

¹⁴¹ (JR 1327/060 [2010] ZALC 189.

¹⁴² Grogan (note 18 above).

¹⁴³ 2010 (11) BLLR 1161 (61).

employment relationship with the employer". The interpretation of the word "intolerable" in section 186(1)(e) by the courts seems to favour a stricter approach to be adopted when compared to the common law when proving a constructive dismissal. The word "intolerable" according to *Grogan* suggests that: "constructive dismissal should be confined to instances in which the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign". There are various instances under which the employer can be said to have behaved in such a manner that left the employee with no option but to resign.

It has become apparent that an objective test is applied in deciding the existence of a constructive dismissal. Thus, "the subjective state of mind of the employee is not a critical factor in the assessment of the existence or otherwise of a constructive dismissal".¹⁴⁴

In general, in order to succeed with a constructive dismissal claim, the employee must show that he or she resigned because of "coercion" by the employer. "Failure by the employee to use internal grievance procedures, although this is not a determinative factor, is an important aspect in the objective assessment of whether or not the employee was left with no option but to resign".¹⁴⁵

In *Mapengo v CCMA*,¹⁴⁶ Rabkin-Naicker J made reference to the case of *Jordaan* and held that the court, by making reference to *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others*,¹⁴⁷ "confirmed the two-step approach to constructive dismissal disputes. It held that an employee who leaves employment bears the onus of showing that the employer effectively dismissed the employee by making his/her continued employment intolerable. Once this is established, it then has to be established whether the dismissal was unfair".

¹⁴⁴ *Eastern Cape Tourism Board supra* note 143 at 19.

¹⁴⁵ *Eastern Cape Tourism Board supra* note 144 at 40.

¹⁴⁶ (JR 362/2014) [2015] ZALCJHB 225 (30 September 2015).

¹⁴⁷ 1998 (19) ILJ 1240 (LC).

The approach set out in *Murray v Minister of Defence*¹⁴⁸ was considered and followed in *Metropolitan Health Risk Management v Majatladi & Others*.¹⁴⁹ The LAC held that “the question to be asked is whether the employer’s conduct lacked reasonable and proper cause and not just whether the work situation had become unbearable”. The court found that the employee had proved a dismissal and that the dismissal arose due to the conduct of the employer, i.e. due to a situation in which the conduct of the employer compels the termination of employment by the employee. The court then held that once the Commissioner finds that the employee has been dismissed, the Commissioner must move to the second stage of the test which involves an evaluation of whether the dismissal was unfair. The court then stated that “the two stages set out above are not independent stages. They are two stages in the same journey. The facts that are relevant in regard to the first stage may also be relevant in regard to the second stage. Moreover, there may well be cases where the facts relating to the first stage are determinative of the outcome of the second stage. Whether or not this is the case is a matter of fact and no general principle should be laid down”.

In the matter of *The Member of the Executive Council for the Department of Health, Eastern Cape v Odendaal & Others*¹⁵⁰, the LC adopted a literal approach of the interpretation of section 186(1)(e). The court held as follows:

“It appears from the language of s186(1)(e) of the LRA that for there to be a dismissal under its provision, the following facts have to be present:

- (a) “The employee must have terminated the contract of employment;
- (b) The termination may have been with or without notice;
- (c) The reason for the employee terminating the contract of employment must have been the conduct of the employer;
- (d) Such conduct must have made the continued employment intolerable for the employee.”¹⁵¹

¹⁴⁸ 2009 (3) SA 130 (SCA); 2008 29 ILJ 1369 (SCA).

¹⁴⁹ 2015 (30) IL 958 (LAC) at para 30-32.

¹⁵⁰ 2009 (30) ILJ 2093 (LC).

¹⁵¹ *Odendaal* supra (note 150 at 85).

The court in interpreting section 186(1)(e) of the LRA adopted both the literal and purposive approach. It is submitted that the test set out above concurs with that set out by the CC. It upholds the provisions of section 23 of the Constitution and balances the conflicting rights of both the employer and the employee. In arriving at a conclusion, the court initially dealt with the interpretation of the doctrine of constructive dismissal in light of the approach developed in the United Kingdom.¹⁵² It went further and looked at the meaning in light of the 1956 LRA up to the 1995 LRA. The current LRA has however severed the link between common law repudiation and constructive dismissal.¹⁵³

4.3 Conclusion

This chapter has critically evaluated the application of the test formulated by the CC in *Mvumbi*. The courts' decisions referred to in this chapter are those which have been made after the decision of the CC. It appears that the courts, in the majority of the recent judgments, seem to have been reluctant in applying the decision of the CC as it was made in *Mvumbi*. The majority of the lower courts continue to hold that a resignation of an employee should only be opted for as a measure of last resort and that the employee carries a duty to prove that the conduct of the employer was intolerable.

