Constructive Dismissal
in Labour Law

by

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PREAMBLE

First and foremost I wish to dedicate and thank our Lord, Jesus Christ this treatise, who had given me the knowledge, talent, insight and ability to write and completed this treatise. To my wife Isabelle, and my children, Jeanene and Johan, thank you for the love, inspiration and understanding throughout the whole period and the precious time lost together during the time that I did the research and writing of this script. But without denigrating the role of those not mentioned, I extend my thanks to Professor van der Walt who gave me the opportunity to pursue an interest in Labour Law in a practical realm. Professor Marion Fouché who inspired me and also encouraged me when it became difficult.

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SUMMARY

The history of constructive dismissals in South Africa imitated from the English law in 1986, when an employee successfully challenged the employer on this particular concept after an incident relating a forced resignation.

From the literature it is clear that constructive dismissal, as we know it today, originated from our English counterparts. Being a relatively new concept, the South African labour laws caught on at a rapid pace. The leading case on which the South African authors leaned towards was the English case of Woods v WM Car Services (Peterborough).

In South Africa constructive dismissals were given statutory force in unfair dismissal law and is defined as the coerced or forced termination of a contract of employment resultant in from the conduct of the employer.

There are many forms in which constructive dismissals would postulate that could justify an employee to lay claim to constructive dismissal. Examples thereof are the amendment of the contract of employment, rude language and sexual harassment.

It is eminent that certain elements should be present before an employee would have reasonable prospects of succeeding with such a claim.

Constructive dismissal comes into the equation when an employer behaves in such a manner that eventually and ultimately leads to the employee, being the receiving party, in the employment relationship, to terminate the employment contract. This termination must be the direct result of the conduct of the employer that irreparably frustrated the relationship and made it impossible for the employee to remain in the service of the employer in question.

It appears that the courts have taken a firm stance on coerced or forced resignation, in its various forms tantamount to breach of contact, that any sufficiently
unreasonable conduct by an employer may justify that the employee to terminate services and lay claim to the fact that he had been constructively dismissed.

It needs to be mentioned that the fact that the mere fact that the employer acted in an unreasonable manner would not suffice and it is up to the employee to prove how the conduct of the employer justified the employee to leave and claim that the employer’s conduct resulted in a material or fundamental beach of the employment contract.

In dealing with the contingency of the concept of constructive dismissals it has been expressly provided for in numerous systems of labour law. As is seen herein, a constructive dismissal consists in the termination of the employment contract by reason of the employee’s rather than the employer’s own immediate act. The act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified.

Various authors and academics endeavoured to defined constructive dismissal and all had the same or at least some of the elements present, to justify constructive dismissal. The most glaring element being the termination of employment as a result of the any conduct that is tantamount to a breach going to the root of the relationship by the employer, that frustrated the relationship between the employer and the employee and rendered it irreparable.

The employee resigns or repudiates the employment contract as a result of the employer normally not leaving the employee any other option but to resign. This can also be termed as coerced or forced resignations and are commonly better known as “constructive dismissal”. The employee is deemed to have been dismissed, even though it is the employee who terminated the employment contract. The most important element to mention is the employee terminated the employment contract, *ie* resigned yet this is regarded as a dismissal, it is however for the employee to first lay a claim at the proper authority and the employee must prove his / her allegation before it can be a constructive dismissal.

As will become clear, that the onus of proof is on the employee to show that the termination of employment resulted from the conduct of the employer. Equally true
as in all cases of constructive dismissal, including cases of sexual harassment, being a ground for constructive dismissal, the employee must prove that to remain in service would have been unbearable and intolerable.

Sexual harassment is one of the most difficult forms of constructive dismissals, in many cases there are no witnesses and the employee either "suffers in silence or opt to place her dignity at stake to prove her case. It seems as though the test is to determine if the employer’s conduct evinced a deliberate and oppressive intention to have the employment terminated and left the employee with only one option that of resignation to protect her interests.

Employees have a right to seek statutory relief and needs to be protected. If a coerced or forced resignation had taken place irrespective whether the employee resigned or not.

It is against this back drop that constructive dismissals was given legality and are now recognized as one of the four forms of dismissals in terms of the Act.
CHAPTER 1
INTRODUCTION

The concept of “constructive dismissal” was first imported into the South African jurisprudence from the English law in our labour courts in 1986 in the matter of *Small & others v Noella Creations (Pty) Ltd.* In this case certain employees in the employment of the respondent resigned because they were not willing to work for the respondent under a contractual stipulation that stock unaccounted for would have to be paid for by staff. Having resigned, the employees were reinstated in terms of section 43 of the Labour Relations Act of 1956 and the concept of constructive dismissal became part of unfair dismissal law. It has been given statutory force in the Labour Relations Act (hereinafter “the Act”) which defines the termination of a contract of employment by an employee, with or without notice as a result thereof that the employer who made the continued employment intolerable for the employee. It is now recognized as one of the four forms of dismissals in terms of the Act.

Although there is no common law definition of constructive dismissal, the term was defined by the authors Cameron *et al* quoted with approval in *Howell v International Bank of Johannesburg Ltd.*

> “Actions on the part of the employer which drive the employee to leave (whether or not there is a form of resignation) will amount to a constructive dismissal.”

It is accepted that a termination of the contract of employment will constitute dismissal within the Act if an employee is entitled to terminate it as a result of the conduct of the employer. This is widely known as a constructive dismissal. An employer that behave in a way so calculated to lead either to the eventual dismissal of the employee or to the resignation of the employee because he finds it impossible to remain in the employ of the employer in question. Such enforced dismissals are legally labelled as constructive dismissal. As it is clear that the law of constructive dismissal as we know it in South Africa today originated from the United Kingdom. It

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1. (1986) 7 ILJ 614 (IC).
2. (1990) 11 ILJ 790 (IC) at 795C-D.
became clear that the labour courts in England paved the way on constructive dismissals and South Africa followed suit. In leading cases on constructive dismissal in the South African context reliance was placed on Woods v WM Car Services (Peterborough) such as in Halgreen v Natal Building Society; Jooste v Transnet Ltd t/a South African Airways and Dallyn v Woolworths where the Labour Appeal Court had cited the case of Woods v WM Car Services (Peterborough).

Initially some courts took the view that any sufficiently unreasonable conduct by an employer might justify the employee resigning and then claim that he had been dismissed. However the Court of Appeal in England made it clear, in Stephenson and Co (Oxford) Ltd v Austin that “it is not enough for the employee to leave merely because the employer had acted unreasonably, the conduct of the employer must amount to a breach of contract of employment”. It must be emphasized that a constructive dismissal is not necessarily unfair and a tribunal that makes a finding of constructive dismissal will err in law if it assumes that the dismissal is unfair without the explicit finding on the reason for the dismissal and whether the employer has acted unreasonably in all circumstances. Lord Denning in the Western Excavation v Sharp stated that

“[a]n employee is entitled to treat himself as unfairly dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. In those circumstances the employee is entitled to leave without giving notice, but the conduct must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having affirmed the contract, and will lose his right to treat himself as discharged.”

This view may be interpreted in both the narrow and a broad sense. The contractual text is to ask whether the employer's actions show that he does not intend to be bound by the contract of employment any longer. Many employers in the past and the present are excreting pressure on employees to force them to resign and would

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4 (1986) 7 ILJ 769 (IC).
7 (1990) ICR 609 (EAT).
then claim that the employee resigned and was not dismissed. To deal with this contingency the concept of constructive dismissal has been expressly provided for in several systems in the world.

Unlike an actual dismissal, a constructive dismissal consists of the termination of the employment contract by reason of the employee’s rather than the employer’s own immediate act. However such an act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified.

In 1993 Landman\(^9\) defined constructive dismissal as “the termination of a contract of employment by an employee under circumstances that make the termination tantamount to, or virtually, or in substance, the termination of employment by the employer”.

Until 1995, some Industrial Court it was clear that decisions and academics favoured the view as was stated in the Ferrant v Key Delta\(^10\) case, that an essential element of constructive dismissal was that the employer breached a material term of the contract of employment, justifying the employees’ decision to terminate the contract of employment. It was strongly stated in Dallyn v Woolworths,\(^11\) that “the act of the employee should evince a clear intention to terminate the employment relationship; any conduct that is tantamount to a breach going to the root of the relationship”.

In the current labour relations era constructive dismissals are a statutory dismissals and in effect entails the termination of the employment contract by the employee as a result of the employer making it continued employment totally unbearable and intolerable. This entails that the employee resigned or repudiated the employment contract as a result of the employer not leaving the employee any other option but to resign. This can also be termed as coerced or forced resignations and are commonly better known as “constructive dismissal”. The employee is deemed to have been dismissed, even though the employee terminated the employment contract. The most important element is that the employee terminated the

\(^9\) Vol 2(9) Contemporary Labour Law.
\(^10\) (1993) 14 ILJ 464 (IC).
\(^11\) (1995) 6(3) SALLR 30 (IC).
employment contract, *ie* resigned yet this is regarded as a dismissal, it is however for
the employee to first lay a claim at the proper authority and the employee must prove
his/her allegation before it can be a constructive dismissal. Du Toit *et al*\textsuperscript{12} makes
mention thereof that “the employee does not need to formally resign, he or she can
claim to have been dismissed even when he or she simply leaves his or her
employment in circumstances that would otherwise have amounted to abscondment”.
It was furthermore reiterated by Le Roux and Van Niekerk: \textsuperscript{13}

> “In considering what conduct on the part of the employer constitutes constructive
dismissal, it needs to be emphasized that a ‘constructive dismissal’ is merely one form
of dismissal. In a conventional dismissal, it is the employer who puts an end to the
contract of employment by dismissing the employee …"

In a constructive dismissal it is the employee who terminates the employment
relationship by resigning due to the conduct of the employer. As Lord Denning said
in *Woods v WM Car Services*:\textsuperscript{14}

> “the circumstances of constructive dismissal are so infinitely various that there can be,
and is, no rule of law saying what circumstances justify and what do not. It is a question
of fact for the tribunal of fact …”

Subject to the reservation, that in our labour law, it is not necessary to find an implied
term of the kind required in English law, an approach which commends itself to me is
that of the Employment Appeal Tribunal in *Woods v WM Car Services*.\textsuperscript{15} It is clearly
established that there is implied in a contract of employment a term that employers
will not, without reasonable and proper cause, conduct themselves in a manner
calculated or likely to destroy or seriously damage the relationship of confidence and
trust between employer and employee.

