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Employees Resignation due to
Employers Conduct**

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South African Law Regarding Employees Resignation due to Employers Conduct

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Abstract

In this paper, I illustrate various tests which have been developed over the years to bring about constructive dismissal in South Africa. I further indicate that even though the Constitutional Court has attempted to clarify the law in relation to the requirements for constructive dismissal, there is still confusion relating to the amount of “culpability” required from the employer to justify the employee resigning due to the alleged intolerable work conditions within the workplace.

Key words: Constructive Dismissal, Intolerable Conditions, Resignation, Unfair Dismissal, Employee, Employer

Introduction

This paper discusses the development of the concept of constructive dismissal in South Africa. This will be done by assessing how South African courts have dealt with cases relating to constructive dismissal. Furthermore, I will highlight recent developments relating to the remedy of reinstatement in relation to constructive dismissals. There is judicial and academic consensus that the concept of constructive dismissal has been imported into South African labour law from England.¹ Vettori has argued that English case law has, and may continue to have, a substantial influence on the development and interpretation of the law relating to constructive dismissal in South Africa'.²

It has been held that 'when the labour courts imported the concept into South African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal'.³ The position in England was that it is not enough for the employee to merely leave his or her employment because the employer had acted unreasonably, such employee should do so when the conduct of the employer amount to a breach of the contract of employment.⁴ This approach was followed in some of the decisions of the then Industrial Court in South Africa.⁵

Constructive Dismissal

Section 23 (1) of the 1996 Constitution provides that 'everyone has a right to fair labour practices' in a sense that no one may be unfairly dismissed. To give effect to this provision dedicated legislation had to be promulgated. The LRA was the first piece of labour legislation to be promulgated after the post-apartheid elections in 1994. The LRA created the concept of unfair dismissal and along with its accompanying code of practice, has made a large contribution to systematising and clarifying of this important area of South

¹See *Courtin Small & others v Noella Creations (Pty) Ltd* (1986) 7 ILJ 614 (IC) See also Dekker, H. 2012. Did He Jump or Was He Pushed? Revisiting Constructive Dismissal' *Merc LJ* 346-354, 346 and Vettori, S. 2012 The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals' *PER* 102 – 231, 112.

²Vettori, S. 2011 'Constructive Dismissal and Repudiation of Contract: What must be proved?' *Stell LR* 173-187, 173.

³*Murray v Minister of Defence* 2009 (3) SA 130 para 8.

⁴See *Stephenson and Co (Oxford) Ltd v Austin* (1990) ICR 609 (EAT) and *Western Excavation v Sharp* [1977] EWCA Civ 165.

⁵See *Ferrant v Key Delta* (1993) 14 ILJ 464 (IC) and *Dallyn v Woolworths* (1995) 6(3) SALLR 30 (IC).

African Labour law.¹ In terms of section 188(1) of the LRA, dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason—related to the employee’s conduct or capacity; or based on the employer’s operational requirements; and that the dismissal was effected in accordance with a fair procedure. This simply entails that the dismissal must be both procedurally and substantively fair. It must be noted that ‘the distinction between procedural and substantive aspects of a dismissal is not merely theoretical; the respect in which a dismissal is unfair affects the relief that may be granted’ by the court if approached to decide on the fairness of the dismissal.²

At times the conduct of the employer can be such that the employee can no longer tolerate it and ultimately decides to terminate the employment relationship by resigning, even though he or she in real terms still wishes to continue with such employment. Such termination of the employment contract will be due to the intolerable work environment created by the employer which the employee finds himself or herself in. The concept of dismissal under South African labour law is defined generally in section 186 (1). In terms of section 186 (1)(e) of the LRA, dismissal means that ‘an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee’. This is generally known as a constructive dismissal provision under South African labour law. It has been held that this provision ‘was clearly designed to protect employees who resigned in desperation as a last resort, because of the unlawful and unfair behaviour of the employer, which makes continued employment intolerable’.³ This provision has been interpreted as imposing an obligation on an employer not to do anything that would make an employee’s continued employment intolerable.⁴ However, this provision does not define the limits of what may be intolerable behaviour on the part of the employer, thereby providing labour courts with a wide discretion to make a value judgment taking into account the facts of each case.

Judicial Approach

In order for constructive dismissal to come into being the employee must have terminated the contract of employment. The circumstances leading to constructive dismissal are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not.⁵ As such, it is a

¹Chapter VII of the LRA.

²Grogan, J. 2007 *Dismissal, Discrimination and Unfair Labour Practices* 2 ed 221.

³*Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC)

⁴*Nxele v Chief Deputy Commissioner, Department of Correctional Services* 2008 12 BLLR 1179 (LAC) 1194A.