Lower courts remain unwilling to confirm claims of constructive dismissal where an employee merely proves that the working conditions have become unbearable. It remains insufficient. The employee is still required to show that there were no other alternatives short of resignation. A similar conclusion is reached when it appears that the employee had reasonable alternatives at his/her disposal but elected not to make use of those alternatives to resolve the dispute without any reasonable justification.

It becomes apparent that the CC in its judgment did not sufficiently address the appropriate test to be followed when dealing with claims of constructive dismissal. The judgment of the CC attempted to bring about a shift from the test which had been

¹⁵² Supra.

¹⁵³ Vettori (note 1 above).

previously applied which is that a resignation should be exercised as a measure of last resort. It may well be said that the CC adopted a literal meaning of the interpretation of section 186(1)(e). Much was left open for lower courts to resolve. The CC had a duty to sufficiently set out all the requirements of section 186(1)(e) of the Act and to clearly formulate an interpretation which upholds the values of the Constitution and complies with the notion of fairness.

CHAPTER 5

CONCLUSION

5.1 Introduction

This chapter will provide the reader with a brief discussion on how the doctrine of constructive dismissal has evolved in South African law. It also provides recommendations on the appropriate test to be followed when one is dealing with a claim of constructive dismissal and will set out all the necessary requirements which should be met in order to succeed with a claim. The conclusions drawn in this chapter will be arrived at by taking into account the test recently formulated by the Constitutional Court in the *Mvumbi* decision and in addition, the chapter will set out the appropriate remedies that should be applied by an arbitrator once an employee has successfully proved a claim of constructive dismissal.

5.2 Conclusion

As already discussed above, “the term ‘constructive dismissal’ is one which was imported into South African law from the United Kingdom”.¹⁵⁴ “Under the 1956 LRA, constructive dismissal was greatly linked with the doctrine of repudiation”.¹⁵⁵ The LAC in *Albany Bakeries v Van Wyk and Others*¹⁵⁶ “severed the cords of repudiation”. The decision of *Murray* was quoted with approval by the CC in *Strategic Liquor Services v Mvumbi*.¹⁵⁷ The SCA held as follows:¹⁵⁸

“... It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable”.¹⁵⁹

¹⁵⁴ *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others* 2013 (34) ILJ (LC) at para 92.

¹⁵⁵ *Supra*.

¹⁵⁶ 2005 (26) ILJ 2142 (LAC).

¹⁵⁷ *Western Cape Department of Transport and Public Works v Fritz NO and Others* (C846/08) [2011] ZALCCT 23 (26 August 2011) at para 44.

¹⁵⁸ *Mafomane v Rustenburg Platinum Mines* 2003 (10) BLLR 999 (LC) at para 49.

¹⁵⁹ *Murray supra*; see also *Albany Bakeries v Van Wyk* 2005 (26) ILJ 2142 (LAC) at para 29.

The term constructive dismissal is routinely used to describe a dismissal under section 186(1)(e) of the LRA. However, “the term does not appear in the statute itself”.¹⁶⁰ Therefore section 186(1)(e) must be afforded an interpretation that is reasonable. It is appropriate for any court or arbitrator tasked with the interpretation of a statute or legislation to adopt a purposive approach. This is mandatory in order to uphold the objects, purports and spirit of the Bill of Rights as envisaged in the Constitution.¹⁶¹ It must, however, be noted that constructive dismissal remains a tricky horse to ride.¹⁶² This is founded on the basis that it is the courts and the arbitrators who must ensure that the conflicting rights of the parties are reasonably balanced. “The notion of fairness in the context of unfair dismissals must be considered from the perspective of both the employer and the employee”.¹⁶³ This is contained in section 23 of the Constitution which provides that “the employer has a right to fair labour practices”. While the provisions of the LRA seek to develop the common law, and provide that “the employee can terminate the employment relationship with or without notice where the employer makes the employment relationship intolerable”, the Constitutional Court has stated that the employee does not need to prove whether there was a reasonable alternative before effecting resignation but he only needs to prove that the employment relationship was made intolerable.¹⁶⁴

