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Intolerability of the Employment Relationship in the Context of Constructive Dismissal: An Analysis of Recent Judgments from South Africa, Namibia, Lesotho and Eswatini/Swaziland (Part 2)

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Abstract

The first part of this article introduced the concept of constructive dismissal in the law of unfair dismissal in South Africa, with some illustrations from Namibia, and discussed mainly the test for constructive dismissal which deals with the employee's burden of proving that his/her resignation was not voluntary but literally foisted upon them by the conduct of the employer, who should have gone further to prove that the dismissal was not unfair or did not constitute unfair labour practice. This second part begins with the discussion of the experience of Lesotho and Swaziland/Eswatini and proceeds to discuss the three elements of constructive dismissal, by which the employee must have brought the employment relationship to an end by proving that continued employment was intolerable, a situation for which the employer was responsible. A number

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of other instances where constructive dismissal was claimed but the employee failed to convince the courts that it ever existed in the given cases are also outlined in this part.

7 LESOTHO: EMPLOYEE KEPT WAITING BY EMPLOYER AND SUBSEQUENTLY RESIGNING

As in the case of South Africa, constructive dismissal is not mentioned in the Lesotho Labour Code Order 24 of 1992, but unlike in South Africa, section 68(c) of that Code does not use the word “intolerable” in its definition of the type of dismissal that is akin to constructive dismissal. It is thus not surprising that the Lesotho Court of Appeal upheld counsel’s objection in *Muso Tseuo v Lesotho Precious Garments*¹ that the Labour Appeal Court (LAC) was wrong to have imported the requirement that the appellant had to show how his continued employment by the first respondent had been “rendered intolerable” by the unreasonable conduct of the latter.² Dismissal which is provided for in section 66 is defined in section 68(c) of the Labour Code to include: “resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer’s breach of a term of the contract.”

The facts of *Muso Tseuo* were quite different from those of the many South African cases discussed previously.³ There was no allegation of any oppressive, discriminatory or other ill-treatment meted out to the employee at the workplace. The employee/appellant, a personnel manager had resigned from his post and claimed constructive dismissal. An arbitrator had dismissed his application for compensation, or alternatively, re-instatement. His review application at the LAC was dismissed. The appellant was invited to the head office by the general manager who had indicated that he would be attended to by one Mr Mokheseng. The appellant was kept waiting for the entire morning without Mr Mokheseng seeing him. The employee left and returned the following morning and was told that Mr Mokheseng would see him after having attended to certain other employees. Meanwhile, he was expected to wait at the gate where job-seekers wait. Being infuriated by these, he left and showed up the third morning with a letter of resignation. He also had complaints about his remuneration and the employer’s grievance and disciplinary procedures.⁴ The LSCA wasted no time in dismissing the employee’s other complaints for lack of evidence and “bordering on being scandalous,”⁵ before concentrating on the constructive dismissal question. The court held that in terms of section 68(c) of the Labour Code, an employee claiming constructive dismissal is required to establish that:

- The employer has been guilty of conduct which is unreasonable in the circumstances;
- The employer has thereby breached a term of the employee’s contract of employment; and
- By reason of the employer’s unreasonable conduct and breach of contract, the employee would be entitled to terminate the contract without notice.⁶

Did the appellant satisfy these requirements? Was keeping the appellant waiting on two occasions unreasonable? Did the employer breach any term of the contract of employment in

1 2013 LSCA 27 (18 October 2013) (“*Muso Tseuo*”).

2 *Muso Tseuo* paras 6–9.

3 Okpaluba and Maloka “Intolerability of the Employment Relationship in the Context of Constructive Dismissal: An Analysis of Recent Judgments from South Africa, Namibia, Lesotho and Eswatini/Swaziland (Part 1)” 2023 *Spec Juris* 6.

4 *Muso Tseuo* para 2.

5 *Muso Tseuo* paras 3–4.

6 *Muso Tseuo* para 9.

the circumstances? The court did not find unreasonable conduct on the part of the employer for, at all times, the employee's employment was not under threat; his salary was intact even on those occasions he waited and no material disadvantage appeared to have been caused by his having to wait. According to the LSCA, his complaint was simply the fact that he felt humiliated and his feelings were hurt, *inter alia*, by having been made to wait at the gate with job-seekers. However, it appeared that everybody is required to wait at the gate, not just job-seekers.⁷ It was submitted to the court that there is a principle in common law that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties;⁸ that this implied term may be breached without the intention to repudiate the contract; and that it is sufficient if the effect of the employer's conduct as a whole, judged reasonably and seriously, is such that the employee cannot be expected to put up with it. Thring JA held, for a unanimous LSCA that the conduct of the employer in keeping the appellant waiting, could not be regarded in breach of any such implied term. That conduct was not calculated or likely to destroy or seriously damage the relationship of confidence and trust between them; nor could it realistically be concluded that the appellant could not have been expected to put up with it; sometimes delays are inevitable, albeit frustrating and annoying for those who are kept waiting. It follows that the first respondent/employer was not guilty of unreasonable conduct nor breach of contract, neither was the appellant entitled to terminate his contract of employment without notice by reason of such conduct or breach.⁹ There was, therefore, no constructive dismissal in the circumstances.

8 ESWATINI/SWAZILAND

Section 37 of the *Employment Act* 1980 (as amended) provides that:

When the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer.

This is the provision that imports the concept of constructive dismissal into the law of unfair dismissal in Eswatini/Swaziland of which the labour adjudication institutions have made some pronouncements. For instance, Nkonyane J held in *Vilakazi v Anti-Corruption Commission*¹⁰ that from the wording of the provisions of constructive dismissal, the burden is on the employee to prove that the employer's conduct was such that they could no longer be reasonably expected to continue with the employment. Should they then leave with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by the employer. The test is an objective rather than a subjective one. Then, in *Mdluli v Conco Swaziland Ltd*,¹¹ Dunseith JP cited with approval the South African LAC case of *Pretoria Society for the Care of the Retarded v Loots*¹² where it was held that by so resigning the employee is saying in effect that the situation has become so unbearable that they could no longer fulfil their duties as an employee. In other words, the employee would have carried on working indefinitely had the unbearable situation not been created.¹³ It was held in *Mdluli*, that the conduct of the employee who complains must

7 *Muso Tseuo* para 11.

8 Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28.

9 *Muso Tseuo* paras 12–13.

10 (IC Case No. 232/02) 5; [2006] SZIC 39 (10 February 2006) ("*Vilakazi*").

11 (IC Case No. 12/04) para 4 ("*Mdluli*").

12 1997 18 *ILJ* 981 (LAC) ("*Loots*").

