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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 1)

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Abstract

A number of recent cases from the Labour Court, especially, HC Heat Exchangers (Pty) Ltd v Araujo (JR155/16) [2019] ZALCJHB 275; 2020 3 BLLR 280 (LC) has compelled a revisit of the constructive dismissal aspect of the law of unfair dismissal in contemporary South African labour law. Although constructive dismissal is not mentioned in the Labour Relations Act 66 of 1995, unlike "dismissal" and "automatically unfair dismissal", its existence has been read by necessary implication into the definition of "dismissal" in its section 186(1)(e). From the case law, and the various issues surrounding it, there can be no doubt that constructive dismissal has come to stay in South Africa's labour lexicon; it cannot simply be bypassed in the study of the law of unfair dismissal in modern times. In light of the two important aspects of

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this subject, namely, the two-stage test and the three elements of unfair dismissal both of which have accumulated enormous jurisprudence, a two-part series is adopted in this article. While the primary question of whether there was a dismissal and whether it was fair is dealt with in this first part, whereas, the three elements of whether the employee brought the employment relationship to an end; whether the conduct complained of by the employee judged objectively was intolerable; and whether it was the conduct of the employer that caused the employee's resignation, will be discussed in Part 2. Instances where the employees' claims of constructive dismissal were successful, will be discussed along with the remedies awarded. On the other hand, instances where the employee failed to scale the strong threshold of proving constructive dismissal, are equally discussed. Since the developments in South Africa and Namibia are dealt with in Part 1, the developments in Lesotho and Eswatini/Swaziland are examined in Part 2.

1 INTRODUCTION

In simple language, constructive dismissal arises in a situation where an employee terminates his or her employment because the employer has made the working environment intolerable for the employee to continue to work for the employer. In recent times, one of the elements of such intolerability is the instance of sexual harassment in the workplace where the employer had failed to act after the matter had been reported.

Historically speaking, the concept of constructive dismissal was incorporated into the South African labour law terminology by way of purposive interpretation by the old Industrial Court of the labour relations regime of 1956. Otherwise, it is a concept derived from English labour law. As could be seen from the case law of the Industrial Court[1] and the Labour Appeal Court of that era,[2] constructive dismissal conveys a notion that there existed an implied term in a contract of employment that an employer would not conduct itself in such a manner that is designed to destroy or materially damage the relationship of trust and confidence that sustains the employment relationship, which term, if breached, entitles the employee to cancel the contract.[3] While the Labour Relations Act 1995 does not make any specific mention of the term "constructive dismissal", a clear indication is conveyed by the Act that it is incorporated therein by necessary implication. The proposition that constructive dismissal can occur where an employee decides to resign or quit due to an intolerable working environment created by the employer is supported by the Act's definition of the term "dismissal".[4] In a situation where an employee resigns because of unfair circumstances, the employee is said to have

1 See e.g. *Halgreen v Natal Building Society* 1986 7 *ILJ* 769 (IC) 775G-I; *Ndebele v Foot Warehouse (Pty) Ltd t/a Shoe Warehouse* 1992 13 *ILJ* 1247 (IC) 1251B-H.

2 See e.g. *Amalgamated Beverages Industries (Pty) Ltd v Jonker* 1993 14 ILJ 1232 (LAC) 1248F-1249B; *Jooste v Transnet Ltd t/a SA Airways* 1995 16 *ILJ* 629 (LAC) 636D-637J ("*Jooste*").