It is for this reason that one must look at the meaning of the word intolerability in its general sense. It can be said that the word intolerability suggests that the employee had no alternative besides resignation because of the very nature of the conduct of the employer. Notwithstanding all the relevant various judgments discussed, the general meaning of the word “intolerable” connotes the absence of a reasonable choice. If the employee has a reasonable alternative, it will suggest that “the conduct of the employer is not unbearable or not beyond the limits of tolerance”.¹⁶⁵ This section must, therefore, be pleaded under highly oppressive circumstances which prohibit the employee from

¹⁶⁰ *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others* 2013 (34) ILJ (LC) at para 78.

¹⁶¹ Vettori (note 1 at 83).

¹⁶² Dekker (note 6 at 193).

¹⁶³ *Mafoane* supra (note 158 at 90).

¹⁶⁴ *Mvumbi* supra.

¹⁶⁵ *Distinctive Choice* supra (note 160 at 129).

executing her duties genuinely. The word demonstrates a situation that demands immediate departure. The availability of an alternative short of resignation is a factor that also needs to be considered when assessing intolerability. If there are avenues which are capable of restoring the relationship, it cannot be said that the test for intolerability has been satisfied without having had regard to the availability of those alternatives in order to curb the prevailing circumstances. If courts were to adopt this interpretation, it would have an impact in minimizing wrongful claims of constructive dismissal. If a lighter test is applied, the courts will be overwhelmed with trivial constructive dismissal claims arising from “some form of controversial engagement between the parties but which does not necessarily amount to constructive dismissal”.¹⁶⁶

The employee must act reasonably in terminating the contract of employment. In other words, “if the employee’s conduct in resorting to terminating the contract of employment when faced with the situation which he found unacceptable was unreasonable, there will be no constructive dismissal”.¹⁶⁷

“An objective assessment should be made in regards to the determination of whether or not the dismissal was constructive”.¹⁶⁸ In order to succeed with a constructive dismissal claim, the employee must show that he or she resigned because of “coercion” emanating from the objective conduct of the employer. The failure of an employee to exhaust the internal grievance procedure at his or her disposal, although “this is not a determinative factor, is an important aspect in the objective assessment of whether or not the employee was left with no option but to terminate the employment relationship”.¹⁶⁹ If an employee foresees that using internal grievance procedures would still be futile, as it was held in *Mvumbi*,¹⁷⁰ the employee must adduce evidence before

¹⁶⁶ *Jordaan v Commission for Conciliation Mediation & Arbitration* 2010 (31) ILJ (LAC) at para 14.

¹⁶⁷ *Carlos v IBM South Africa (Pty) Ltd and Another* (A36/2004) [2006] ZALAC 11 (22 March 2006) at para 11.

¹⁶⁸ *Fakude v Spoornet and Others* (JR 1327/060 [2010] ZALC 189 at para 18.

¹⁶⁹ *Eastern Cape Tourism Board* supra (note 144 at 17).

¹⁷⁰ *Mvumbi* supra.

the court that he would have been dismissed either way. The employee's contention in this regard must have a proper foundation.¹⁷¹

The court in *Western Cape Department of Transport and Public Works v Fritz NO and Others*¹⁷² found that the employee had not been constructively dismissed and held that the employee had options short of resignation. The court held that "the employee could have followed the formal grievance procedures which were known to her and that she could also have referred an unfair labour practice dispute to the relevant Bargaining Council and as a consequence her resignation was premature". Steenkamp J in this judgment made a very critical finding. In some instances, it may be advisable for the employee to refer an unfair labour practice dispute to the relevant body rather than electing to resign in the face of a dispute which is capable of being resolved and thereby promoting the restoration of the employment relationship. The court in *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others*¹⁷³ arrived at a similar conclusion and held as follows:

"If an employee finds herself confronted by conduct which she considers intolerable but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s23 of the Constitution which requires that fairness is viewed from the perspective of both employer and employee."¹⁷⁴

There is only one test that needs to be applied when dealing with constructive dismissal. The test used in the *Murray* matter is the same test that has been used by the LC and the LAC over the past years. This is in accordance with the provisions of

¹⁷¹ *Old Mutual Group Scheme v Dreyer* 1999 (20) ILJ 2030 (LAC).