The conduct of the parties has to be looked at as a whole and its cumulative impact
assessed.\textsuperscript{16}

\textsuperscript{13} The South African Law of Unfair Dismissal at 84.
\textsuperscript{14} (1982) *IRLR* 413 (CA) at 415.
\textsuperscript{15} (1981) *IRLR* 347 at 350.
\textsuperscript{16} Courtaulds Northern Textiles Ltd v Andrew(1979) *IRLR* 84.
In the United Kingdom it is a question of fact for the tribunal to determine whether the employer’s conduct that precipitated the resignation amounted to a repudiation of the contract.

In short, unlike an actual dismissal, a constructive dismissal consists of the termination of the employment contract by means or conduct of the employee’s rather than the employer’s own immediate act. However, such act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified. Thus, like an actual dismissal, a constructive dismissal may or may not be unlawful (in the sense of constituting a breach of the employment contract) and may or may not be unfair. It is not, as is sometimes mistakenly thought, either inherently unlawful or unfair.

In the present Act a constructive dismissal is statutorily defined. In order for the employee to prove that he was dismissed in the sense mentioned herein he must prove that to remain in service would have been unbearable and intolerable. In a sense this suggests that the legislature has created a somewhat stricter test than that accepted by the labour courts under the previous Labour Relations Act 28 of 1956.

Seemingly the intention was to determine if the employer’s conduct evinced a deliberate or preconceived intention to have the employment contract repudiated. According to Grogan:¹⁷

“the requirement that the prospect of continued employment to be intolerable further suggests that this form of dismissal should be confined to situations in which the employer behaved in a deliberate oppressive manner and left the employee with no option but to resign in order to protect his interests.”¹⁸

Many employees that have been placed in such a situation as is mentioned above would simply leave their place of work without resigning and would in a sense just abscond. However, in cases where the employee simply leaves work and stays away without explanation, the situation is different. The courts have long struggled to conceptually pigeonhole what is commonly termed “desertion” or “absconding”. Is it

¹⁷ At 108.
the deserting employee who terminates the contract, or does the employer terminate when he or she performs some unambiguous act which signals that the employment relationship has come to an end, either by replacing the missing employee, or by informing the employee that there is no longer work available for him or her if and when he or she returns? The question is not merely academic, because if employees are dismissed, they have a right to seek statutory relief. If employees voluntary resign, that is the end of the matter, however a coerced or forced resignation will be seen as a dismissal irrespective whether the employee resigned or not.

The labour courts treat constructive dismissals in the same way as any other dismissal, the determining factor is whether the circumstances that prompted the employee to resign were fair or not. The courts will consider the circumstances with the view to establish whether the employee could have been expected to put up with the employer’s conduct or sought some other form of relief.

The field of constructive dismissals is a burgeoning one in the South African labour law and in practice.
CHAPTER 2
TERMINATION OF THE CONTRACT OF EMPLOYMENT

According to Brassey “the contract is brought to an end in a manner recognized by law”. It is therefore, necessary to explore the means of termination that the law acknowledges and accepts. This termination may be in the sense that the employer dismisses the employee and therefore repudiates the existing contract of employment and employment bond. Or where the employee repudiates the employment bond for reasons acceptable by law. Under the common law, an employment contract can be terminated either by the employer or by the employee, by mutual consent, or by operation of law. Termination by the employer is generally termed “dismissal” and termination by the employee “resignation”. Although it creates three forms of dismissal unknown to the common law, the LRA preserves the common law insofar as the employer with or without notice defines dismissal, \textit{inter alia}, as the termination of a contract of employment.

2.1 TERMINATION IN TERMS OF SECTION 186(a) OF THE LABOUR RELATIONS ACT

This form of dismissal can normally be easily recognized when it occurs. All that is required is some form of action, be it express or implied, by the employer, which indicates that he considers himself no longer bound by the contract either to accept the employee’s service, or to pay that employee. This brings the contract to an end, whether the employee likes it or not. The same happens when an employee resigns.

2.2 TERMINATION IN TERMS OF SECTION 186(e) OF THE LABOUR RELATIONS ACT

The definition in section 186(e) 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.\footnote{Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC).}

\footnote{Grogan \textit{Workplace Law} supra.}
With the constitutional right to fair labour practice in mind, the Labour Relations Act, Act 66 of 1995 the provision of section 186(e) has given the concept of constructive dismissal statutory force, under this section “dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.

Basson et al\textsuperscript{21} opined as follows:

“The definition of a constructive dismissal in section 186(e) does not define the limits of what may be intolerable behaviour on the part of the employer, and in the end this will probably be a value judgment made according to the facts of each case. What the case does seem to suggest, however, is that the inquiry by the court is twofold:

Firstly, the employee must establish that there was no voluntary intention by the employee to resign. Thus interpreted correctly the employer must have caused the resignation.

Secondly, the court must look at the employer’s conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it …”

In the matter of \textit{Sappi Craft (Pty) Ltd t/a Tugela Mill v Majaka}\textsuperscript{22} Landman J confirmed the approach set out by Basson above as follows:

“They are two stages in the same journey and the facts which 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. It is clear that the evaluation must be an objective one and that if the employee is oversensitive, or misinterprets the conduct of the employer in a subjective way, this does not constitute sufficient proof of dismissal. It must also be borne in mind that it is not impossible that an employee may resign and rely on section 186(e) as a sort of pre-emptive move to avoid a possible disciplinary inquiry.”

The indicia of Le Roux and Van Niekerk \textit{The South African Law of Unfair Dismissal}\textsuperscript{23} illustrate when a constructive dismissal is effected:

“A constructive dismissal takes place where an employee terminates the employment, or agrees to the termination, but this termination or agreement was prompted or caused by the conduct of the employer. The fact that the employee was caused to terminate

\begin{footnotes}
\textsuperscript{22} (1998) 19 ILJ 1240 (LC) at 1250E-I.
\textsuperscript{23} At 84.
\end{footnotes}
his employment as a result of an employer’s actions means that the termination was at the initiative or behest of the employer.”

In essence constructive dismissal would imply:

“An (i) employee (ii) terminates (iii) contract of employment with or without notice because the (iv) employer made (v) continued employment (vi) intolerable for the employee.” (my underlining).

One should therefore have to find these elements present before one can determine whether the dismissal was constructive or not.

2.3 EMPLOYEE

- Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

- Any other person whom in any manner assist in carrying on or conducting the business of an employer.

2.4 TERMINATION / RESIGNATION

Strictly speaking termination means to finish, close, end, discontinue, terminate, conclude or bring to an end. Termination by the employer is generally termed and “dismissal” and termination by the employee “resignation”.

For the purpose of and in context to constructive dismissal it would mean that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

A resignation takes effect when it is tendered, since it operates unilaterally, it does not require acceptance from the employer to become effective, the contrary is also

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true. The employer is entitled to keep an employee to his resignation and the employee cannot retract his resignation without the employer’s consent.

Under constructive dismissal the resignation operates in the same way. Brassey opines:\(^{26}\)

“a resignation given in breach of contract is ineffective in itself but constitute repudiation entitling the employer to cancel the contract”.

### 2.5 CONTRACT OF EMPLOYMENT

This is the agreement under which the employee is employed. It can be varied from time to time by subsequent agreements, but not every agreement between an employer and employee will constitute or be a component of a contract of employment. A number of tests have been enunciated and debated, considered and reconsidered, applied and discarded by the court in determining whether or not the relationship between the parties is indeed one of employment. Various tests have vied for predominance: \(^{27}\)

(a) The presence of the employer’s right of supervision and control over an employee is “indeed one of the most important indicia that a particular contract is in all probability a contract of service”. According to Joubert JA in *Board of Executors*. It is probably the most prominent test. In the view of Nugent J in *Liberty Life*, the assumption of control is at least of such “prime importance”. In *Bayer v Frost*\(^ {28}\) that “its absence of control should cast serious doubt upon whether the relationship is one of employment”. On the other hand, says Nugent J, “its presence ... is by no means a sure sign that the relationship is one of employment”.

(b) The contract itself requires consideration. In *Smit’s case*, Joubert listed the object of the contract as one of the “most important legal characteristics of the contract of service and the contract of work”, while Brassey, in his article “The

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\(^{26}\) At A8:17.

\(^{27}\) Board of Executors Ltd v McCafferty (1998) 7 LAC 4.3.1.