13 *Loots* 984D-G.

be unlawful and unfair before the employee has invoked the provisions of section 37 of the Employment Act.¹⁴ The Industrial Court held in *Thwala v Neopac (Swaziland) Ltd*,¹⁵ that to invoke the provisions of that section, the employee must have exhausted the internal grievance remedies of the undertaking, however, the court in *Mdluli*, cited with approval the South African Labour Court case of *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre*¹⁶ where the court modified (in a way) the above requirement. Basson J had held that:

Where it appears from the circumstances of a particular case that an employee could or should reasonably have channelled the dispute or cause of unhappiness through the grievance channels available at the workplace, one would generally expect an employee to do so. Where, however, it appears that objectively speaking such channels are ineffective or that the employer is so prejudiced against the employee that it would be futile to use these channels, then it may well be concluded that it was not a reasonable option in the circumstances.¹⁷

Applying the foregoing principles to the facts of *Dlamini v Limkokwing University*¹⁸ so as to ascertain whether or not the respondent had constructively dismissed the applicant, that is, whether the applicant had discharged the onus on him, the court considered that his reason for resigning was that he alleged that he was barred from the university premises after he had used a university vehicle to pick up his girlfriend, a student at the university who entered the employer's premises in violation of university policy against intimate relationships between staff and students. The university could not be seen by other staff and students to relax this rule for its driver and expect to maintain discipline at the institution. The university therefore, could not be faulted by requesting the applicant and his girlfriend to leave the campus as it did. On his part, instead of raising the issue of his being aggrieved with the policy or its implementation with respect to him, he rushed to resign. The court did not find that the respondent would have been prejudiced against the applicant so as to render his reporting of the grievance ineffective. At the end of the day, the CMCA Arbitrator found that the real reason for the employee's resignation was because he had secured a job elsewhere, hence the answer to the issue whether the applicant was constructively dismissed by the respondent elicited a negative response; he was not constructively dismissed; he had resigned voluntarily.

A similar question of whether the applicant was constructively dismissed was the issue that confronted another CMCA Arbitrator in *Manana v Peak Strike Force*.¹⁹ The employee in this case, a general labourer, claimed that his resignation constituted a constructive dismissal because it was brought about by the respondent's conduct towards him.²⁰ The applicant alleged that he had resigned because the respondent warned him of several disciplinary hearings which kept on being postponed, the labourer also had a grievance against the respondent for having failed to process his funeral cover claim.²¹ The Arbitrator reiterated the principles embedded in those cases — *Vilakazi*; *Dlamini*; and *Thwala* — on the law of constructive dismissal in Swaziland²² and added the principle that an employer has the prerogative to prescribe work assignments, working methods, processes to be followed, to supervise work and to ensure acceptable conduct of the workplace.²³ Having considered all the evidence including that

14 See also *Dlamini v Fairdeal Furnitures* (IC Case No.145/00) ("*Dlamini*").

15 (IC Case No. 18/1998) ("*Thwala*").

16 2008 29 ILJ 356 (LC) ("*LM Wulfsohn Motors*").

17 *LM Wulfsohn Motors* para 12.

18 2012 SZCMAC 5 (28 February 2012).

19 2014 SZCMAC 2 (27 February 2014) ("*Manana*").

20 *Manana* para 3.2.

21 *Manana* para 7.8

22 *Manana* paras 7.4–7.6.

23 *Manana* para 7.10. See also *Soko v Swazi Paper Mills* (IC Case No. 206/1998).

resignation by an employee facing disciplinary enquiry has never been held to be a constructive dismissal; that the decision to pay out the funeral cover benefit does not rest with the employer; and the fact that the applicant, by own admission as stated in his resignation letter, had indeed secured alternative employment, the Arbitrator found that the applicant had failed to make out a case for constructive dismissal; had failed to show that any conduct of the respondent was either unlawful or unfair. Accordingly, the applicant resigned of his own accord and the respondent is therefore discharged from having to prove the fairness of the termination.²⁴

9 THE THREE ELEMENTS OF CONSTRUCTIVE DISMISSAL²⁵

The LAC had laid down the principle in *Solid Doors (Pty) Ltd v Commissioner Theron*²⁶ and this was followed in subsequent cases by the LAC²⁷ and the LC²⁸ that in order to establish constructive dismissal, a court must ensure that all three of the following requirements are proved, that is: (a) that the employee must have terminated the contract of employment; (b) the reason for the termination of the contract must be that continued employment has become intolerable for the employee; and (c) that it must have been the employer who made continued employment intolerable. A brief discussion of these three requirements is discussed below.

9 1 The Employee Bringing the Employment Relationship to an End

It would appear that an employee can achieve this either by resigning from his or her job²⁹ or by taking a measure which would clearly show that they intend to end the relationship unilaterally. In other words, the resignation must be either verbal or by conduct which must convey a clear and unambiguous intention not to go on with his or her contract of employment.³⁰ Examples of such conduct were given in *Solidarity v Public Health and Welfare Sectoral Bargaining Council*³¹ and *Mnguti v CCMA*³² where there was no written resignation and the employee

24 *Manana* paras 7.14–7.15.

25 See also *Billion Group (Pty) Ltd v Ntshangase* 2018 39 ILJ 2516 (LC) para 11 (“*Billion Group*”). It was held (paras 36 and 47) that it was clear that Ntshangase resigned and the first leg of the test for constructive dismissal was met. However, in the circumstances, the court was not satisfied that Ntshangase established on a balance of probabilities that his continuous employment with the company was intolerable. It follows that it was not necessary to consider the third leg of the test for constructive dismissal. Consequently, the arbitrator’s finding that Ntshangase was constructively dismissed and the consequential relief ordered could not stand. Prior to this case, the CCMA Commissioner had, in *Copeland and New Dawn Prophecy Business Solutions (Pty) Ltd* 2010 31 ILJ 204 (CCMA) paras 56–58 and 70–72 not only reiterated that the three elements being discussed herein must exist for a claim for constructive dismissal to succeed but that the employees must go further to show that they had exhausted all internal mechanisms available at the workplace before resigning. In other words, that their resignation came about as a result of the employer being the “villain” in the workplace to such an extent that the employee had to resign in sheer desperation. The Commissioner however, found that although the applicant considered the employer’s conduct unbearable, the applicant’s further stay in the workplace was made in good faith in the hope that the respondent’s chief executive officer would live up to his promises of a compensatory increase in salary to re-instate the applicant’s medical aid and provident fund contributions which the employer had withdrawn earlier. The applicant was however found to have discharged the burden of proving that he was constructively dismissed hence he was awarded compensation.

26 2004 25 ILJ 2337 (LAC) para 28 (“*Solid Doors*”).

27 *Conti Print CC v CCMA* 2015 36 ILJ 2245 (LC) para 9.

28 *Agricultural Research Council v Ramashowana* NO 2018 39 ILJ 2509 (LC) para 11 (“*Agricultural Research Council*”); *Bandat v Kock Engineers* 2015 36 ILJ 979 (LC) para 49 (“*Bandat*”); *Johnson v Rajah* NO 2017 ZALCJHB 25 (26 January 2017) para 38 (“*Johnson*”).

29 *Eagleton v You Asked Services (Pty) Ltd* 2009 30 ILJ 320 (LC) para 31 (“*Eagleton*”).

30 *Fijen v Council of Scientific and Industrial Research* 1994 15 ILJ 759 (LAC) 772C-D. See also *Uthingo Management (Pty) Ltd v Shear* NO 2009 30 ILJ 2152 (LC) para 19 (“*Uthingo Management*”).

31 2013 34 ILJ 2509 (LC) para 19.