¹⁷² (C846/08) [2011] ZALCCT 23 (26 August 2011) at para 49.

¹⁷³ 2013 (34) ILJ (LC) at para 13.

¹⁷⁴ 2013 (34) ILJ (LC) at para 131.

section 186(1)(e) of the LRA.¹⁷⁵ In fact, in a number of cases decided after *Mvumbi*, the courts still found that resignation as a matter of last resort was an important element of intolerability.¹⁷⁶ It is clearly stated in the wording of section 186(1)(e) that for there to be a constructive dismissal the following must be established:¹⁷⁷

- (a) There must be a termination of the contract of employment;
- (b) The employee must be the one who terminated the contract of employment;
- (c) The employee's reason for the termination of the contract of employment must be that continued employment had become intolerable, and,
- (d) The employer must be the one who made continued employment intolerable for the employee.

It is submitted that the approach adopted in *Conti Print CC v Commission for Conciliation Mediation & Arbitration and Others*¹⁷⁸ is correct. It was held that "the assessment required from the arbitrator was to determine if there was evidence to establish that there was a termination of employment by the employee, intolerability of continued employment and that the intolerability was the fault of the employer".

The legislature has clearly formulated an approach to be followed when deciding a claim of constructive dismissal in the wording section 186(1)(e) itself. It remains a matter of adopting a purposive approach when interpreting section 186(1)(e) and such an approach must conform to the values of the Constitution and embrace the notion of fairness. Section 186(1)(e) is self-explanatory. The question of the availability of alternative accommodation is a factor which a reasonable arbitrator should consider in light of all other factors to conform to fairness. It should not be assessed as an independent factor in isolation from the exact provisions of section 186(1)(e). Alternatively, if amendments were to be made to this section, the discretion of the

¹⁷⁵ *Moaka v General Public Services Sectoral Bargaining Council and Others* (JA14/2012) [2014] ZALAC 28 (12 June 2014) at para 24

¹⁷⁶ Dekker (note 121; 320).

¹⁷⁷ *Carlos IBM South Africa (Pty) Ltd and Another (A36/2004)* [2006] ZALAC 11 (22 March 2006) at para 11.

¹⁷⁸ 2015 (9) BBLR 865 (LAC); See also *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others* 2013 (34) ILJ (LC) at para 85 & *Solid Doors (Pty) Ltd v Commissioner Veron and Others* 2004 (25) ILJ 2337 (LAC) at para 28.

arbitrator will be limited. It would be difficult to fairly decide a claim and may result in the failure of justice even when present circumstances do not warrant such a result.

Where the employee terminates the employment relationship and later attempts to retract his resignation,¹⁷⁹ it would generally suggest that the situation is not one that can be labelled as intolerable. Such an attempt automatically negates the contention of intolerability. The question to be asked by the arbitrator should be: what is the meaning of intolerability? Once the answer is established, he must go further and ask whether the employee would be expected to put up with the situation? If the answer is in the affirmative, then it means he was not constructively dismissed. A resignation should only be applied as a measure of last resort because it can negatively impact the parties concerned but more so the employee. It can adversely affect the personal circumstances of the employee. The consequences of a resignation remain drastic and life-changing and therefore the issue of a dismissal must be carefully assessed.

The employee may initially refer an unfair labour practice dispute in order to bring the unpleasant situation to an end. In *Western Cape Department of Transport and Public Works v Fritz NO and Others*,¹⁸⁰ the court found that the employee was not constructively dismissed and held that the employee had further options open to her to try and resolve the dispute. It was held that "she could have followed a formal grievance procedure which she was aware of". Referring an unfair labour dispute is also a measure which is short of resignation and this option must be exercised if the circumstances of the case warrant it.

If an employee brings a constructive dismissal claim, she must discharge the onus and show before the court that there was a dismissal and that it was unfair.¹⁸¹ In South Africa, it is evident that before an arbitrator can entertain a claim, the employee has the duty to show that the conduct complained of was intolerable before the enquiry moves

¹⁷⁹ N Whitear-Nel, B Grant & L Jansen Van Rensburg 'Is an attempted retraction of a resignation consistent with a claim for constructive dismissal?' (2012) 2 *ILJ* 2309-2318.