⁵For instance in *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* [2010] 7 BLLR 785 (LC), it was held that ‘it has been accepted that unilateral alteration of terms and conditions of employment may constitute constructive dismissal’.

question of fact which should be decided on the facts of the particular case before to court or tribunal. The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots*¹ where it was held that:

“...the enquiry [is] whether the [employer], without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court’s function is to look at the employer’s conduct as a whole and determine whether...its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it”.²

This approach was a slight deviation from English law which placed much emphasis on the employer’s repudiation of the contract of employment. The test developed by South African labour courts emphasises that the court’s function is to holistically assess the employer’s conduct in order to formulate an opinion as to whether the employer could objectively be expected to reconcile him/herself with such conduct. If the court after its assessment of the employer’s conduct finds that the employee could not be reasonably expected to put up with the employer’s conduct then the employee should be declared to have been constructively dismissed if the employee terminated such contract due to the employer’s conduct. By terminating his or her employment, such employee is in fact indicating that the situation has become so unbearable and that he or she cannot fulfil his/her duties.³ However, it has been held that if such employee is wrong in his or her assumption and the employer proves that his or her fears were unfounded, then he or she has not been constructively dismissed, but his or her conduct proves that he or she has in fact resigned.⁴

A two stage test was set out in *Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake N.O. & Other*⁵, where it was held that an employee who leaves a place of employment bears the onus of showing that the employer effectively dismissed the employee by making her continued employment intolerable. Once this is established, a second stage must be applied and this concerns an evaluation of whether the dismissal was unfair. This essentially entails that an employee alleging constructive dismissal bears an initial onus of showing, on an objective grounds, that his or her employer has rendered the employment relationship so intolerable that he or she became convinced that in the

¹(1997) 18 ILJ 981 (LAC). See also *Woods v WM Car Services (Peterborough)* (1981) ILR 347 at 350

²*Pretoria Society for the Care of the Retarded v Loots* at 985 A-B. See also *Majatladi v Metropolitan Health Risk Management and Others* (2013) 34 ILJ 3061 (LC).

³*Pretoria Society for the Care of the Retarded v Loots* at 984 D-E.

⁴*Value Logistics Ltd v Basson and Others* (2011) 32 ILJ 2552 para 30.

⁵(1998) 19 ILJ 1240 9 (LC) at 1250

circumstances it was justifiable for him or her to termination the employment relationship.¹

A strict test was adopted in *Mafomane v Rustenburg Platinum Mines Ltd*² where court was of the view that the employee had to establish the following; that he or she terminated the employment contract; that continued employment had become intolerable; that the circumstances that rendered continued employment intolerable were due to the conduct of the employer; and that he or she had no other alternative but to resign because of those circumstances. The last of these factors raised confusion because it seemed to suggest that the employee must show that he or she had no choice but to resign. This test was also adopted by in *Chabeli v Commission for Conciliation, Mediation and Arbitration and Others*³, where the 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 have become so intolerable that he or she had no option but to terminate the employment relationship.⁴ This strict approach made it even more onerous for employees who work under unreasonably trying circumstances to seek relief from the law by terminating their employment and claiming constructive dismissal. Some courts were of the view that where a reasonable alternative to resignation existed it cannot be said that the employer has made continued employment intolerable for the employee. The Labour Appeal Court endorsed this approach in *Jordaan v CCMA*⁵ where Davis JA held that:

‘... constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.’⁶

The Constitutional Court had an opportunity to pronounce on this matter and emphasised 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.⁷ It is thus important to note that in order for the employee to be successful in his or her claim; such employee need not show or prove that he or she had no choice but to resign. In

¹See generally *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 2331 (LAC).

²[2003] 10 BLLR 999(LC).

³(2010) 31 ILJ 1343 (LC).

⁴*Chabeli v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 1343 (LC) par 17.

⁵[2010] 12 BLLR 1235 (LAC) 1239 B-E.

⁶*Jordaan v CCMA* [2010] 12 BLLR 1235 (LAC) 1239 B-E.

⁷*Strategic Liquor Services v Mvumbi NO & others*(2009) 30 ILJ1526 (CC) para 4.

Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others¹ Steenkamp J was doubtful whether the strict approach adopted in Chabeli survives the formulation by the Constitutional Court in Strategic Liquor Services.² The employee's decision to terminate employment should be judged objectively in order to assess whether as a matter of fact the employer's conduct rendered continued employment intolerable.