3 See per Snyman AJ, *HC Heat Exchangers (Pty) Ltd v Araujo* 2020 3 BLLR 280 (LC) para 44 ("*HC Heat Exchangers*").

4 Section 186(1)*(e)* of the *Labour Relations Act* 66 of 1995 (LRA).

been constructively dismissed.[5] That this is the current position was encapsulated in the SCA judgment delivered by Cameron JA in *Murray v Minister of Defence*[6] to the effect that:

> The term used in English law, 'constructive dismissal' (where 'constructive' signifies something the law deems to exist for reasons of fairness and justice, such as notice, knowledge, trust, desertion), has become well-established in our law. In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South African law from English law in the 1980's, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.[7]

The current statutory provision of constructive dismissal since the 2015 Amendment to the LRA removed "contract of employment" from the definition of dismissal which means that section 186(1)*(e)* of the LRA now reads: "Dismissal means that — an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee." But as Snyman AJ points out in *HC Heat Exchangers*:[8] "the principles applicable to the current concept of constructive dismissal as embodied in section 186(1)*(e)* is somewhat

5 From the Canadian common law standpoint, the employer is not only obliged to treat the employee in a manner that renders competent work performance impossible or continued employment intolerable, but an employer has a broader responsibility to ensure that the work environment does not otherwise become so hostile, embarrassing or forbidding as to have the same effect. In other words, an employer has a duty to see that the work atmosphere is conducive to the well-being of its employees — *Stamos v Annuity Research & Marketing Service Ltd* 2002 OJ No. 1865. At para 60 of this same *Stamos* judgment, the court had held that failure to abide by the foregoing could result in a repudiation of the employment contract. Further, that: "An employer owes a duty to its employees to treat them fairly, with civility, decency, respect and dignity. An employer who subjects employees to treatment that renders competent performance of their work impossible or continued employment intolerable exposes itself to an action for constructive dismissal. Where the employer's treatment of the employee is of sufficient severity and effect, it will be characterized and unjustified repudiation of the employment contract. Whether such treatment is viewed as a breach of a specified fundamental implied term of the employment relationship — *Lloyd v Imperial Parking Ltd* 1996 AJ No. 1087 (Alta. QB); *Sheppard v Sobeys Inc*. 1997 NJ No 78 (Nfld. CA), or as a repudiation of the entire employment relationship — *Shah v Xerox Canada Ltd* 2000 CanLII 2317 (ON CA) (20 March 2000), the result is the same. The employee is entitled to treat the employment contract as at an end, and to recover at least damages in lieu of reasonable notice."

6 2008 29 *ILJ* 1369 (SCA) para 8.

7 For the history of implied term in English law see per Lord Steyn, *Malik v Bank of Credit and Commerce International* 1997 UKHL 23 paras 58–61. See generally, Brodie "The Heart of the Matter: Mutual Trust and Confidence" 1996 *ILJ (UK)* 121; "Beyond Exchange: The New Contract of Employment" 1998 *ILJ (UK)* 79 and "Fair Deal at Work" 1999 *OJLS* 83 and "Mutual Trust and the Values of the Employment Contract" 2001 *ILJ (UK)* 84; Brooks "The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence" 2001 *U Tas LR* 26.

8 *HC Heat Exchangers* para 46.

different to the concept as initially imported out of the English law."[9]

Before any further discussion of the necessary thresholds to prove for a claim of constructive dismissal to succeed and for the court to engage any further in investigating whether the dismissal was unfair, it is important to make two points that link constructive dismissal with two other aspects of the law of unfair dismissal. The first is that although constructive dismissal is read by implication in the context of the definition of dismissal, there are ample provisions in the LRA for what the Act refers to as automatically unfair dismissal. While, in certain circumstances, the question might arise as to whether an employee has been constructively dismissed in such unfair circumstances, the LRA had gone the distance not only to itemise certain dismissals that translate into automatically unfair dismissals as well as constituting unfair labour practices,[10] but it also provides that an order of reinstatement should be made once dismissal is found to have been automatically unfair.[11] Another distinguishing factor between constructive dismissal and automatically unfair dismissal is that whereas constructive dismissal is a construct of the courts in their categorisation of dismissals even at common law, automatically unfair dismissal is part and parcel of the statutory creation or innovation of the modern law of unfair dismissal.