\(^{28}\) (4) SA 559 (A) at 584I.
Nature of Employment”, considers that the object of the contract should
determine its character and should not be regarded as merely one of its
characteristics.\textsuperscript{29} The court in \textit{Borcherd’s}\textsuperscript{30} case stated as follows:

“In order to ascertain the nature of the relationship between the parties, it is
obviously necessary to look at the terms of the contract. It is the terms of the
contract which determine that relationship, although the parties’ own perception of
their relationship and the manner in which the contract is carried out in practice
may, in areas not covered by the strict terms of the contract, assist in determining
the relationship.”\textsuperscript{31}

However in \textit{Goldberg v Durban City Council}\textsuperscript{32} it was stated: “it is not enough for
the parties to describe their contract ... for it is the duty of the court to have
regard to the realities of their relationship and not regard itself as bound by what
they have chosen to call it”\textsuperscript{33} which approach was followed in \textit{Dempsey v Home & Property}.\textsuperscript{34}

(c) The dominant impression test requires a balancing of certain \textit{indicia} for and
against the existence of an employment contract. The application of this test is
illustrated by the approach of Joubert JA in \textit{Smits}\textsuperscript{35} case where he stated “... there may be other important indicia to be considered depending upon the
provisions of the contract in question as a whole”. In \textit{Borcherd’s} case this court
followed such approach in conducting “a review of those factors which may tend
to indicate the object of the contract” and concluded that some factors were only
or more consistent with one notion, while other factors were only consistent with
a different notion and other factors were neutral. In \textit{Dempsey’s} case there was
a similar weighing up of the factors as against each other and the court
concluded that “the dominant impression test tips the scale in favour of the
respondent’s case”.\textsuperscript{36}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{29} Brassey “The Nature of Employment” (1990) 11 ILJ 889.
\item\textsuperscript{30} At 1277H.
\item\textsuperscript{31} \textit{Borcherds v CW Pearce and Steward t/a Lubrite Distributors} (1993) 14 ILJ 1262 (LAC).
\item\textsuperscript{32} 1970 (3) SA 325 (N).
\item\textsuperscript{33} \textit{Goldberg v Durban City Council} 1970 (3) SA 325 (N).
\item\textsuperscript{34} (1995) 16 ILJ 378 (LAC).
\item\textsuperscript{35} At 62H.
\item\textsuperscript{36} See also \textit{Neville Kommissaris v Onderlinge Versekeringsgenootskap AVBOB} 1976 (4) SA 446 (A) at 457A.
\end{enumerate}
\end{footnotesize}
2.6 EMPLOYER

Section 1 of the Labour Relations Act “employer” is defined *inter alia* as follows:

“any person whomsoever who employs or provides work for any person and ... who permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business ...”

Joubert JA justifiably, so state in *Board of Executors Ltd v McCafferty*:

“In interpreting the provisions of any enactment one is obliged to apply the so-called golden rule of construction, restated by Joubert JA in *Adampol (Pty) Ltd v Administrator, Transvaal* at 804B: ‘The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent’. “37

This approach has been followed in this court where it has been called upon to decide whether a party was an employee as contemplated by the relevant provisions of the Labour Relations Act.38 It is equally appropriate that this approach is followed when deciding whether appellant was an employer as contemplated by section 1 of the Act.

2.7 CONTINUED EMPLOYMENT

In *Courtaulds Northern Textiles v Andrew*,39 the supervisor humiliated the employee to such an extent that the employee resigned and claimed constructive dismissal. The Employment Appeals Tribunal found the supervisor’s expressions did not reflect a true assessment of the employee’s ability and stated the following:

“there is an implied term in the contract of employment that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to...

37 *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A).
39 *IRLR* 84.
destroy or seriously damage the relationship and confidence and trust between the parties … Any conduct which is likely to destroy or seriously damage the employment relationship of mutual trust and confidence between employer and employee must be something that goes to the root of the contract.”

This approach was adopted and supported in the leading South African case, Pretoria Society for the Care of the Retarded which will be discussed below. This concept relates to the prospects or possibility of a continuation of the relationship that existed between the employee and the employer at the time that the contract was still in tact. The test for whether the employer has rendered the prospect of continuation of the employment relationship intolerable is objective, ie the question is not to be determined from the state of mind of the employee. In furtherance of this argument it is stated in Pretoria Society for the Care of the Retarded v Loots case:40

“...The enquiry is whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. 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 ... its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

What is clear from the aforesaid decision of the Labour Appeal Court is that the test for determining whether or not the termination of employment constituted a constructive dismissal is an objective one. The subjective apprehensions of an employee can therefore not be a final determinant of this issue. The conduct of the employer must therefore be judged objectively. It would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when these perceptions turn out to be incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the Act.

Grogan41 states that

“[t]he requirement that the prospect of continued employment be intolerable ... suggests that this form of dismissal should be confined to situations in which the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign in order to protect his or her interests.”

41 Workplace Law supra at 109.
2.8 INTOLERABLE

What does intolerability entail? This question was considered by our courts in a number of judgments prior to the commencement of the current Labour Relations Act. Du Toit et al\textsuperscript{42} submits that intolerability should not be interpreted as meaning that no reasonable alternative to resignation exists. The employer should view the employee’s circumstances in context in order to establish whether resignation constitutes a reasonable response to unlawful or oppressive conduct. He does however suggest that the Labour Appeal Court applies the principle of “the only reasonable option”.

Just before the coming into law of the 1995 Labour Relations Act, the notion of “intolerability” was introduced in Jooste v Transnet Ltd t/a South African Airways.\textsuperscript{43} The requirement of breach of contract on the employer’s part was eliminated from constructive dismissal law. Myburgh J held that an employee had to surmount not one but two hurdles before a claim for constructive dismissal could be accepted, namely that the employee had not intended to terminate the contract of employment, but that he or she had put an end to the contract because of the conduct of the employer.\textsuperscript{44} Judge Landman in the matter of Sappi Craft reiterated this approach in 1998.

This less restrictive approach advocated that the employer’s conduct should be looked at, as a whole and its cumulative impact assessed an a determination being made as to whether the conduct is such, that if judged reasonably and sensibly, the employee cannot be expected to put up with it. In applying the test, the court found that Jooste had not been constructively dismissed because he accepted a voluntary severance package in order to escape working for a supervisor that he disliked. His choice said the court had not been made under duress.

Intolerability connotes a wider ambit than conduct which involves a breach of contract or some form of coercion or duress. A fitting definition In Contemporary Labour Law

\textsuperscript{42} Labour Relations Law supra at 343.
\textsuperscript{43} Supra.
\textsuperscript{44} Jooste v Transnet Ltd t/a South African Airways (1995) 16 ILJ 629 (LAC).
is “not to be endured” or “conduct that the employee cannot be expected to put up with”.\(^{45}\) In other words the employee cannot reasonably (objectively) be expected to endure the situation regardless of the cause from which it originates. Strictly speaking, intolerable means insufferable or insupportable. In the context of employment, one would suggest it concerns the circumstances in which the relationship between the employee and the employer had deteriorated as a result of the conduct ascribed to that of the employer. Broadly construed to embrace the circumstances in which the employer’s conduct had made the continued and future relationship between the employee and the employee impossible. In the case of *Pretoria Society for the Care of the Retarded v Loots*\(^{46}\) the Labour Appeal Court dealt with constructive dismissal under the previous Labour Relations Act and laid down a number of features:\(^{47}\)

\[(a)\] When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work. The employee is in effect saying that he would have carried on working indefinitely had the unbearable situation not been created.

\[(b)\] She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.

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

\(^{45}\) *Contemporary Labour Law* (2000) 9(12) at 112.

\(^{46}\) At 985.

\(^{47}\) *Pretoria Society for the Care of the Retarded v Loots* (1997) 6 BLLR 721 (LAC).
(d) It is the employer’s unlawful act which has precipitated the refusal to work and the acceptance of the employer’s repudiation. The two envisaged steps are not always easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not.

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

(f) The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. 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 is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

None of the above observations provides a practical test for determining when an employer’s conduct is so intolerable that the employee cannot be expected to put up with it. The Pretoria Society for the Care of the Retarded v Loots case provided an example of one of the cases in which the Labour Appeal Court found that an employer has behaved so badly that the employee was driven to resign. While Mrs Loots was on leave the employer enquired from her subordinates whether they were happy with her. The employer then started compiling a dossier against her and she was placed under precautionary suspension pending a disciplinary enquiry. While on suspension Mrs Loots was refused access to the office and documents she needed to prepare a defence. At the enquiry Mrs Loots was found guilty on a number of charges including misconduct and poor performance and sanctioned with a final written warning a month later when she was allowed to return to work. On her return she was deprived of her keys and certain of her duties and to add insult to injury the
final warning with which she was issued, was published in the employer’s news letter with no mentioning of the fact that Mrs Loots had appealed against the sanction. Mrs Loots resigned and claimed constructive dismissal against her employer. The court had no hesitation in finding that the employer had engaged in a course of action in which Mrs Loots’ resignation amounted to a constructive dismissal.

One could not claim that he had been constructively dismissed purely because he had not been treated well. This is an objective assessment by nature and a touchy or over-sensitive person will not have a claim to better protection than more brutish colleagues. Notably where the employee alleges an invasion of his or right to his or her feelings of self-esteem. In such cases, the courts require that the plaintiff must actually (subjectively) have felt insulted, but that the reasonableness of that feeling of indignation or outrage must be reasonable when (objectively) assessed against the standard of the sensivities of normal people in the circumstances. In the context of a dispute about the non-renewal of a fixed-term contract, it is obvious that the feeling would be peculiar to the employee, as otherwise there would be no dispute. The treatment must be significant so that it meets the requirements of intolerability and these elements seems to suggest sufficiently hostile, harsh or antagonistic.