32 2015 36 ILJ 3111 (LC) paras 22–23 and 33 (“*Mnguti*”).

verbally resigned on 31 August 2011, left on the same day and made arrangements to sign the pension withdrawal documents on a subsequent date. Since resignation was a unilateral termination, which for all intents and purposes made clear that the employee had ended the employment, it need not be accepted by the employer nor does it require its consent.³³ The LC found this to accord with the behaviour consistent with that of an employee who had resigned of own accord as opposed to one who has been arbitrarily dismissed. Snyman AJ held that the employee in this case decided to leave the employer's employment out of own freewill and that the elements of a termination of employment by the applicant were present, namely that: (i) the applicant clearly, unambiguously and unequivocally³⁴ indicated to the employer that he wanted to leave its employment; (ii) the applicant indicated that he wanted to leave its employment, effective immediately;³⁵ (iii) the conduct of the applicant was unilateral, and final; (iv) the conduct of the applicant, established holistically from the evidence, would leave a reasonable person with the belief that the applicant had the intention to bring the employment relationship to an end, and then acted accordingly; and (v) the contradictory nature of the applicant's evidence as to the circumstances of his termination of employment was indicative of a situation of the applicant disingenuously trying to extract himself from what he did, of his own accord, and after the fact.³⁶ It was held that the applicant was never dismissed, but, in fact, verbally resigned on 31 August 2011 in a final and unilateral act and left. Thus, the award of the arbitrator was upheld and the applicant's review application was accordingly dismissed.³⁷ It was held in *HC Heat Exchangers (Pty) Ltd v Araujo*³⁸ that as constructive dismissal is dependent upon the employee terminating the employment relationship, the respective claims of constructive dismissal and an ordinary dismissal within the context of section 186(1)(a), are mutually exclusive and cannot be both pursued at the same time.³⁹

9 2 Intolerability of Continued Employment

Having scaled over the first hurdle of whether it was the employee who terminated the employment relationship, the next question is whether it was the employer who created the circumstances of intolerable working conditions that, literally speaking, drove the employee from the workplace. This means that there must be a close link between the intolerability⁴⁰ and the termination.⁴¹ As Snyman J observed in *HC Heat Exchangers*, what is at the heart of the enquiry at this stage is establishing what is "intolerable," which is far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter, an

33 *Sihlali v SA Broadcasting Corporation Ltd* 2010 31 ILJ 1477 (LC) paras 11 and 13 ("Sihlali"). See also *Uthingo Management* paras 16–19. *Contra* the dictum in *CEPPWAWU v Glass and Aluminum 2000 CC 2002 23 ILJ 695 (LC)* para 33 where the clause "if it is accepted by the employer" was added but which suggestion has not been adopted.

34 *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 4 SA 809 (A) 830E; *Du Toit v Sasko (Pty) Ltd* 1999 20 ILJ 1253 (LC); *Sihlali* para 11. See also Manamela "'To meet is to part': resignation by SMS constitutes notice in writing as required by the Basic Conditions of Employment Act: *Mafika v SA Broadcasting Corporation Ltd*: case comment" (2011) *SA Merc LJ* 521.

35 *ANC v Municipal Manager, George Local Municipality* 2010 31 ILJ 2923 (LC) para 15.

36 *Mnguti* paras 32–33.

37 *Mnguti* para 35.

38 2019 ZALCJHB 275 (8 October 2019) para 48 ("*HC Heat Exchangers*").

39 *HC Heat Exchangers* para 48; *Eagleton* para 33.

40 Rycroft "The Intolerable Relationship" (2012) 33 ILJ 2271; Van Jaarsveld "An Employee's Contractual Obligation to Promote Harmonious Relationships in the Work Place: When are the Stakes too High? Some Pointers from the Judiciary" 2007 *SA Merc LJ* 204; Okpaluba and Maloka "Employee's Incompatibility as a Ground for Dismissal in Contemporary South African Law of Unfair Dismissal: A Review of *Zeda Car Leasing, Mgijima and Watson*" 2021 *SA Merc LJ* 238.

41 See *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 12 ("*Murray*"); *Johnson* para 57; *Bandat* para 66.

obnoxious, rude and uncompromising superior who may treat employees badly.⁴² Even a breach of the employment contract, deduction from salary, or unfair disciplinary action would not *per se* establish intolerability;⁴³ this is because it requires a “high threshold” of proof.⁴⁴ It implies a situation that is more than can be tolerated or endured; or insufferable.⁴⁵ It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance.⁴⁶

The burden of proof that intolerability exists rests with the employee whose subjective views on the matter is irrelevant, as the test is always an objective one.⁴⁷ Then, what establishes intolerability from that objective viewpoint can be garnered from the core considerations distilled from decided cases by the judge:

- Whether when reasonably and sensibly judged, the employer’s conduct is, in all the circumstances, not one any reasonable employee could be expected to put up with or that resignation was a reasonable step expected from any reasonable employee in the circumstances this employee found him or herself.⁴⁸
- It is not necessary to show that the employee had no other choice but to resign.⁴⁹ All that need be shown is that it was the actual existence of the intolerable conduct on the part of the employer that caused the resignation. Or, as described in *Yona*,⁵⁰ “resignation must have been a reasonable step for the employee to take in the circumstances.”⁵¹
- The following dictum in *Loots*,⁵² aptly formulates the enquiry: “When an employee

42 *HC Heat Exchangers (Pty) Ltd v Araujo* (JR 155/16) [2019] ZALCJHB 275; 2020 3 BLLR 280 (LC) para 49 (“*HC Heat Exchangers*”). Cf *Foschini Group v CCMA* 2008 29 ILJ 1515 (LC) para 22 (“*Foschini*”).

43 See also *Albany Bakeries Ltd v Van Wyk* 2005 26 ILJ 2142 (LAC) paras 17–19 (*Albany Bakeries*); *Experian Regent Insurance Co Ltd v CCMA* 2013 34 ILJ 410 (C) paras 60–61 (“*Experian Regent Insurance Co*”).

44 *Billion Group* para 11. Cf in Canada the test for whether a workplace has been rendered intolerable is high and objective — *Baraty v Wellons Canada Corp.* 2019 BCSC 33 (CanLII) para 131. Arnold-Bailey J had held in *Danielisz v Hercules Forwarding Inc.* 2012 BCSC 1155 (CanLII) paras 78, 81, 84–85 that “It is clear that for a negative behavior towards an employee by an employer to constitute a constructive dismissal it must be such as to render continued employment beyond what an employee may reasonably be expected to bear. The threshold must be high enough to permit an employer to legitimately express frustration to an employee, make very direct comments about performance, or require the employee to work in a workplace with a degree of discord and conflict.” It was further held that the court is required to assess whether, on the totality of the evidence, the abusive treatment of the employee was so obscene as to amount to repudiation of the employment contract. Unfriendliness, confrontations between co-workers or even some hostility and conflict will not amount to constructive dismissal where the employee is still able to perform their work. The threshold for a claim of constructive dismissal based on the employer’s conduct in the workplace is whether a reasonable person under the circumstances should not be expected to persevere with the employment.

45 In *Visser & Amalgamated Roofing Technologies t/a Barloworld* 2006 27 ILJ 1567 (CCMA) 1567–1571, Marcus C cautioned that: “A modern workplace is not heavenly garden of smiling Buddhas focused on the welfare of others. More often than not it represents the contrary picture of a highly stressful and robust environment in which the pressures to perform on staff and even more so, members of management who carry the can, can on occasions contribute to managers conducting themselves in a manner that is less than desirable ... managers are after all infallible. They are subject to human limitations like the rest of us and cannot reasonably be expected to perform to the standards of a saint in their conduct towards staff”

46 *HC Heat Exchangers* para 49.

47 *HC Heat Exchangers* para 50; *Armaments Corporation of SA Ltd v Nowosenetz NO* 2015 ZALCJHB 241 (5 August 2015) para 42 (“*Armaments Corporation of SA*”); *NHS v Yona* 2015 36 ILJ 2259 (LAC) para 30 (“*Yona*”); *Foschini* para 26 *Johnson* paras 50–51; *Bandat* para 55; *SmithKline v Beecham (Pty) Ltd v CCMA* (2000) 21 ILJ 988 (LC) para 38 (“*SmithKline*”); *Asara Wine Estate & Hotel (Pty) Ltd v Van Rooyen* 2012 33 ILJ 363 (LC) para 38 (“*Asara Wine Estate*”).