Currently, as the law stands there are only three requirements which need to be proved by the employee in order to be successful with a constructive dismissal claim. Such an employee should satisfy the court that he or she terminated the contract of employment due to the fact that continued employment had become intolerable and that the employer made continued employment intolerable.³ Thus, the employee only has to prove that the resignation was not made voluntarily and that he or she did not intend to terminate the employment relationship but was motivated to do so by employer's conduct. Once this has been established, then the inquiry 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 confidence and trust with the employee. The court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it.⁴

In terms of section 192(1) of the LRA, the employee bears the onus of proving that there was a dismissal. If the employee is successful, then the onus shifts to the employer in order for such employer prove that the dismissal was fair in terms of section 188 (1) of the LRA. The Supreme Court of Appeal in *Murray v Minister of Defence* has cautioned that:

‘...the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances ‘must have been of the employer's making’. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked ‘reasonable and proper cause’. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case’.⁵

¹(2012) 33 ILJ 363 (LC)

²See also *Value Logistics (Pty) Ltd v Basson & others* (2011) 32 ILJ.

³*Eagleton and Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) para 22

⁴*Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 985 A-B).

⁵*Murray v Minister of Defence* 2009 (3) SA 130 (SCA) para 13.

It is important to note that this case was decided before the Constitutional Court clarified the law with respect to constructive dismissals. However, it has been held that the Constitutional Court in *Strategic Liquor Services* cited with approval *Murray v Minister of Defence*.¹ With respect, I am unable to agree with this contention. Even though the Constitutional Court cited *Murray v Minister of Defence*, I am convinced that the Constitutional Court did not approve the above quote from *Murray v Minister of Defence*. What the Constitutional court did in *Strategic Liquor Services* was to clarify that the employee's resignation must have been instigated by the conduct of the employer. In my view, the Supreme Court of Appeal's approach in *Murray v Minister of Defence* as evidenced in the above quote indirectly confirmed the strict test of constructive dismissal in South Africa, which in my view the Constitutional Court in *Strategic Liquor Services* clearly rejected.

The SCA by saying that "more is needed" in order to prove that the work conditions were made intolerable by the employer leading to the employee resigning because "there are many things an employer may fairly and reasonably do that may make an employee's position intolerable" places an unnecessary enormous burden on employees. In actual fact, the SCA seems to be saying that employees should withstand intolerable conditions until such time that such conditions deteriorates, at which time it can be said that something "more" was indeed present to justify resignation by the employee. The SCA did not even provide guidelines or even an obiter remark as to what is likely to constitute something "more" which in its view is needed to justify employees resigning from their employment and thereafter claiming constructive dismissal successfully. This in my view indirectly confirmed the view that when employees decide to resign they should do so because they had no option but to do so. This approach is not what the Constitutional Court in *Strategic Liquor Services* advocated for. The Constitutional Court merely clarified the law that the test for constructive dismissal does not require that the employee must have no choice but to resign, but only that the employer should have made continued employment intolerable.² The Constitutional Court did not discuss the above quote from the SCA judgment nor did it refer to it anywhere in the judgment.

The Constitutional Court only referred to paras 12 and 67 of SCA's judgment in *Murray v Minister of Defence*. The SCA in para 12 of its judgment commented on the evolution of the South African jurisprudence by the labour courts on constructive dismissals. In that it is well established that the onus is on the employee to prove that resignation constituted a constructive dismissal¹. Further that once this is established, the inquiry 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 confidence and trust with the employee. The SCA further clarified that looking

¹See footnote 23 of *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 ILJ 363 (LC) (24 August 2011).

²*Strategic Liquor Services v Mvumbi NO & others* (2009) 30 ILJ1526 (CC) para 4. The Constitutional Court then cited *Murray v Minister of Defence* and in particular paras 12 and 67.

at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.¹ As far as para 67 is concerned, on the facts of this case, the SCA found that there was some basis for concluding that the employee heeded legal advice that resignation was a necessary precursor to a claim for compensation. The court then held that, that does not mean that the employee's position was tolerable, or that the desire for compensation was the main operating factor in his decision to resign. Further that the employee did not forfeit his right to claim constructive dismissal because of his intention to be compensated. These are the only two paragraphs from the SCA judgment which the Constitutional Court referred to. However, the Constitutional Court did not even discuss these paragraphs at all.

Nonetheless I submit that it could have been ideal for the Constitutional Court to comment on para 13 of the SCA's judgement in *Murray v Minister of Defence*. In my view, the Constitutional Court missed an opportunity to clarify what the extent of the employer's culpability should be in making the employees working conditions intolerable which will justify the employee tendering his or her resignation. The Constitutional Court should also have expressed a view on whether it agrees with the SCA that it is not enough that employment conditions have been made intolerable, in that "more" is needed to be proved by the employee. It should also have been made clear as to when would employers' conduct which lead to employment conditions being intolerant not amount to constructive dismissal should the employees resign as a result of such conduct.² Hopefully, these question will be answered in future cases on constructive dismissal. Nonetheless, it can be argued that the Constitutional Court has done away with the strict test, and it is enough to justify constructive dismissal if the employee resigns because the employer had made working conditions intolerable. In that resignation should not be the only choice available to the employee. It is worth noting that are no objective guidelines which guides South African labour courts as to what conduct by the employer would render employment intolerable for the employee. I submit that such employee should be successful with a constructive dismissal claim if she terminated his or her employment contract due to the employer's conduct. The position is now clear that in order to amount to constructive dismissal, the employee's resignation need not necessarily be in response to the employer's breach of employment contract but intolerable conditions at work due to the employer's making.