In Lubbe v ABSA Bank Bpk\(^48\) where reference was made to the Pretoria Society for the Care of the Retarded\(^49\) case Nicholson AJ stated the following:

“Die betoog steun op die wanopvatting dat die passasie ‘n subjektiewe toets (aan die kant van die werknemer) daarstel om te bepaal of ‘n bedanking op ‘n ‘konstruktiewe ontslag’ neerkom al dan nie. Dit is nie die geval nie.”

Nicholson AJ goes further by stating:

“When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has


\(^{49}\) Supra.
not been constructively dismissed and her conduct proves that she has in fact resigned (court’s emphasis)."

In this case the appellant’s subjective fear was unfounded. The onus was upon the appellant to prove, not only that his resignation was not what he had intended, i.e. to bring to an end the employment relationship, but also that the conduct of the employer, objectively assessed, was such that he could not remain in the employ of the employer. In *WL Osche & Pretorius* the court highlighted an interesting phenomenon in that the Labour Appeal Court held that a constructive dismissal was fair since it had its source in valid operational requirements of the employer. The employee, it seems, resigned as a consequence of the employer’s conduct. If he had resigned for any other reason he cannot claim constructive dismissal.

In the case of *Mthembu v Soukop & Associates* the arbitrator formulated the test as follows:

“The use of the word ‘intolerable’ means that there is an onerous burden on the employee as it means that the employee must show that, in the circumstances, continued employment would be objectively unbearable. In other words this requirement that the employer should have made employment ‘intolerable’ for the employee seems to narrow down the ambit of constructive dismissal to situations where the employer behaved in a deliberately oppressive manner.”

The test as to whether the employer has rendered the prospect of continuation of the employment relationship intolerable was meted out by the Labour Court in the *Smith Cline Beecham (Pty) Ltd* as an objective one and is not to be determined from the state of mind of the employee.

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51 KN 3297, 2 July 1997.
Since the onus rests on the employee in terms of section 192(1) of the LRA 66 of 1995 to prove to the court or tribunal that he had been dismissed, he must also satisfy the court or tribunal that the conditions were indeed so intolerable that his resignation amounted to a dismissal within the ambit of section 186(e).

This section postulates that the onus is on the employee to establish the existence of a dismissal and the onus is on the employer to justify its actions. In this context it is stated by Hoffmann and Zeffert\(^\text{52}\) that the “onus” refers to its common usage in civil law, whereby the incidence of the overall burden of proof decides which party should be the loser where the court is unable to make a finding on the facts before it. The placing of the onus on the employee to prove the dismissal can be traced to the Labour Appeal Court judgment of Myburgh J (as he then was), in the case of Pilatus Manufacturing (Pty) Ltd v Mamabalo.\(^\text{53}\) Although the case was decided under the old LRA 28 of 1956, the court held that if the probabilities were evenly balanced as to whether the employee had been dismissed or had resigned, the Industrial Court could not find that the employee had been dismissed. Where the probabilities are evenly balanced, the application falls to have been dismissed.\(^\text{54}\)

In Employment Law the author opined as follows:\(^\text{55}\)

“As the Act prescribes that an employee bears the onus of proving that he or she is an employee as defined and that he or she has been dismissed, as set out in section 186. In other words the employee must satisfy the arbitrator on the balance of probabilities, that working conditions had reached the degree of intolerability contemplated in terms of section 186(e).”

In Old Mutual Group Schemes v Dreyer and another\(^\text{56}\) Conradie JA confirmed that the onus on the employee is a heavy one:

\(^{52}\) The South African Law of Evidence 4th ed at 194.
\(^{53}\) (1996) 1 BLLR 26 (LAC).
\(^{54}\) At 29C-D and 29F.
\(^{56}\) Unreported LAC (on appeal from the Industrial Court NHK 11/2/4752 & NHK 11/2/4758.
“Dit is nie vir ’n werknemer maklik om aan te toon dat ’n werkgewer die voortsetting van sy diens onuithoubaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld maar hom nie aanstaan nie. Net soos ontslag is gedwonge bedanking ’n allerlaaste opsie.”

A similar view was expressed in *Lubbe v ABSA Bank Bpk*\(^{57}\) where Froneman DJP held that:

> “Selfs al word die appellant se getuienis oor die geldigheid van sy griewe aanvaar, kan dit nie die gevolgtrekking regverdig dat hy, objektief gesproke, genoop was om sy goed te vat en te loop nie.”\(^{58}\)

Having established that the employer’s conduct was intolerable does not automatically mean that the employee can claim to have been unfairly dismissed. The onus then shifts to the employer to prove that his conduct was nevertheless neither unfair, nor unlawful.\(^{59}\) Employers may well have reason, possibly due to circumstances beyond their control, which cause them to act in such a manner, that a continued employment relationship became intolerable for the employee.

With regard to the above, Commissioner Loveday argued correctly in *Jacobs v Otis Elevator Co Ltd*\(^{60}\) as follows:

> “It is important to be cautious in adopting a wide interpretation of what conduct by an employer constitutes constructive dismissal because of the danger of inviting a flood of employees who resign and then repent and want to claim the protection of the Act, especially as the dispute resolution of the Act is still in its infancy in interpreting the new Act. On the other hand, it would be a corruption of the Act to adopt a very restrictive interpretation. The definition in s 186(e) was clearly designed to protect employees who resign in desperation as last resort because of the unlawful or unfair conduct of the employer, which makes a continued employment relationship intolerable. Employers do have a responsibility to avoid acting in a manner that would be likely to destroy or undermine the employment relationship. I agree with the approach that one must look at the conduct of the employer as a whole and decide whether it was such that an employee would be entitled to say they cannot take this conduct any longer and must resign. A global approach would also take account of the conduct of the employee and the interaction between both parties in determining the existence of a constructive dismissal. Both case law and the Act (in s 192) place the onus on the employee to prove the dismissal, constructive or otherwise.”

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\(^{57}\) JA 116/97 (unreported).


\(^{59}\) *Contemporary Labour Law* Vol 9 No 12 July 2000 at 112.

\(^{60}\) CCMA case no GA3672.
CHAPTER 4
COERCED RESIGNATION OR DISMISSAL

Between resignation and dismissal lies a murky area in which it is uncertain just who
terminated the employment contract. Desertion is one such case. It is unclear who
actually brings the contract to an end. This situation arises when the employee
deserts or absconds. (The Labour Court has provided some useful guidelines on
how employers should handle extended absence without leave.) It is clear that
although it may affect the breach of contract, the breach must be by the employer,
and not merely the individual with the authority to dismiss. It is accepted by the
Labour Court that any supervisory employee will bind the employer, provided that the
supervisor is acting in the course of his or her employment. Other questions that
raises concern are:

(a) What is the nature of the employer’s conduct that entitles the employee to leave
   and claim constructive dismissal?

(b) Is the conduct sufficiently unreasonable?

(c) Must the conduct involve a breach in the contract of employment?

An interesting judgment was found in the case of Marshall (Cambridge) Ltd v
Hamblin. When the employee, a car salesman gave his three months notice to
resign, the employer invoked a clause in the contract of employment allowing the
employer to pay out the salary of the employee in lieu of notice and not allowing the
employee to work his notice period. This in itself is not unusual. The problem,
however, was that the employee’s income was structured with a small basic salary
and that the remainder was commission based. Thus the employee was largely
dependant on commission and not on the basic salary. The employee therefore had
to work to earn commission and in this case the employer had only paid out the basic
salary portion. If the employee did not work he would not be in a position to earn
commission. The employee claimed constructive dismissal on that basis. It was held

that where the contract provides for payment in lieu of notice there is no right to work out the notice, even where it involved commission. Thus, the employer was not in breach of contract and there was no constructive dismissal. Judge Harford added that if any question arose as to any commission payable, which was a common law matter, it had to be resolved in a separate court under the common law. The elements of constructive dismissal are, in the first instance, that the employer’s conduct must have driven the employee to resign and secondly, that the employer’s conduct must imply a fundamental breach in the terms and conditions of employment. In this matter the employee was never forced to resign, nor coerced, and the employee resigned voluntarily. On its own, being a unilateral action not needing the consent of the employer, coupled with the clause allowing the employer to make payment in lieu of notice, made it adequate to contest and oppose a claim of constructive dismissal effectively.

In *Gilbert v Goldstone Ltd*\(^6^2\) Kilner-Brown J expressed the view that “unreasonable conduct was enough, irrespective of whether or not it amounted to a breach of contract”. This was subsequently followed by a number of decisions and was also the test adopted by the English Court of Appeal in *Turner v London Transport Executive*.\(^6^3\) However, in *Western Excavating v Sharp* the court vigorously reasserted the contractual test and treated the comments made in the *Turner* case as obiter only.

Another interesting decision is found in the English case of *Robertson and King v Securior Transport Ltd*\(^6^4\) where the dismissed employees were given the option of either resigning and be given a reference, holiday pay and pay in lieu of notice, or if they refused to resign, they would be summarily dismissed. The tribunal ruled that although the employees had written letters of resignation, they had in fact been dismissed. This decision followed the ruling in *Coenen v South England Tyre Service Ltd*,\(^6^5\) where it was held that resignation subsequent to a request to resign amounted in a dismissal.