48 *HC Heat Exchangers* para 50.1.

49 *Strategic Liquor Services v Mvumbi NO* 2010 2 SA 92 (CC) para 4 (“*Strategic Liquor*”); *Johnson* para 47.

50 *Yona* para 30.

51 *HC Heat Exchangers* para 50.2.

52 *Loots* 984D–G. See also *Old Mutual Group Schemes v Dreyer* 1999 20 ILJ 2030 (LAC) paras 16–17.

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 they 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 the 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."⁵³

9.3 Intolerability may have been caused by the Employer

The question of the employer being responsible for causing the intolerability carries with it the element of culpability on the part of the employer. As explained in *HC Heat Exchangers*, it is not culpability in the sense that the employer must be shown to have had the intent to get rid of the employee, but at least it must be shown that the employer acted without reasonable and probable cause.⁵⁴ A claim of constructive dismissal fails if the employee had suitable alternative remedies or mechanisms to resolve the cause of the intolerability before resorting to resignation. In addition to the discussion below on this issue in *Albany Bakeries; Bandat* and *Loots*, suffice it to mention that it was held in *HC Heat Exchangers*⁵⁵ that where there is a grievance process in the workplace, the employee must avail themselves of that process for, unless such a process is followed, a claim for constructive dismissal will fail unless there is an exceptional circumstance(s) that may serve to absolve the employee from so obliging.⁵⁶ For an employee to claim his or her lack of confidence in the outcome of such a grievance process cannot be equated with such an exceptional circumstance.⁵⁷ Further considerations that could work against a conclusion that intolerability exists include:⁵⁸

- Where the employee resigns on notice;⁵⁹
- Where the employee later sought to withdraw the resignation;⁶⁰
- Where the employee continued to work for the employer for some time after the events that it is alleged caused the intolerability to arise;⁶¹ or
- Where the employee imposes a condition that must be met by the employer against which the employee would resign willingly and then the condition is not met with the employee resigning and claiming constructive dismissal;⁶² or
- Where the employee resigns in the face of disciplinary or poor work performance proceedings, it would be very difficult to successfully claim constructive dismissal.⁶³

It was held that even if it is true that the employee was constructively dismissed, all it proves is

⁵³ *HC Heat Exchangers* para 50.3.

⁵⁴ *HC Heat Exchangers* para 51. See also *Murray* para 13; *Metropolitan Health Risk Management v Majatladi* 2015 36 ILJ 958 (LAC) para 30; *Bandat* para 53.

⁵⁵ *HC Heat Exchangers* para 54.

⁵⁶ *Foschini* para 37.

⁵⁷ *Armaments Corporation* paras 44 and 46.

⁵⁸ *HC Heat Exchangers* para 56.

⁵⁹ *Billion Group* para 12.

⁶⁰ *Value Logistics Ltd v Basson* 2011 32 ILJ 2552 (LC) para 61 ("*Value Logistics*").

⁶¹ *Volschenk v Pragma Africa (Pty) Ltd* 2015 36 ILJ 494 (LC) para 26.

⁶² *Albany Bakeries* paras 31–32.

⁶³ *Asara Wine Estate* paras 37–38.

that the employee was dismissed. This is only the first of a two-stage enquiry.⁶⁴ As the employee in such circumstances has proven that they were dismissed, the employer must then prove that the dismissal was fair⁶⁵ for, it is only when the dismissal is unfair that the arbitrator could afford the employee relief if it also finds, with proper reasoning, that the dismissal as established by the constructive dismissal is unfair.⁶⁶

Consider the case of the employee in *Schindler Lifts SA (Pty) Ltd v Metal and Engineering Industries Bargaining Councils*⁶⁷ who had resigned after demotion and reduction in salary and was awarded compensation by the Commissioner who found the dismissal unfair. The employee had contended that by demoting him with substantial salary reduction were unbearable as it imposed new contractual terms which were not previously agreed to whereas the employer argued that the employee was not compelled to resign as he was given a choice to either sign the new salary package or face dismissal.⁶⁸ Molahlehi J canvassed the law of constructive dismissal through the well-known South African cases on the subject,⁶⁹ including *Van Der Riet v Leisureniet t/a Health and Racquet Club*⁷⁰ where demotion of an employee without consultation was held by the LAC to be sufficient to constitute constructive dismissal. The court held that the ruling of the CC in *Strategic Liquor Services* to the effect that constructive dismissal does not require that an employee have no choice but to resign, but only that the employer should have made continued employment intolerable to be similar to both the English⁷¹ and Canadian⁷² cases.⁷³ After briefly considering these cases,⁷⁴ the court held that the test for constructive dismissal is one of causation and that the conduct of an employer that may form the basis for constructive dismissal may be of two forms: (i) in the form of a unilateral change in conditions of employment and; (ii) in the form of harassment of an employee including discrimination, sexual harassment and racist conduct.⁷⁵ It was also held that the Commissioner in *Schindler Lifts* considered the legal principles in some detail and found that the employer had made the working conditions of the employee intolerable. This finding was based on the following facts: (a) subsequent to the dismissal ruling of the chairperson of the disciplinary hearing, the employee appealed the decision; (b) the appeal chairperson found the dismissal to be too harsh a sanction, reduced the sanction to a final warning and found that the employee did not have the capacity to lead evidence; and (c) the employer then took the decision to demote and reduce the salary of the employee.⁷⁶ Molahlehi J accepted the finding of the Arbitrator as correct and held that the letter of demotion and reduction in salary tantamount to saying to the employee “you are dismissed.”⁷⁷ The learned Judge further held that the facts and circumstances of this case were so compelling that but for the conduct of the third respondent, the employee would

64 *Niland v Ntabeni NO* 2017 38 ILJ 1686 (LC) para 22; *Majatladi v Metropolitan Health Risk Management* 2013 34 ILJ 3282 (LC) para 49; *Asara Wine Estate* para 36; *Eagleton* para 35.

65 See s 188(1) read with s 192(2) of the LRA.

66 *HC Heat Exchangers* para 57.

67 2013 ZALCJHB 248 (2 October 2013) paras 26–32, 34–35, 37 (“*Schindler Lifts*”).

68 *Schindler Lifts* para 11.

69 *Loots* 985A-C; *Asara Wine Estate* para 26; *Ferrant v Key Delta* 1993 14 ILJ 464 (IC) 4681 (“*Ferrant*”); *Strategic Liquor*.

70 1998 5 BLLR 471 (LAC).

71 *Marriot v Oxford and District Society Ltd No 2* 1969 3 All ER 1126 (CA); *Lewis v Motorworld Garages* 1986 ICR 157 (CA).

72 *Smith v Viking* 1998 68 OR 228 (Ont.CA) 231.

73 *Schindler Lifts* para 25.

74 *Schindler Lifts* paras 26–28.

75 *Schindler Lifts* para 29.

76 *Schindler Lifts* paras 30–31.