However, not every conduct of the employer will amount to constructive dismissal. Employees should be encouraged not to be overly insensitive and rush to resign even in circumstances which do not warrant resignation, with the hope that they will be able to claim constructive dismissal. If employees are faced with employers who are generally rude or who uses "abusive" language

¹See also *Amalgamated Beverage Industries (Pty) Ltd v Jonker* (1993) 14 ILJ 1249 (LAC).

²See *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (199&) 18 ILJ 361 (LAC).

towards them, they need to assess the situation carefully before they decide to resign.¹ Furthermore, the resignation of an employee in the face of a disciplinary hearing and/or resigning in order to avoid the disciplinary hearing would not necessarily constitute constructive dismissal. However, it may well do so if the employee was threatened – ‘resign, or face a disciplinary hearing where you will be dismissed anyway’. Unfair disciplinary action taken by the employer also could constitute a breach of contract and may amount to a constructive dismissal.

Reinstatement

In terms of section 193 (1) of the LRA, there are basically three remedies for unfair dismissal and unfair labour practice, namely reinstatement, re-employment and compensation. In terms of section 193 (2) of the LRA, the employer must be ordered to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed, circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate or re-employ the employee, or the dismissal is unfair only because the employer did not follow a fair procedure. An order for reinstatement simply entails that an employee would be placed in a position he or she was before the dismissal, as if there was no break in service with the same terms and conditions of employment and benefits. Re-employment means that an employee can be re-employed at the company backdated to the time that he or she was dismissed, making his or her first day of service the day following the day he or she was dismissed or an agreement could be made for re-employment from any further date agreed to by both the employer and employee. Compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances.

The mere fact that one of the conditions for ordering reinstatement contained in section 193 (2) of the LRA is that the circumstances surrounding the dismissal should not be that a continued employment relationship would be intolerable, seems to suggest that the remedy for reinstatement might not be competent when an employee has been found to be unfairly constructively dismissed. From a logical point of view, a question can be, how can an employer be expected to reinstate an employee who resigned because he or she felt that the conditions under which he or she worked were intolerable to work

¹See *Milady's, a Division of Mr Price Group Ltd v Naidoo & Others* (2002) 11 (LAC) para 33. However, I submit that should the employer's language be so abusive and grave that the employee is constantly uncomfortable and cannot perform his or her duties as efficiently and effectively as he or she could as a result of such abuse, then there is no reason why the employee cannot be successful when alleging constructive dismissal.

under? If the employer's workplace is such that the employee can be offered work at a different section or division within the employer's workplace where the intolerable conditions which made him or her resign would not be present, perhaps then re-employing such employee may be justifiable. However, recently the Labour court made an order for reinstatement in a case where the employee successfully established that he was unfairly constructively dismissed.

In *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*¹ the employee resigned and successfully claimed constructive dismissal in the CCMA but the arbitrator ordered the employer to reinstate the employee. On review to the Labour Court, there was evidence before the court that the employee would not be subjected to the same circumstances that prevailed before he resigned and further that the employee had recovered psychologically and thus far better equipped to work than he was previously. This evidence was not refuted by the employer's witness. On dismissing the employer's review application, Steenkamp J held that on the facts of the case before him, the apparent contradiction occasioned by an order for reinstatement disappeared. He further held that conclusion that he arrived at is limited to the very specific and unusual circumstances of this case. It is thus evident that if the employer could have refuted the employee's version that employee would not be subjected to the same circumstances that prevailed before he resigned; reinstatement would not have been a competent remedy.

Conclusion

It is important that the concept of constructive dismissal should not be used as a convenient escape by disgruntled employees, but a genuine tool for employees who find themselves in employment environments which are unbearable and intolerable to continue to work under. Constructive dismissal cases are different to other claims of unfair dismissal in that the employee must have tendered his or her resignation. However, such resignation must have been induced by the conduct of the employer who made continued employment intolerable. The employee bears the onus of proving constructive dismissal and once that has been established, the employer must prove that the dismissal was fair. In order to prevent flood gates, it might perhaps be ideal to encourage employees to afford their employers a fair and reasonable opportunity to rectify the "intolerable" situation which potentially could lead to their resignations, before they tender such resignations and ultimately claiming constructive dismissal. Employers should also deal with grievance received by employees seriously by putting in place formal grievance procedures or policies that specifically addresses grievances from employees relating to intolerable condition within their workplaces.

¹(C 360/2012) [2013] ZALCCT 5.

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