\(^{62}\) (1977) 1 *IRLR*.
\(^{63}\) (1977) *IRLR* 441.
\(^{64}\) (1972) *IRLR* 70.
\(^{65}\) (1971) *ITR* 41.
In *Dallyn v Woolworths (Pty) Ltd*\(^{66}\) it was held that the mere offer by an employer that the employee may rather resign than go through a disciplinary enquiry, did not give a reason for the employee to claim constructive dismissal unless an adverse finding against the employee was a foregone conclusion. In this judgment the court stated that the test enunciated in *Ferrant*, i.e., that the constructive dismissal was established only when the employer evinced a clear intention to terminate the contract, was probably too strict. The court held that the employee’s conduct must at least have gone to the root of the employment relationship. Or when the parties are in dispute over whether the employee actually tendered his or her resignation, or where the parties parted ways in circumstances where it is unclear who took the decision to terminate the contract. Disputes over whether an employee resigned, or was dismissed, arise frequently as points *in limine* in labour litigation. There may be, for example, a factual dispute whether the employee tendered his or her resignation voluntarily or whether he or she was forced to do so; or whether the employer gave the employee the impression that he or she was being fired; or whether the employer had culpably created a situation which left the employee with no option but to leave; or whether the contract was for a fixed-term or for a particular purpose.

One of the most difficult problems that that the courts face is where an employer offers an employee the choice of resigning as an alternative to dismissal or being subjected to a disciplinary enquiry. In *Muller v Unilong* the employee was informed that he was to be dismissed on grounds of incompetence. When he asked for a further chance he was given three options, namely:

\(a\) to be subjected to a disciplinary hearing;

\(b\) to be dismissed with two months notice; and

\(c\) to accept a voluntary severance package.

Needless to say, he opted for the latter and signed a pre-prepared letter that was prepared on his behalf in which he applied for voluntary retrenchment. The court

\(^{66}\) (1995) 16 ILJ 696 (IC).
found that the employee had been confronted with certain dismissal had he not made that choice. The resignation was therefore not voluntary and constituted a constructive dismissal.

In *Jooste v Transnet Ltd t/a South African Airways* \(^{67}\) the court held that an employee who resigns can only claim constructive dismissal if he can show that the resignation was not freely made but was caused by duress or some form of coercion. Each case relies on its own facts. The court must adopt a subjective approach to questions such as the timing or delay in submitting the resignation, or to the status of the employee, including his educational and literacy qualifications, the availability of assistance, professional or otherwise. Generally speaking, an employee who is unfairly treated has two choices. He can either bring unfair labour proceedings in terms of the LRA, while remaining in employment, or he can elect to resign.

In *Dalgleish v Ampar (Pty) Ltd t/a Sol Energy* \(^{68}\) the accused employee approached the employer after a disciplinary hearing had taken place, but prior to its formal finding enquired about the possibility of her resigning. This request was to ensure that she would not have her unblemished record stained. She was then given the option to resign without notice, or to be dismissed with two weeks notice pay. She opted to resign. The court in this instance found that there was no constructive dismissal. Further, that there had been no sign of duress, pressure or force on the part of the employer and that the employee had resigned voluntarily. In *Braun v August Laepple (Pty) Ltd* \(^{69}\) the employee was subjected to a flawed disciplinary hearing and the employee was advised by one of the members of the employer that took part in the hearing before the formal finding that he should resign or face dismissal. The accused employee resigned. The court found that the advice was not unsolicited, was naïve rather than sinister and did not amount to coercion or harassment.

\(^{67}\) Supra.
\(^{68}\) *(1995) 11 BLLR 9 (IC).*
\(^{69}\) *(1996) 6 BLLR 724 (IC).*
In *Moser Industries (Pty) Ltd v Venn*, the employee was informed by management that if he did not accept a retrenchment package he would be dismissed. The court summarized as follows:

“The manner in which the offer was made to the respondent justified at least the inference that what was conveyed was that a rejection of the offer would result in the termination of the respondent’s services, however that was achieved on terms less favourable than those contained in the offer. That in itself would be sufficient to found a finding that the appellant had compelled the respondent to resign. A fortiori would that finding be justified if the respondent was caused to think that the rejection of the offer would result in his being fired without any additional benefits …”

Since the employee was compelled to resign, he had been constructively dismissed. The court referred to Elkouri:  

“However, if intent to resign is not adequately evidenced or if a statement of intent to resign is involuntary or coerced, an alleged resignation will be treated as a discharge for purposes of arbitral review. A similar result has sometimes been reached where a resignation was made under severe emotional stress or was based upon a mistake concerning material facts.” (my underlining)

The dictum in the unreported Industrial Court case of *Boshard v Cullinan Holdings Limited*, is apposite:

“The question which this court has to answer is whether applicant resigned voluntarily or was coerced into resigning by duress, undue influence or misrepresentation on the part of the respondent. If the latter is proven then it amounts to a constructive dismissal and it follows that the court must come to her assistance.”

Resignation brings the contract to an end if the employer accepts it. In *Fijen v Council for Scientific and Industrial Research*, Farlam J (as he then was) stated with regard to the test for resignation that an employee has to “either by words or conduct, evince a clear and unambiguous intention not to go on with his contract of employment”. He furthermore stated that to resign the employee has to “act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract”.  

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72 Case no NH 13/2/3815.  
73 At 772C-D.  
75 Cf *Tuckers Land & Development Corporation v Hovis* 1980 (1) SA 645 (A) at 653D-F.
Whilst it is correct that a resignation on the part of an employee is the event which terminates the employment relationship without any requirement from the employer to “effect” the termination, the unilaterality of such termination flows from the fact that a resignation does not constitute a breach of contract. According to the court, this was the essence of the distinction between a resignation and a desertion. Although desertion may be seen as a form of “tacit” or “constructive” resignation, it is not an act permitted by the contract. Also, because desertion is not permitted by the contract, it constitutes a breach of the contract. However, “it is not part of our law that breach of contract, however material, brings about a termination of the contract. In our law, such an act on the part of a party simply entitles the other party to acknowledge the ‘repudiation’, and then by a juridical act of its own, usually referred to as an ‘acceptance’ of the repudiation, to put an end to the contract by consciously electing to do so. From this perspective, it is not the act of desertion which terminates the contract of employment, but the act of the employer who elects to exercise its right to terminate the contract in the face of that breach”.

A decision to resign will seldom be accepted as constructive dismissal when the employee had realistic alternatives. Failure at least to attempt to use a formal grievance procedure when he or she could have done so will almost always count against the employee, no matter how intolerable the situation in which he finds himself.\textsuperscript{76}

Brassey\textsuperscript{77} suggests this test goes too far. The true test is where the resignation was a reasonable option, that is, one of the reasonable options when more than one exists.

\textsuperscript{76} Grogan “Resign or be damned. The Labour Appeal Court’s Approach to Constructive Dismissal” (1999) 15(1) \textit{EL} at 9.

CHAPTER 5
ABUSIVE OR RUDE LANGUAGE

The fourth and final form of statutory dismissal is defined in section 186(e) of the Act as “an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.

In the English case, *Palmanor Limited v Cedron*\(^78\) the nightclub manager wrongly accused the applicant, who was employed at a nightclub and had previously arranged to attend later than usual for being late. The manager then became abusive saying, “You are a big bastard, a big c… you are pig-headed, you think you are always right”. The employee objected and the manager responded, “I can talk to you any way I like, you big s…t” and “if you leave me now, don’t bother to collect your money, papers and anything else. I’ll make sure you don’t get a job anywhere in London”. The employee resigned and his claim, that he had been constructively dismissed, by reason of the behaviour in question, including the abuse, was upheld by the Employment Appeal Tribunal. Slynn J acknowledged that many cases involving foul and abusive language did not constitute constructive dismissal. This case was however exacerbated by the threats made to the employee.

In *Haworth v Quigney Spar & another*\(^79\) the employer not only verbally abused the employee, but also threatened her as follows: “I have a f…n problem with you. For your type, I don’t have time. You are an f…n piece of scum. I can tell you now your time at Spar won’t be much longer. You can run back to them now and tell them I’m threatening you”. He went on by saying “try and send people after me again I’ll f…n show you what I’ll do to you”. The employer also stuck his keys into the employee’s mouth. The employee resigned or repudiated the contract, because the employer left her with no option.

The Commissioner found that the employer not only created an unbearable situation for the employee, and that there was no possibility of the employer abandoning that

\(^78\) (1978) *IRLR* 303.
pattern. It is accepted that the employee could not be expected in the present matter to put up with the employer’s conduct. In the circumstances, it was further accepted that there was no other form of relief available to the employee but to repudiate her contract.

In both these cases constructive dismissal was found not so much for the language used, but more for the threats that were made during the flurry of words that exchanged.

However, it can be argued that the foul language was yet another factor to prove that the relationship had been irreparably broken down. Whether continued employment was intolerable should be determined objectively by considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasized that a “constructive dismissal” is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer. Lord Denning held in Woods v WM Car Services (Peterborough) Ltd:80

“The circumstances of constructive dismissal are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact …

Courtaulds Northern Textiles Ltd v Andrew (1979) IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it … the conduct of the parties has to be looked at as a whole and it cumulative impact assessed.”