77 *Schindler Lifts* paras 32–34.

not have resigned. It was apparent from the conduct and in particular the correspondence that the employee addressed to the third respondent that he still wished to continue with the employment relationship and again emphasised that but for the conduct of the third respondent he would not have resigned.⁷⁸

10 OTHER INSTANCES OF EMPLOYEE'S FAILURE TO PROVE CONSTRUCTIVE DISMISSAL

The case law is replete with the refrain that the onus to prove that the resignation was not voluntary was on the employee who had no intention of terminating the employment relationship. Once the employee overcomes this hurdle, it is then upon the employer to discharge the onus that assessed reasonably that the conduct of the employer was such that the employee could not reasonably have been expected to put up with the employer's conduct. The mere fact that an employee resigned because work became intolerable does not, in and by itself, lead to a conclusion that the employee has been constructively dismissed.⁷⁹ Case law contains many instances where the employee had failed to establish that intolerability existed, and therefore, could not substantiate the claim for constructive dismissal. Such instances are:

- Where the employee had resigned on notice;⁸⁰
- Where the employee later sought to withdraw the resignation;⁸¹
- Where the employee continued to work for the employer for some time after the events that were alleged to have caused the intolerability;⁸²
- Where the employee imposed a condition that must be met by the employer against which the employee would willingly and then the condition is not met with the employee resigning and claiming constructive dismissal;⁸³
- Where the employee had resigned in the face of disciplinary or poor work performance

78 *Schindler Lifts* paras 30–37. A demotion or reduction in salary can constitute a constructive dismissal — *Younger v Canadian National Railway Co.* 2014 BCSC 1258. However, where the employer had planned to effect such a demotion but changed his mind would not constitute a constructive dismissal — *Rampre v Okanagan Halfway House Society* 2018 BCSC 992. See further *MacGregor v Lethbridge College* 2016 ABPC 72; *Baraty v Wellons Canada Corp.* 2019 BCSC 33 (CanLII) paras 148–150 where Wilson J held that the plaintiff and another colleague of his share responsibility for their difficult relationship and while the working environment was strained due to the antagonistic approach of both men, it had not deteriorated to the point that it rendered performance of the plaintiff's work objectively intolerable. The plaintiff was thus unable to establish that the employer subjected him to working conditions that evinced an intention on its part not to be bound by the employment contract hence his claim that he was constructively dismissed from his employment, was dismissed.

79 *Murray* paras 12–13. See also *De Wet v Bigen Africa (Pty) Ltd* 2019 ZALCJHB 102 (10 May 2019) para 34 (“*Bigen Africa*”).

80 *Billion Group* para 12.

81 *Value Logistics* para 61.

82 *Volschenk v Pragma Africa (Pty) Ltd* 2015 36 ILJ 494 (LC) para 26.

83 *Albany Bakeries* paras 31–32.

proceedings;⁸⁴

- Where the employee had the opportunity to escalate his grievance to senior management rather than resigning;⁸⁵
- Where the employee had left his employ owing to his concern for his salary;⁸⁶
- Where the employee's resignation was designed, deliberate and premeditated including the procedures to be followed;⁸⁷
- Where the employee's reaction to employer's remedial action was grossly unreasonable;⁸⁸
- Where the employee's resignation was motivated by employee's own subjective considerations;⁸⁹ and
- Similarly, an employee who resigned instead of going through the disciplinary process or a performance counselling process cannot complain of constructive dismissal.⁹⁰

Owing to space constraint, suffice it here to illustrate in further details other instances brought about by recent judgments including the *Heat Exchangers; Armaments Corporation of SA; Bakker* and *Bandat* cases. The illustrations below demonstrate how difficult it is to prove constructive dismissal let alone succeeding with a claim that it is unfair.

84 *Moyo and Standard Bank SA Ltd* 2005 26 ILJ 563 (CCMA); *Asara Wine Estate* paras 37-38; *Nampak Products Ltd t/a Nampak Glass v NBC for the Chemical Industry* 2017 ZALCJHB 508 (25 October 2017); *UNISA v Nowosenez* NO 2017 ZALCJHB 95 (23 March 2017) para 61. The situation in *Louw v SALGBC, Benoni* 2015 ZALCJHB 363 (18 September 2015) paras 46–47, 52–53, 55 and 63 is quite different. The employee who was facing disciplinary enquiry had resigned because of a so-called settlement negotiation letter threatening that civil and criminal action may be taken against him if he did not resign. It was held that any reasonable man would have regarded the threat and the indication that it gave of the potential danger he would be placing himself in if he were not to heed the warning, especially where there was a *prima facie* case against him, as being sufficient to justify his resignation. In other words, a reasonable man, guilty or not guilty would not want to face these prospects. Having been coerced into resigning without compensation, the applicant therefore had established that he was constructively dismissed. This is to be distinguished from the situation where, as in *Asara Wine Estate*, the employee resigned in the face of a disciplinary enquiry without such a threat. While considering that an amount equal to three months of the applicant's remuneration as at the date of his dismissal was fair and just where the respondent was "the author of its own demise," Snider AJ held that: "There are no degrees of comparison for the word 'intolerable' as used in section 186(1)(e). There is though, certainly, a broad scope of conduct on the part of an employer, more or less egregious, that can cause a constructive dismissal. In this case it was a single incident, not a pattern that led to dismissal. It is also the case that the letter was sent in the context of settlement negotiations and that there was at least a *prima facie* case against the applicant in the disciplinary proceedings." See also *SALSTAFF obo Bezuidenhout v Metrorail* 2001 9 BALR 926 (IMSSA).

85 *Solidarity obo Van Vuuren v Lekwa Local Municipality* 2014 ZALCJHB 220 (19 June 2014) paras 28–29.

86 *Moaka v General Public Service Sectoral Bargaining Council* 2014 ZALAC 120 (12 June 2014) paras 32–34.

87 *Ternsportwear (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry* 2010 ZALCD 17 (27 January 2010) paras 17–18, 26–27 and 30.

88 In *Conti Print CC v CCMA* 2015 ZALAC 61 (15 May 2015), paras 28 and 31–32, the employee complained that the air conditioning located in an adjacent workplace partially partitioned it from her workstation and was impairing her health. The employer offered to move the employee and promised to close the gap in the partition. The employee not only refused to move but also abruptly left employment and claimed constructive dismissal. It was held that the evidence show that the employer reacted reasonably to ameliorate the adversity to the employee whose reaction, in return, proved to be grossly unreasonable. Do the proven facts establish a constructive dismissal? The LAC held that assessing the employer's conduct, it cannot be said to have been responsible for creating an intolerability of continuation of the employment relationship hence, there was no constructive dismissal.

89 *Bandat* discussed *infra*, in the context of sexual harassment.

90 *Hickman v Tsatsimpe* NO 2012 5 BLLR 493 (LC).