¹⁸⁰ (C846/08) [2011] ZALCCT 23 (26 August 2011).

¹⁸¹ Labour Relations Act 66 of 1995; section 192.

to the second stage. Secondly, the employer can escape liability if the claim is based on the LRA and it can be proven that the employer acted fairly.¹⁸²

“Once a court or an arbitrator is satisfied that an employee has been unfairly dismissed, they are empowered by the Act to order that the employer reinstate the employee”.¹⁸³ “A reinstatement is a primary remedy if a dismissal is found to be substantively unfair.¹⁸⁴ Reinstatement restores the employee to the position he or she initially occupied before the dismissal on the same terms and conditions.”¹⁸⁵ Section 193(2) provides that the court or the arbitrator must require the employer to re-employ the employee unless:-

- (a) The employee does not wish to be reinstated or re-employed;
- (b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) It is not necessary or practicable for the employer to reinstate or re-employ the employee; or
- (d) The dismissal is unfair only because the employer did not follow a fair procedure.

Section 193(2) of the Act sets out instances under which a reinstatement will not be applicable. The existence of a constructive dismissal is also an exception to reinstatement. In the ordinary sense, it would be a contradiction to an allegation of intolerability where the employee seeks reinstatement. “In circumstances where constructive dismissal has been established, an award of compensation in accordance with section 193(1)(c) of the Act will be just and equitable”.

The LAC in the case of *Western Cape Education Department v General Public Services Sectorial Bargaining Council and Others*¹⁸⁶ reviewed a finding made by the arbitrator where “an employee had succeeded in claiming a constructive dismissal and sought

¹⁸² Vettori (note 1 at 185).

¹⁸³ JC Kanamugire & TV Chimuka ‘Reinstatement in South African Labour Law’ (2014) 5(9) *Mediterranean Journal of Social Sciences* 256.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ 2014 (35) ILJ 3360 (LAC).

reinstatement as a remedy". The arbitrator ruled in favour of the employee. The question that arose was: Can an employee who seeks reinstatement at arbitration convincingly state that his employment was rendered intolerable by his employer?¹⁸⁷ Steenkamp J held that an employee who seeks reinstatement based on a claim of constructive dismissal is being destructive to his or her claim of constructive dismissal. He held that "if an employee subsequently seeks a reinstatement, then such an employee needs to show that the intolerable circumstances that prevailed at the time of termination of the employment contract are no longer in existence and in addition to that, where the employer has chosen not to dispute the allegations formed against him, then the notion of fairness dictates that the employee's uncontested evidence be accepted as it is and that the employee be reinstated into his or her position".

Section 193(2)(b) requires an arbitrator or a competent court to make an order of the reinstatement of an unfairly dismissed employee unless "the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable".¹⁸⁸

¹⁸⁷ Z. Ngwenya 'Constructive Dismissal: Is reinstatement a competent remedy?' available at <https://www.labourguide.co.za/most-recent/1652-constructive-dismissal-is-reinstatement-a-competent-remedy>, accessed on the 20 April 2018.

¹⁸⁸ *Schindler Lifts (Pty) Ltd v The Mental Engineering Industries Bargaining Councils & Others* (JR 1551/11) [2013] ZALCJHB 248 at para 18.

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 Others* (C118/07) [2011] ZALCCT 61 (26 August 2011)

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Western Cape Department of Transport and Public Works v Fritz NO and Others (C846/08) [2011] ZALCCT 23 (26 August 2011)

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12 March 2019

Ms Nonkululeko Cele (211541463)
School of Law
Howard College Campus

Dear Ms Cele,

Protocol reference number: HSS/0943/017M

New project title: Proving Constructive Dismissal: A critical evaluation of Section 186(1)(e) of the Labour Relations Act 66 of 1995 and Recent Judgments

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 12 March 2019 has now been approved as follows:

- Change in Title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for period of 3 years from the date of original issue. Thereafter Recertification must be applied for on an annual basis.

Best wishes for the successful completion of your research protocol.

Yours faithfully,

.....
Dr Rosemary Sibanda (Chair)

/ms

cc Supervisor: Ms Rowena Bernard
cc Academic Leader Research: Dr Freddy Mnyongani
cc Post Graduate Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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