In Loubser v PM Freight Forwarding81 the commissioner found that the applicant was constructively dismissed and he agreed with the approach of the British Employment Tribunal that one must look at the conduct of the employer as a whole and decide whether it was such that an employee would be entitled to say he or she cannot take this conduct any longer and is compelled to resign. A holistic approach also takes

80 (1982) IRLR 413 (CA) at 415.
into account the conduct of the employee, and the interaction between both parties in order to determine whether the employer’s conduct was the direct cause of the employee’s resignation. *In casu* the commissioner found that the employer had made a continued employment relationship intolerable, and the conduct of an employer was neither fair nor lawful.

In *Miladys v Naidoo*, the employee had an argument with her employer about the performance of the branch. On the basis of abusive language and management style resigned and claimed constructive dismissal. Nicholson JA stated:

“I do not believe that an employee is entitled to make a case of constructive dismissal out of her own excessive overreaction to a management style with which she does not agree.”

It is therefore apparent that abusive or rude language as such does not necessarily establish sufficient reason to claim constructive dismissal. It contributes however to a possible situation where continued employment may become intolerable.

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*82 Milady’s, a Division of Mr Price Group Ltd v Naidoo & Others (2002) 11 (LAC) 6.13.3.*
CHAPTER 6
CHANGES TO CONDITIONS OF EMPLOYMENT

There is a clear distinction between implying a term in a contract of employment which negates a provision which is expressly stated and implying a term which controls the exercise of a discretion that is expressly conferred in a contract. The first is of course impermissible and unlawful while the latter not, because there may well be circumstances where discretions are conferred. They are nevertheless not unfettered discretions which can be exercised in a capricious way.

Where an employee’s terms and conditions of employment are changed is such a way that leads to a drastic reduction in earnings for instance this would result in a fundamental breach in the contract of employment. However, if the employee agrees to that, the employer and employee may, as a result of economic stress, vary the contract to avoid a possibility of redundancy or retrenchment. This will not necessarily be viewed as fundamental breach in the contract of employment should the employee resign, and claim constructive dismissal.

In Van der Riet v Leisurenet Ltd t/a Health and Racquet Club, Van der Riet resigned after the employer had restructured its operation in such a way so that he reported to a supervisor in a position lower than the one to whom he had previously been answerable to. Although the court accepted that the employer had a genuine commercial reason for restructuring, it found that Van der Riet had not been consulted and had been overlooked for promotion within the new structure, because of unproven suspicions regarding his performance. This, the court said, was enough to justify his resignation. The respondent had a grievance procedure that the appellant could follow however. The appellant did not follow the normal channels to air his grievance and there was nothing in the record of proceedings that he had indeed done so to prove that his grievance would not receive proper attention had he followed the grievance procedure. The appellant also had no regard to any of the sympathetic suggestions and hereby dug his own grave.

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While the test is contractual in nature, reasonableness is not wholly irrelevant. It may be of evidential value as was made clear in Courtaulds Northern Spinning Ltd v Sibson\textsuperscript{84} where the following comment was made: “Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behavior may be strong evidence of a significant repudiatory breach. Nevertheless it remains true that conduct however reprehensible, may not necessarily result in a breach of a fundamental term of the contract.”\textsuperscript{85} In another English case, Middlemass v Greenwood and Bateley\textsuperscript{86} it was held that an offer of alternative work at a reduced salary and reduced benefits coupled to the status of the employee constituted a repudiation of the contract of employment and therefore constitute a constructive dismissal even though the employee resigned. In Stewart Wrightson (Pty) Ltd v Thorpe\textsuperscript{87} “a refusal to permit an employee to do the work he had been appointed to do, or seriously degradation in the employee’s status constituted summary dismissal amounting to repudiation of the service contract. By compelling the defendant to sever all connections with the office to which he had been appointed to manage, the plaintiff destroyed the very being of the contract …”.

Until the decision of the Court of Appeal in Petersen v Camden London Borough Council\textsuperscript{88} it was generally accepted that questions pertaining to constructive dismissal were questions of law and that consequently if an appellate court disagreed with a finding of the court \textit{a quo} it could substitute its own view of that court. However in Petersen, Lawton LJ distinguished three separate issues which may arise in determining whether there are grounds for constructive dismissal or not.

\begin{itemize}
\item \textit{(a)} What are the terms of the contract?
\item \textit{(b)} Did the facts as found by the court \textit{a quo} constitute a breach of contract by the employer?
\end{itemize}

\textsuperscript{84} (1987) ICR 329.
\textsuperscript{85} Courtaulds Northern Spinning Ltd v Sibson (1987) ICR 32.
\textsuperscript{86} (1972) IRLR 3.
\textsuperscript{87} 1974 (4) SA 67 (DCLD).
\textsuperscript{88} (1981) IRLR 173.
(c) Was the breach a fundamental breach of the contract?

The Court of Appeal accepted that the first question was one of law, but took the view that the question (b) and (c) mentioned supra were essentially questions of a mix of law and fact. Appellate Courts could not intervene merely because it disagreed with the conclusion of the court a quo, they could do so only if there are sufficient evidence on which a reasonable court could reach that conclusion. The well-known administrative law approach laid down in Edwards v Bairstow was essentially the test. The appeal decision in Woods v WM Car again confirmed this test.

Not any unilateral variation of the contract by the employer will justify a claim of constructive dismissal; the variation must be of such significance as to evince an intention on the employers’ part to repudiate the contract. In practice, however the courts must to a large extent chip away the difference by holding that many forms of unreasonable conduct will in fact constitute a breach of some contractual terms.

In Ferrant v Key Delta the court referred to M McMillan v ARP & P Noordhoek Development Trust that adopted a description of constructive dismissal as action on the part of the employer, which drives the employee to leave. The court stated unequivocally that to rely on the testimony by the employee that he resigned as a result of certain actions of the employer could be a one-sided approach. It was therefore necessary to consider whether there was repudiation of the contract of service by the employer, repudiation of a contract being an unequivocal intention on the part of a party not to be bound by the contract and evincing a clear intention not to perform the obligations due under the contract. The court further stated that not every change in the conditions of employment by an employer can be construed as constructive dismissal, even if such a change is serious enough to entitle the employee to cancel the contract in terms of the common law. Such changes must imply coercion on the part of the employer to drive the employee to leave. Though not all changes in conditions of employment amount to constructive dismissal they

\[89\] 3 (1956) AC 14.
\[90\] Supra.
\[91\] (1991) 2(3) SALLR 1 (IC).
may constitute an unfair labour practice. But relief can be obtained by an approach to the industrial court while still in employment.

If the court concludes that an employer’s action amounts to constructive dismissal the question then is whether or not it was reasonable and justified. In *Van Der Merwe, M v Die Bronberg Aptekers en Drogiest*,⁹² it was found that the option of accepting an alteration of her term of employment that the employer seeks to impose unilaterally and without prior negotiation and in breach of the contract of employment, such conduct amounted to constructive dismissal. An alternative that was not a real or viable alternative could, in itself, suggest grounds and a claim for constructive dismissal.

In the above case the applicant contended that her resignation constituted constructive dismissal. The respondent, in turn, contended that the applicant was not obliged to resign, nor had she been under any pressure to resign, and that the resignation was a voluntary act. The court was to determine whether, in fact, the applicant's resignation amounted to constructive dismissal. In *Quince Products CC v Pillay*⁹³ the court ruled that the employee was constructively dismissed because he was denied the use of a company vehicle to get to work, whereas he did not have one of his own. It needs to be mentioned that in this case the employer had allowed the applicant the use of the company vehicle for some nine months prior to this decision that he may no longer use the said vehicle. The court in this case ruled that this amounted to the unilateral change of the conditions of employment and that the employee was pressurized and coerced to resign.

In *Brown v Power Air-conditioning (Pty) Ltd*⁹⁴ the court held that the action of the employer constituted a constructive dismissal when he unilaterally changed the employees’ status from a salaried employee to one being paid on commission. In *Jansen Van Vuuren v Transnet*⁹⁵ the court found that the employer’s action when moving a managerial employee in, and out of various jobs (some of which were of

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⁹² Unreported case nr NH 13/2/7711, ref 94076.
⁹³ (1997) 12 BLLR 1547 (LAC).
reduced status) was insufficient grounds to justify an allegation of constructive dismissal.

The question that the court was confronted with was whether the respondent was entitled to unilaterally convert the terms and the conditions of the applicant's employment, even if such conversion was based on commercial factors the underlying question would be, if respondent was entitled to unilaterally amend the conditions of employment without first consulting with the employee for the reasons that resulted the need to convert the terms and conditions of the employment (my italics). From this case it seems obligatory on the respondent to a further properly advise the employee of the changed economic conditions prevailing in the respondent’s business.

In NUMSA v Atlantis Diesel Engines the Labour Appeal Court accepted, that consultation in its own right was important, albeit from the perspective of the decision to retrench. It was further unequivocally stated that that consultation is critical to the philosophy of the LRA.

In the Van der Merwe case, it was found that at no stage had there been a bona fide attempt to consult with the employee or was she taken into the employers’ (respondent’s) confidence concerning the respondent's changed economic circumstances. The applicant was not invited to make recommendations or suggestions as to how the matter might be resolved.

Before considering whether the failure to properly consult might on its own constitute an unfair labour practice, the court dealt with the definition of constructive dismissal. In Amalgamated Beverages, the appellate judge remarked, “the employer’s conduct had left the employee with the choice of the lesser of two evils, he chose, as he stated, the best deal he could obtain. Hence his resignation”.

No reference was made to duress or coercion. The test postulated here was whether the conduct of the employer left the employee with any other choice accept that of resignation.