10 1 Where there were Reasonable Alternatives to Resignation⁹¹

It has already been shown in the case of *Heat Exchangers* in respect of the third element of constructive dismissal that where a grievance process in the workplace is available to the employee which would, if applied, resolve the intolerability problem, the employee must explore that option. The opportunity offered in the present context takes that discussion further, beginning with *Bakker*. Following her resignation on 22 January 2013, the applicant referred her unfair dismissal dispute to the CCMA two days later, seeking retrospective re-instatement. The Commissioner, however, found that she was not constructively dismissed by her employer, ABSA Bank. Whitcher J took the time to rehearse and provide a comprehensive overview of the law of constructive dismissal starting with the provisions of section 186(1)(e) including:

- The LAC judgment in *Loots*⁹² laying down the two-stage test and it was also added that whether or not the employer intended to repudiate the employment contact was irrelevant;⁹³
- The Constitutional Court's explanation in *Strategic Liquor Services*⁹⁴ of that test that it does not require that the employee had no choice but to resign, but only that the employer must have made continued employment intolerable, which more or less shifts the test to one that is slightly less strict;⁹⁵
- The LAC judgment in *Yona* where it was held that resignation must have been a reasonable step for the employee to take in the circumstances;⁹⁶
- That a two-stage inquiry is envisaged⁹⁷ where the fairness of the employer's behaviour is under scrutiny,⁹⁸ the focus must be on the substantive fairness as procedural fairness is hardly the concern of constructive dismissal;⁹⁹
- That where an employee was too impatient to wait for the outcome of the employer's attempt to address the employee's concern before resigning, then, constructive dismissal is out of the question;¹⁰⁰
- Where there was persistent unfair treatment;¹⁰¹ and
- Where the employee's demotion was the cause of intolerability.¹⁰²

The statement in *Strategic Liquor Services* was interpreted to mean the absence of reasonable alternative, for where that exists, the conduct of the employer would not have been unbearable or not beyond the limits of tolerance.¹⁰³ It would be opportunistic for an employee to leave his or her employ by alleging intolerability while there was a perfect legitimate avenue open to

91 *Experian Regent Insurance Co* para 61: in these circumstances, there can be no talk of constructive dismissal. The employee had reasonable alternative options and did not make use of them.

92 1997 18 ILJ 981 (LAC) 984E-F.

93 *Loots* 985A-C.

94 *Strategic Liquor Services* para 4.

95 *Experian Regent Insurance Co* para 47.

96 2015 36 ILJ 2259 (LAC) para 30.

97 *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC) 2335.

98 *Jonker v Amalgamated Beverages Industries* 1993 14 ILJ 119 (IC) 211.

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

100 *SmithKline*.

101 *Armaments Corporation of SA*.

102 *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (MIBC)* 2013 ZALCJHB 355; 2013 ZALCJHB 83 (14 May 2013) ("*Distinctive Choice*").

103 *Distinctive Choice* paras 129–130.

alleviate his or her distress by solving the problem.¹⁰⁴ These views were adopted in *Bandat*¹⁰⁵ and applying them to the facts of *Bakker*, it was held that ABSA had dealt reasonably with the applicant's grievance;¹⁰⁶ that there had been no unfair disciplinary action;¹⁰⁷ nor an unfair refusal to take leave;¹⁰⁸ that the primary factor which allegedly gave rise to the applicant's constructive dismissal would not have vanished by virtue of her being deployed into Slabbert's team.¹⁰⁹ On the issue of reasonable alternatives to resignation, the court held that in the light of the Head of CAF's — Baloyi's — offer to assist the applicant, it was not certain whether the situation which she perceived as intolerable would have remained so. She was assured that if she applied for an alternative position, her management would support her. The applicant however, responded that she intended to stay in her position and refer the dispute to the CCMA.¹¹⁰ Although Baloyi testified that there was no policy which provided that an employee in the applicant's position would not be appointed to a position because of a C or D-rating, yet the applicant felt that her C-rating would impact on her possibility of succeeding in her application for another position in the bank.¹¹¹ The court found no evidence that the applicant's job was in jeopardy so, her fear in that regard was irrational, rather, there was evidence that if she failed to perform she would have been placed on performance counselling and sessions to improve in terms of ABSA's policies. There was also no evidence that ABSA deliberately and unfairly placed pressure on her to resign whereas, on the other hand, ABSA took all reasonable steps to address her complaints, despite the fact that there was no substance to them. She acted impulsively and precipitously in resigning.¹¹² Baloyi testified that she was a valued and good employee and was requested to change her mind when she submitted her resignation. Accordingly, the resignation was manifestly unreasonable in all the circumstances.¹¹³

Applying these aphorisms to the facts of *Bigen Africa*,¹¹⁴ Schensema AJ held that it was clear that the employee did resign but that it was a voluntary resignation, with the applicant having made it clear that she would accept a severance package had she not been transferred back to the Bushbuckridge project, thereby providing an alternative to her resignation. Having thus provided the employer with an alternative of being transferred back, the working environment was therefore not intolerable and continued employment was thereby possible. The applicant was not able to show that the employer had behaved in a manner that rendered the relationship intolerable and would continue to do so.¹¹⁵ The employer had not conducted itself in a manner that was calculated or likely to destroy or seriously damage the relationship with the applicant. Given these circumstances, the applicant was not able to convince the court that she had been constructively dismissed. It was held that the Commissioner was correct to have found that the applicant had failed to establish a constructive dismissal by considering the totality of the evidence before him and by further considering the cumulative impact of the conduct complained of and adjudged whether such conduct viewed reasonably and sensibly was such

104 *Albany Bakeries* paras 28–29.

105 *Bandat* para 52.

106 *Bakker* para 78.

107 *Bakker* para 82.

108 *Bakker* para 85.

109 *Bakker* para 86.

110 *Bakker* paras 92–94.

111 *Bakker* paras 95–96.

112 *Bakker* paras 57–59.

113 *Bakker* paras 97–98.

114 *Bigen Africa* para 35.

115 *Bigen Africa* paras 37–38.

that the applicant could not be expected to put up with.¹¹⁶

10 2 Where there was Differentiation between Salary paid to Trainee and the Graduate Pool

Thus, Jammy AJ found in *Mahlangu v Amplats Development Centre*¹¹⁷ that the core factor in appellant's dissatisfaction with his relationship with the respondent was the differentiation between the salary paid to him as a trainee and that earned by employees in the graduate pool. By attributing that differentiation to racial discrimination against him, the employee merely betrayed his emotional disregard of the entreaties of the employer.

The unchallenged evidence of the company's general affirmative action policy and of its attempts, within the ambit of that policy, to advance the applicant in areas considered to be more suitable than the underground environment with his incompatibility had been established, negate the contention. There is nothing in the evidence presented in this matter, objectively assessed, to indicate the imposition by the respondent of intolerable or unbearable working conditions which would justify a finding of constructive dismissal as opposed to one of un-coerced and voluntary resignation. Stated simply, the applicant has failed to discharge the onus which he bears to establish the automatically unfair constructive dismissal for which he contends.¹¹⁸

10 3 Where the Employee was Slow in Taking Action¹¹⁹

Three groups of recent cases illustrate the courts' attitude in circumstances where constructive dismissal was claimed. First, there are two Labour Court cases where employees had virtually lost the right to claim that their employment circumstances were intolerable but that they were slow or late in taking action. Thus, in *Agricultural Research Council*, the LC held that an employee had failed to show that the employer's conduct was objectively unbearable where the employee had continued to work for fifteen months after the alleged oppressive conduct of the employer. In effect, an employee had to demonstrate their unwillingness to acquiesce to the hardship created by the employer by resigning within a reasonable time of the triggering of the event. In another case, *Billion Group*, the LC found that an employee had failed to establish that continued employment had become intolerable, the employee's foreboding about his continued employment prospects was not sufficient to justify his resignation. Again, in the following two CCMA cases — the CCMA did not find that the circumstances of constructive dismissal had occurred or was established: (a) where the incidents cited by the employee as constituting proof of harassment and victimization on the ground of race were misconceived;¹²⁰ and (b) where the

116 *Bigen Africa* paras 39–40.

117 2002 23 ILJ 910 (LC) para 21 (“*Mahlangu*”).

118 *Mahlangu* para 21.

119 This should be contrasted with the situation where the employee was too hasty in his decision to resign. In *Solidarity obo Van Tonder v Armaments Corporation of SA (SOC) Ltd* 2019 40 ILJ 1539 (LAC) para 46, the LAC held that the appellant resigned before the grievance process had progressed beyond the first stage. The appellant clearly demonstrated that he had no confidence in the internal grievance process and preferred to resign and approach the CCMA instead even before reaching step 5 of the process. According to the LAC, “his conviction in the merit of his cause, fuelled by his obvious outrage and indignation, may well have been misplaced. His assumption that his superior's views about the performance contract outputs and appointments were wrong or unacceptable needed to be tested and there was a legitimate, prescribed remedy available for that very purpose, which he opted to pursue.” The appellant's resignation was “petulant, premature and ill-considered” thus taking his case completely outside the realm of constructive dismissal.

120 *Mafomane v Rustenburg Mines Ltd* [2003] 10 BLLR 999 (LC); *Mbambo and Barloworld Logistic (Pty) Ltd* 2018 39 ILJ 2590 (CCMA). Cf *Maharaj v CP de Leeuw* 2005 26 ILJ 1088 (LC). See generally, Botha “Managing Racism in the Workplace” 2018 *THRHR* 671; Khumalo “Racism in the Workplace: A View from the Jurisprudence of Courts in the Past Decade” (2018) *SA Merc LJ* 377; Thabane and Rycroft “Racism in the Workplace” (2008) 29 *ILJ* 43.

CCMA Commissioner found that failure by an employer to pay commission to an employee which was within the employer's discretion and not a material breach of the employee's contract of employment and could not lead to constructive dismissal.¹²¹ But, in the third illustration, on the other hand, a CCMA Commissioner found that the mere fact that a professional nurse had, for a long time, tolerated poor working conditions in the neo-natal intensive care unit of the hospital did not amount to a waiver of her right to tolerable working conditions and fair labour practices.¹²²

10 4 The Judgment of the LAC in *Heat Exchangers*

It was uncontested that the first respondent resigned on 18 May 2015, therefore, the first requirement for constructive dismissal had been met.¹²³ The next question was whether continued employment was made intolerable for the first respondent and whether the applicant was the cause of such intolerability?¹²⁴ The court observed that even if the conduct of one Dixon during an altercation was unacceptable as he swore at the first respondent and threatened to harm him physically, was that such conduct was unduly oppressive continued employment under such circumstances was beyond the limits of what could be reasonably tolerated, thus justifying the label of "intolerable conduct." Would it automatically lead to a conclusion that the continued employment of the first respondent with the applicant was rendered intolerable to the extent that the first respondent would be entitled to quit the employment and claim constructive dismissal? Another way of looking at the matter would be to ask whether the first respondent brought the problem to the attention of the applicant's responsible management and what the applicant did about it upon having been informed.¹²⁵

Snyman AJ held that considering the nature of the incident that as the first respondent complained about, was perpetrated by one employee against another in the course of a one-on-one altercation, it was essential that it should have been brought to the attention of the applicant's responsible management. Failure to do so would mean that the responsible management staff in charge would not be aware and would not be expected to rectify a problem they had been unaware of. That the employer be given the opportunity to fix the intolerable condition has been a refrain from the courts since *Loots*; through *Albany Bakeries Ltd* down to *Armaments Corporation of SA* and *Bandat*.¹²⁶ Did the employee in this case, report the intolerable condition as required? Unfortunately, he did not even though he had the opportunity to do so. Having removed himself from the area of conflict through medical certificates, he managed to report to the appropriate authority almost three weeks later. The question is: had he regarded Dixon's behaviour on 23 April 2015 so egregious that he could not reasonably be expected to put up with it and remain employed by the applicant, why did it take him so long to bring it to the attention of the applicant's responsible management? The court found this a diminishing of the *temporal nexus* between the incident and the action taken by the employee as a detraction from a legitimate complaint of intolerability.¹²⁷ In spite of the efforts by the head of the HR department to arrange grievance meetings and the assurance that his complaints were taken seriously and that his grievance would be properly dealt with, and the willingness of the applicant to have him back despite his having submitted a letter of resignation, the first respondent did not take this

121 *Van Niekerk and Andrew John Weyers Inc* 2018 39 ILJ 2603 (CCMA).

122 *DENOSA obo Mokatile and Netcare Pelonimi Hospital (Pty) Ltd* 2018 39 ILJ 2579 (CCMA).

123 *Heat Exchangers* para 61.

124 *Heat Exchangers* para 62.

125 *Heat Exchangers* paras 63–64.

126 *Heat Exchangers* para 65.

127 *Heat Exchangers* paras 67–68. Cf *Bandat* para 66; *Taylor v ILC Independent Loss Consultants CC* 2011 32 ILJ 2006 (LC) para 34.

approach to heart. The court likened his case to that of *Armaments Corporation of SA* where the employee resigned before the grievance procedure had taken its course.¹²⁸ The first respondent's views on the outcome of the grievance process could equally have been misplaced as in the case of the employee in the *Armaments Corporation of SA*'s case.¹²⁹

It was held that as unacceptable as the conduct of a co-employee might have been, it was not sufficient to establish without the proof of more intolerable working conditions, which the first respondent could not reasonably be expected to have to put up with. The following should be considered:

- The time lapse between the event itself and when the issue was raised with the applicant;
- The applicant's immediate steps taken to deal with the issue in a formal grievance process and providing assurance to the first respondent that his complaint is considered serious and will receive proper attention;
- The fact that the first respondent raised and was a willing participant in the grievance in which he sought an outcome restoring the working relationship;
- The first respondent not being at work between the event and his ultimate resignation, and thus did not further inter-act with Dixon which may have compounded matters, before the grievance was dealt with; and
- There was no case that the grievance would not have been properly dealt with by the applicant. The court referred to and accepted what was said in *Ternsportwear (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing Industry*¹³⁰ to the effect that:
 - "... as the record in this matter reveals that the first time the third respondent raised his concern regarding his treatment by Mr. Lu in writing with the applicant was on the 4th February, in the face of clear evidence that the third respondent's issue was in the process of being dealt with; the third respondent's resignation can only be described as deliberate and premeditated and his resignation does not constitute a constructive dismissal."¹³¹

In the final analysis, assuming that the conduct complained of established intolerability, the first respondent's short-circuiting of the grievance procedure by not allowing it to run its course would have neutralised that intolerability for an employer could not be held accountable for an intolerable conduct it was not aware of, and when it became aware, made repeated efforts to resolve the problem and to avoid the intolerability but for the first respondent's scuttling the grievance process.¹³² It therefore follows that the applicant did not dismiss the first respondent but that the latter resigned of own accord. The first respondent failed to prove that he was dismissed as contemplated by section 186(1)(e). That being the case, the MEIBC and the third respondent had no jurisdiction to entertain the dispute.¹³³

11 INTOLERABILITY OF TRANSFERRING A MANAGER TO TOILET CLEANING DUTIES: A BOTSWANA CASE

The facts of the Botswana Industrial Court case of *Ganelang v Tyre World (Pty) Ltd*¹³⁴ is interesting when viewed from the angle that the dismissal of the applicant contravened all known employment courtesies in contemporary labour relations. The applicant was a branch manager who doubled as cashier of the employer's business stationed in Serowe, Botswana. She was transferred to another branch and upon arrival she was, for the first time, handed a letter directing her to do toilet cleaning duties for the same remuneration. She had not been consulted beforehand, nor had these changes been discussed with her. Evidence emerged that prior to her receiving the letter the director had told her to her face, that he did not like her. She was also banished from the building housing the respondent's business. Consequently, the applicant formed the view that all these amounted to constructive dismissal and she resigned. The question for Ruhukya J to decide was whether the applicant was constructively dismissed or whether she resigned of her own accord.