Interestingly the court expressed the opinion that it was not convinced that it should take undue cognisance of the tests postulated in a purely contractual relationship. The fact that Labour Court was a court of equity it was obligated to look beyond the terms of the contract and contractual principles to the principles of equity, fairness and flexibility. It was stated that the emphasis on duress and coercion of some sort required to vitiate a contract, is overstated in certain cases. The impression in this case was that the court did not believe that it was necessary for an employer to hold a gun to an employee’s head before the test of constructive dismissal had been complied with.

In Ferrant v Key Delta, Brand, SM, stated:

“The court should determine only whether the actions of the employer had driven the employee to leave. If the answer was in the affirmative, then such actions would amount to a constructive dismissal.”

The changes in conditions of employment were not made with the intention of driving the applicant away. The court found that the action of the employer did not amount to a constructive dismissal.

In Contemporary Labour Law Landman states that “duress is not always required on the part of the employer, something less will suffice”. 98

The crucial question which arise once the contract test is adopted is what conduct of the employer would in law amount to breach of contract? Obviously this would depend on the merits of that particular case, although it is important to emphasize that in determining the contractual terms the CCMA, bargaining councils and the courts must apply the principles of law in the ordinary way and not apply different and more lax principles merely because it is set in an industrial context. If the employer

unilaterally reduces the salary of an employee or if the employer unilaterally changes
the duties of the employee, the determining factor would be to see if it is a
fundamental breach or merely a functional amendment.
CHAPTER 7
CAN DEMOTION GIVE RISE TO A CLAIM OF
“CONSTRUCTIVE” DISMISSAL?

An offer of inferior employment coupled with a threat that the employee will be dismissed if he or she does not accept it constitutes constructive dismissal, as does an employee’s decision to resign rather than accept unlawful deductions from his salary.

There are numerous employers who believe that they can avoid the trauma of following a proper process in dismissing or retrenching an employee or group of employees, by asserting pressure on the employee to resign of his own accord. What these employers fail to realize is that any form of pressure exercised on an employee to resign whether direct or indirect, may be interpreted as a constructive dismissal. In essence the employer is forcing the employee to resign by applying enough pressure to have the employee believe that he has no other choice or alternative except to resign.

When an employee wants to claim constructive dismissal the employee must have resigned or left the employment of the employer and he must show that he was subjected to coercion, undue influence or duress. An employee, subjected to this kind of pressure, normally doesn’t think clearly and would resign. The employer would then have constructed a dismissal irrespective if the employee or employees resigned or not.

A form of such pressure would be to have the employee doing work that is inferior to the post that he or she was appointed to do. In Ferrant v Key Delta, Brand, SM stated: “the court should determine only whether the actions of the employer had driven the employee to leave. If the answer was in the affirmative, then such actions would amount to a constructive dismissal”. Landman\textsuperscript{99} opines that “duress, \textit{ie} actual compulsion or threat of compulsion by the employer will mean that the resignation

\textsuperscript{99} Supra.

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was not freely made. However, duress is not always required on the part of the employer, something less will suffice”.

In the same article Landman states that constructive dismissal means the termination of a contract of employment by an employee under circumstances which make the termination tantamount to or virtually or in substance, the termination of employment by the employer. Landman adds that an employee, who has apparently voluntarily resigned, must prove that he/she is an employee by showing that the resignation was not freely made. In *Halgreen v Natal Building Society* the court quotes with approval the following from *Smith v Cycle & Motor Trade Supply Co*:\textsuperscript{100}

> “An employer who employs a servant for a particular work, and gives him a particular status, is not entitled without the sanction of the employee to alter the character of that contract. The contract remains intact until both parties agree to alter it; it cannot be altered at the instance of one of the parties.”

In *Higgs and African Transport Services*\textsuperscript{101} the commissioner stated that “the employee who is demoted as a result of poor work performance, rather than being dismissed may be justified in finding the conduct of the employer intolerable, but the employer may be able to show that given the harsh alternative of dismissal, his conduct was fair”.

The mere fact that an employee is given an unlawful or unreasonable instruction would not necessary constitutes a constructive dismissal especially if the aggrieved employee did not make use of the employer’s grievance procedure. Neither would the fact that an employee who was not granted a voluntary retrenchment severance package. The other side of the coin is also true. In *Unilong Freight Distributors (Pty) Ltd v Muller* the employer applied undue pressure on an employee to accept an offer of voluntary severance package. It was held by the courts to be a constructive dismissal whether or not the employer had the intention to repudiate the contract of employment or not. The test is abundantly clear that the conduct or continued unacceptable conduct of the employer that would render the relationship intolerable and constitute a constructive dismissal.

\textsuperscript{100} 1933 TPD 324.

\textsuperscript{101} (1998) 7 CCMA 6.13.2.
CHAPTER 8
SEXUAL HARASSMENT AS A GROUND FOR CONSTRUCTIVE DISMISSAL

8.1 OVERVIEW OF SEXUAL HARASSMENT

Sexual harassment can, as the growing body of literature on the subject tells us, take insidious forms that are not easily proven.\textsuperscript{102} It may also take more obvious forms that are embarrassing for the victim. Until recently, the law has done little to help the victims of this malpractice in the workplace. The common law has its crime and delict of \textit{crimen injuria}. Also that, the labour courts has protected workers who have been the victims of harassment. But these victims, like the applicant in \textit{Pretorius v Brits}, have generally had to resign and claim \textit{constructive dismissal} in terms of section 186(e) in order to stem the passions of amorous employers or colleagues.

In \textit{Howell v International Bank of Johannesburg Ltd} “actions on the part of the employer which drive the employee to leave that is not within reason (whether or not there is a form of resignation) will amount to a “constructive dismissal”.”\textsuperscript{103} In \textit{Gerber v Algorax}, Brand SM commented as follows:

“One must also not forget that what may be regarded as acceptable behaviour in a normal social setting, need not necessarily be regarded as normal in the employment environment. Furthermore sexual harassment affects different victims differently.”

He continued and cited the passage by De Kock AM in \textit{J v M infra}:\textsuperscript{104}

“Infieriors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissial, lost promotions, inadequate pay rises, etc - what is referred to as intangible benefits in American law - her position is unenviable. Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence.”

\textsuperscript{102} \textit{J v M Ltd} (1989) 10 \textit{ILJ} 755 (IC).
\textsuperscript{103} \textit{Amalgamated Beverages Industries (Pty) Ltd v Jonker} (1993) 14 \textit{ILJ} 1232 (LAC) at 1248 F-J. At 758B-D.
It is of great concern that the employee that is being sexually harassed does not normally come to the fore and understandably so that these employees are in need of their jobs and would tolerate any onslaughts to their dignity just as long as that they can ensure their only means of income. There are numerous female employees who would not speak up because they fear that the may either compromise their jobs, or even their marriages. This list is endless. It seems as if the harassed employee would rather block-out the incident, as is normally the case with rape victims. Those who do come forward are labelled as easy prey and/or seductive and the harassment may continue.

8.2 SEXUAL HARASSMENT – IN RELATION TO SECTION 186(e)

An exposition of a constructive dismissal which accords more closely with section 186(e) of the Act, is where the employee terminates the employment contract in circumstances of an employer’s intolerable or unreasonable conduct. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer. It is well canvassed that a resignation prompted by an employer’s unlawful or improper conduct such as sexual harassment will constitute grounds for constructive dismissal.

One needs to understand what sexual harassment is first before one can fully understand why it can be argued to be a solid ground for a constructive dismissal. When considering sexual harassment as grounds for constructive dismissal. One should view whether sexual harassment has the elements of a constructive dismissal being: A constructive dismissal consists in the termination of the employment contract by reason of the employee’s rather than the employer’s own immediate act.

Employer breached a material term of the contract of employment, justifying the employee’s decision to terminate the contract of employment the act of the employee should evince a clear intention to terminate the employment relationship for any conduct that is tantamount to a breach going to the root of the relationship. Resultant of the employer making it continued employment totally unbearable and intolerable for the victim. Employer not leaving the employee any other option but to resign due to the fact that continued employment had been made unbearable and as a result of
conduct by the employer. The employee had no intention of resigning but the employers’ conduct determined the resignation.

In *Payten v Premier Chemical Industries*, it occurred when employees sexually assaulted a fellow employee by forcefully removing her T-shirt and the wonder bra from her person. She complained and laid a formal grievance with her manager whose failure to take up her complaint resulted in her terminating her contract of employment. It was argued that the conduct of the employer was of such a nature that it constituted a constructive dismissal. One of the reasons apart from the actual incident was the fact that when she lodged a formal grievance the employer did nothing to remedy the situation.

Another aspect to be considered is the fact that sexual harassment is a form of conduct where of the employer, without reasonable and proper cause, conduct him in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

The true test is that the employee would not have resigned if sexual harassment had not taken place.

### 8.4 FORMS OF SEXUAL HARASSMENT

Sexual harassment has many forms and for convenience were categorized understandable forms as follows:

#### 8.4.1 “QUID PRO QUO HARASSMENT

The first is harassment, which occurs when an employer or (note) a supervisor, member of management or co-employee, “undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant (note again) in exchange for sexual favours”.

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8.4.2 HOSTILE ENVIRONMENT HARASSMENT

\(G v K^{106}\) is an example of another form of harassment. In that case, the applicant, a senior executive, had had an affair with a yet more senior male executive. When the latter, a married man, thought better of the affair, he ended it. The board of directors (and the errant executive’s wife) was, however, unhappy with the aftermath of the affair and sought to persuade the applicant to resign. When she refused, she was dismissed. The court understandably viewed this as grossly discriminatory, and expressed its view as follows:

“There is no basis, whether in law or equity, for the proposition that when an employer has had an affair with his employee he may dismiss her once the affair is over on the ground that the employee’s presence is a source of embarrassment for him. \textit{In casu} the senior director should, at the outset, have been acutely aware of the possible consequences, which the affair held in store, not only for himself but also for his wife and his company. Having made his bed, he must now lie there.”\(^{107}\)

It is trite law that the enquiry is to be dealt with in two stages and that the applicant, the employee, must establish that the employer had made the continued employment intolerable to establish a dismissal in terms of section 186(e).

In \textit{Payten v Premier Chemicals},\(^{108}\) the applicant terminated her contract on 4 January 1999 in that she had refused to resume her services following the Christmas recess. She had endeavoured before to bring her grievance to the attention of the office manager, her supervisor, but he refused to entertain her complaint. As pointed out above, the applicant’s T-shirt was forcefully removed by fellow employees in order for them to see her “wonder bra”.

This behaviour falls directly within the definition of “forms of sexual harassment” noted in the Code of Good Conduct, which was promulgated in mid-1998.

The behaviour falls within paragraph 4(1)(b) of the Code of Good Practice on Sexual

\(^{106}\) (1989) 10 \textit{ILJ} 755 (IC).
\(^{107}\) \textit{G v K supra}.
\(^{108}\) \textit{Supra}.
Harassment cases, which reads:

“Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, ... unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons.”

The commissioner stated that it was then accepted, on the basis of his performance at the CCMA, to come to the conclusion that he was intent on damage control both to protect his own position and, presumably, to protect his employer, and to accept that the version of what happened that day as deposed to by the applicant is the truth.

It is accepted therefore that he put her off and certainly did not point out to her that, if she did not accept his dismissal of her claim for restitution in whatever form, she could refer the matter to the head office. Although she did not make use of any formal grievance procedures, she reported the incident to at least two senior persons in the company and it is clear that enquiries were made. Such enquiries were, however, apparently, of an informal nature in which culprit was merely asked for his version and no effort was made to make an in-depth investigation into the allegations. It would appear that the company did not wish to take responsibility for what had happened in Cape Town. That approach is also suggested by the apparent lack of interest in these proceedings suggested by the failure to send its Industrial Relations incumbent, who had been referred to, to attend it. The failure of the company to institute a formal investigation also suggests that the company acted in an insensitive manner. The Code of Good Practice in terms of item 5(d) and item 7 relating to sexual harassment necessitates that a proper investigation be conducted in a sensitive form.

By not first approaching the complaint with the necessary sensitivity demanded by the Code of Good Practice and properly investigating it, created the impression that the employer acted veraciously in the pursuance of its cause in that it unfairly resulted in what was, substantially, an unwarranted attack on the integrity of the applicant during the proceedings, that caused her further emotional distress.
The commissioner stated that the only conclusion that he could arrive at is that he should treat the matter as one in which the maximum compensation contemplated by the Act should be awarded.\textsuperscript{109}

In \textit{Gerber v Algorax (Pty) Ltd} an incident involving a Ms Newman, a contract worker, at the time. The applicant, a manager with the company, remarked that she looked sexy. She was offended by such remarks and on occasion when she approached the applicant for permission to take leave, the applicant’s response was that she could do so provided that she gave him a kiss. Before she could respond, the applicant forcibly grabbed her and kissed her. On 11 June 1998, and whilst she was sitting in her office, the applicant stroked both her thighs and buttocks. He requested a cup of coffee and when she returned to her office with a cup of coffee in each hand, the applicant approached her from behind and touched her sides, stomach and breasts. The applicant also remarked that he wished to take her into the carbon plant “without protective clothing as carbon black went everywhere and he wished to see where everywhere was”. He also referred to the fact that carbon black would result in her panty line becoming visible. She stated that she was deeply upset and traumatized by the applicant’s conduct and that it had a significant effect on her personal life. She in fact subsequently terminated her contract with the Respondent as a direct result of the applicant’s conduct.\textsuperscript{110}

Had Ms Newman who was only a witness in the \textit{Algorax} case received professional advice and had referred a dispute to the CCMA, it is believed that she would have succeeded with a claim of constructive dismissal on the basis that she was sexually harassed by a manager of her employer. Ms Newman did in fact report the incident and it is not clear whether any action against the manager was taken. It is however clear that as a result of the manager’s conduct Newman resigned. She therefore, on the face of the evidence had adequate reason. It seems that the manager in this instant had on a regular basis been sexually harassing subordinate female staff for some time.

8.5 BURDEN (ONUS) OF PROOF: EVIDENCE IN MATTERS OF SEXUAL HARASSMENT

It is a general rule that he who alleges has to prove the allegations leveled against another. The balance of proof is based on the balance of probabilities.

Eksteen AJP in the matter of National Employer's General Insurance v Jagers\(^{111}\) where the following approach was proposed:

“In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true.”\(^{112}\)

In the light of the above it is clear that where the probabilities are evenly balanced, it is the complainant who bears the onus (or may be it would be more correct to say an evidentiary burden) to satisfy the adjudicator that the conduct had indeed taken place. In determining where the probabilities lie, is it important to establish those facts which are either common cause between the parties, or which were not disputed during the course of the various witnesses’ evidence. The applicant can of course only assert that the respondent’s witnesses ought to be disbelieved in relation to those facts that were disputed during the course of their cross-examination. In Small v Smith\(^{113}\) where Claassen J said the following:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.”

In the light of this passage and although the burden of proof lies with the complainant it is also true that in matters concerning sexual harassment the complainant had been subjected to so much humiliation, duress and possibly psychological trauma, it

\(^{111}\) 1984 (4) SA 437 (ECD).
\(^{112}\) Supra at 440D-F.
\(^{113}\) 1954 (3) SA 434 (SWA) at 438E-G.
is still for the victim who bears the onus to satisfy the presiding Commissioner that sexual harassment had indeed been committed.

Furthermore, sexual harassment affects different victims differently. Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence.

The single witness cautionary rule in terms of the law of evidence must be observed. Sexual harassment normally has no witnesses and it is therefore only the word of she who complains against that of he who has allegedly violated the privileges of the victim. Up to now, the law has done little to help the victims of this malpractice in the workplace and as De Kock in sincerity referred to as “suffer in silence”.

Victims like the applicant in Pretorius v Brits\textsuperscript{114} and Payton v Premier Chemicals\textsuperscript{115} had to resign and lay a claim constructive dismissal in terms of section 186(e) in order to stem the passions of amorous employers or colleagues.

\textsuperscript{114} Supra.
\textsuperscript{115} Supra.
CHAPTER 9
CONCLUSION

Constructive dismissals became entrenched in unfair dismissal law as long ago as 1986 when labour courts in the matter of Small & others v Noella Creations first imported the concept of “constructive dismissal” from the English law in 1986.

With the constitutional right to fair labour practice in mind, the Labour Relations Act, Act 66 of 1995 has given a new dimension to the concept of constructive dismissal, by giving it statutory force, provided for in terms of section 186(e):

“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 can also be termed as coerced or forced resignations and are commonly better known as “constructive dismissals”. Although there is no common law definition of constructive dismissal, the term was defined by the Labour Appeal Court as long ago as 1993 in Amalgamated Beverages Industries v Jonker. Many authors have defined the term and always the elements of “not to be endured”, “unbearable”, and “intolerable” and “as a result of the conduct of the employer” are invariably incorporated in the definition. In other words, the employee cannot reasonably (objectively) be expected to endure the situation regardless of the cause from which it originates. Landsman’s exposition of the concept gives greater understanding in that the termination of a contract of employment by an employee under circumstances that makes the termination tantamount to, or virtually tantamount to, the termination of employment by the employer, creates the impression that, although the employee resigned, it is regarded as if the employer had terminated the contract of employment.

Therefore, if an employer behaves in such a manner, that is calculated to lead either to the eventual dismissal of the employee or to the resignation of the employee because he finds it impossible to remain in the employ of the employer in question, it may be regarded as a constructive dismissal. This entails that the employee
resigned or repudiated the employment contract as a result of the employer not leaving the employee any other option but to resign. The employee is deemed to have been dismissed, even though the employee terminated the employment contract.

The requirement of breach of contract by the employer was eliminated from constructive dismissal law. When the Labour Appeal Court ruled that an employee had to surmount not one but two hurdles before a claim for constructive dismissal could be accepted, namely

- that the employee had not intended to terminate the contract of employment, and;
- that he or she had put an end to the contract because of the conduct of the employer.

This less restrictive approach advocated that the employer’s conduct should be looked at as a whole, with a determination being made as to whether the conduct is such, that if judged reasonably and sensibly, the employee cannot be expected to put up with it. It is this approach that is generally followed in cases heard under the present Act. Despite this, arbitrators remain generally conservative in their approach to constructive dismissal.

The circumstances of constructive dismissal are so infinitely various that there can be, and is, no hard and fast rule establishing which circumstances justify resignation and which do not. Sexual harassment also became prevalent as a ground of constructive dismissal as many employers conducted themselves in a manner that jeopardized the employer-employee relationship.

In short, unlike an actual dismissal, a constructive dismissal consists in the termination of the employment contract by means or conduct of the employee’s rather than the employer’s own immediate act.
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