Ruhukya J adopted the definition of "constructive dismissal" as in the *Osborne's Concise Law Dictionary* (8 ed) to mean: "a dismissal to be inferred from the fact that the employer's conduct is such that the employee has no choice but to resign." The judge also referred to and adopted Professor John Grogan's categorisation of "constructive dismissal" as a coerced resignation or departure,¹³⁵ that is, "where employees resign or otherwise terminate their contracts because they are left with no option but to do so by the employer's conduct."¹³⁶ The author proceeded to outline four elements that would enable a realisation that there has been a constructive dismissal in any given case:

- An employment relationship must exist at the time the employee leaves his or her job.
- The employee must have terminated the contract of employment.
- The employee must prove that it would have been intolerable to remain in employment.
- There must be a causal nexus between the employer's conduct and the circumstances that included the resignation of the employee.¹³⁷

The trial judge held that to succeed in a claim for constructive dismissal in Botswana law, these are elements that the employee must prove. On the basis of these elements, it was held, first, that the facts of the applicant's employment in the present case was not in doubt. Second, that she had terminated her employment contract immediately after receiving a letter re-designating her as a cleaner, was also not in doubt. Third, having held a position as a member of management within the respondent's business, it was highly probable that her sudden re-designation as a cleaner without explanation, justification or consultation was intolerable to say the least. Fourth, a *causal nexus* can easily be found in this case in the sense that it was clear that the reason for the applicant's resignation was because of the letter from the respondent's general manager of the Gaborone branch. The court was satisfied that she was more than justified to act in the manner she did, given the circumstances; "[t]here cannot be a worse insult to an employee who one day is a branch manager and the next is expected to work as a cleaner cleaning toilets. The respondent's actions smack of malice, plain and simple."¹³⁸ That the employee's salary should remain the same changes nothing for an employer who can still be held accountable for bringing about the constructive dismissal of an employee even if an inferior job retains the employee at the same salary.¹³⁹ In reaching the conclusion that the applicant reacted to the appalling

134 2013 2 BLR 577 (IC) ("*Ganelang*").

139 *Ganelang* 580C-D. See also *Bhana v Colombia Stainless (Pty) Ltd* 2005 26 ILJ 1793 (BCA); *Moreni v Westhynd Security (Pty) Ltd* 1998 BLR 287 (IC); *Ferrant*.

conduct of the employer that had made any continued employment intolerable and which left the applicant with no choice but to resign, the court had sought support from the views of the Committee of Experts of the ILO in the 1995 General Survey on C158 where the committee found that a “constructive discharge” can make a worker take legal proceedings as if they had been dismissed by the employer.¹⁴⁰ The claim of the applicant that she was constructively dismissed or discharged was upheld because the conduct of the employer had made the working conditions of the applicant so intolerable that she was forced to resign.¹⁴¹ Since the existence of intolerability was glaring in this case, there was no discussion of any possible re-instatement or re-deployment and the applicant would only be entitled to compensation. In determining the quantum of compensation, the court had to consider as it is mandated to do in terms of section 24(4) of the Trade Disputes Act 15 of 2004:¹⁴² the circumstances of the dismissal coupled with the actual and future loss likely to be suffered by the applicant as a result of the “wrongful” dismissal which had left “a very bad taste in the court’s mouth,” the applicant was awarded eight months’ salary as compensation.¹⁴³

12 CONCLUSION

The jurisprudence with regard to section 186(1)(e) of the LRA as developed from this investigation is compelling evidence that in spite of the omission to spell out the type of dismissal intended by that provision, the courts have done more than the legislature by giving a clear meaning to an unclear enactment of the legislature. The courts have not only incorporated into the labour law jurisprudence the technical concept of constructive dismissal; they have gone further to develop principles which labour arbitrators and adjudicators must bear in mind whenever they are faced with such a claim. Constructive dismissal balances the power of the employer to dismiss unilaterally. The initiative in this instance emanates from the employee by demonstrating to the employer that an employee carries with him or her the right to equality before the law and the right to human dignity entrenched in the Constitution and labour legislation, coupled with mutual respect embedded in the employment relationship.

In a nutshell, both the employee and the employer share an equal burden of proof. While the employee, the claimant/complainant, must show that they had been dismissed, the employer must, in a two-stage inquiry, which dominates the determination whether the employee was constructively dismissed in any given case, shows that the dismissal was not unfair¹⁴⁴ for if it turns out to be fair, then, the employee’s claim comes to an abrupt end. But, if it were shown to be a constructive dismissal then, the employee would proceed to seek relief for unfair dismissal in terms of section 193(2)(a)–(d) but not before the court is satisfied that the three elements of constructive dismissal were met, namely: that the employee brought the employment relationship to an end; the conduct complained of by the employee judged objectively was intolerable; and whether it was the employer’s conduct that caused the employee’s reaction.¹⁴⁵ Since intolerability is the reason for the employee’s complaint for constructive dismissal, would such an employee succeed in obtaining reinstatement as intolerability is a condition for which a court could not award such a remedy or is it a contradiction in terms to seek reinstatement in a case of constructive unfair dismissal? As bewildering as it might appear, the answer to this question is that reinstatement could be ordered in appropriate circumstances to a successful

140 See para 22 of the General Survey 1995.

141 *Ganelang* 581A-G.

142 Cap 48:02.

143 *Ganelang* 581G/H-582A.

144 *Cf* s 188(1) read with s 192(2) of the LRA.

145 *Solid Doors* para 28.

applicant,¹⁴⁶ that is, where: the employee wishes to be reinstated or re-employed; given the circumstances surrounding the dismissal, a continued employment would be intolerable; it is reasonably practicable for the employer to reinstate or re-employ the applicant; or the dismissal was unfair only because the employer did not follow a fair procedure.¹⁴⁷ As it has been shown, it would appear that the two provisions of intolerability, the one that brings about constructive dismissal in section 186(1)(e) and that which would make continued employment intolerable in section 193(2)(b) are designed to serve different purposes and perform dissimilar functions. It must also be borne in mind that there are other inhibiting rules around the burden of proving constructive dismissal, such as, that the employee must exhaust available internal remedies before resigning, that is, they must have explored possible grievance processes or available alternative options rather than resigning. Otherwise, an employee who abandons available reasonable alternatives to resignation, does so at his or her own peril.¹⁴⁸ The employee must have brought the intolerable condition to the attention of the employer or responsible management who, in turn, is equally under obligation to address and attempt to remove the intolerable obstacle,¹⁴⁹ since an employer cannot be held liable if it had not been afforded an opportunity to deal with the matter such discrimination in terms of section 60 of the EEA in the context of automatically unfair dismissal.¹⁵⁰

146 *Western Cape Education Department v The General Public Service Sectorial Bargaining Council* 2014 35 ILJ 3360 (LAC) para 34.

147 See s 193(2) of the LRA.

148 *Experian Regent Insurance Co* para 61.

149 *HC Heat Exchangers* para 67.

150 *TFD Network Africa (Pty) Ltd v Faris* 2019 40 ILJ 326 (LAC) para 51.