The recent Labour Court judgments in *HC Heat Exchangers; Billion Group (Pty) Ltd v Ntshangase*,[12] and *Bakker v CCMA*[13] not only brought together the modern law of constructive dismissal but advances the jurisprudence in such a manner that makes the understanding of this technical concept much clearer. Both cases emphasised the two-stage test involving the burden of proof and the three elements of constructive dismissal, and also reiterated that before an employee resigns, he/she must first exhaust alternative remedies. Further, the employer is thus under the obligation to attend to the problem with an endeavour to remove or remedy it. In addition to the *Heat Exchangers, Ntshangase* and *Bakker* cases, there are other recent judgments such as *Solidarity obo Van Tonder v Armaments Corporation of SA (SOC) Ltd*[14] and *Agricultural Research Council v Ramashowana NO*,[15] which are equally important to discuss. Some of the issues raised include: whether there was a voluntary resignation; whether the granting of an order of reinstatement is not a contradiction in terms for it flouts the provisions of section 193(2)*(b)* of the LRA; and the instances where an employee worked in intolerable conditions, but did not react or resigned. In this article, we will attempt to demonstrate some

9 See also *Albany Bakeries Ltd v Van Wyk* 2005 26 *ILJ* 2142 (LAC) paras 17–18 ("*Albany Bakeries*"). In Canadian Labour Law, constructive dismissal remains a construct of the common law as the term is not defined in the statute such that labour adjudication institutions generally refer to and follow the common law courts in determining whether any situation gives rise to a constructive dismissal — *Cantol Corp. v David Daniska* 2019 CanLII 30995 (ON LRB) para 63. In the leading case on the subject from the Supreme Court of Canada, Wagner J in *Potter v New Brunswick Legal Aid Commission* 2015 SCC 10 (CanLII), paras 30–32, had stated, in no uncertain terms, that when an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal. Since the employee has not been formally dismissed, the employer's act is referred to as "constructive dismissal". The word "constructive" indicates that the dismissal is a legal construct: the employer's act is treated as a dismissal because of the way it is characterised by the law. The burden rests on the employee to establish that he/she has been constructively dismissed. If the employee succeeds, then he/she is entitled to claim damages *in lieu* of reasonable notice of termination as the purpose of the enquiry is to ascertain whether the employer no longer intends to be bound by the contract. Given that employment contracts are dynamic as against commercial contracts, the courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract.

10 Section 187 of the LRA.

11 Section 193(3) of the LRA.

12 2018 39 *ILJ* 2516 (LC).

13 2018 39 *ILJ* 1568 (LC) ("*Bakker*").

14 2019 40 *ILJ* 1539 (LAC).

15 2018 39 *ILJ* 2509 (LC).

instances where employees failed to convince the court that there was a dismissal, let alone a constructive dismissal.

2 REINSTATEMENT IN CIRCUMSTANCES OF CONSTRUCTIVE DISMISSAL[16]

An employee is constructively dismissed if the work environment is intolerable.[17] In *September v CMI Business Enterprise CC*,[18] the question was whether the Labour Court had jurisdiction to entertain a dispute of constructive unfair dismissal or an automatically unfair dismissal dispute as referred to by the applicants. Theron J, for the majority of the Constitutional Court, referred to the concept of constructive dismissal as a "technical" one. Answering the question raised in the affirmative, the Lady Justice held that the "concept of constructive dismissal is legalese and is generally foreign to non-lawyers. It would be expecting too much of a non-lawyer who has her or himself left employment without a pronouncement by the employer that she or he was being dismissed to know that she or he had in fact, been dismissed."[19] In the same case, Zondo DCJ, in his dissenting judgment, held[20] that the term "'constructive dismissal' does not appear anywhere in the LRA but it means the termination of a contract of employment by an employee (as opposed to the employer) owing to the fact that the employer has made continued employment intolerable. The term 'constructive dismissal' is generally used in labour law to refer to what is contemplated in section 186(1)*(e)* of the LRA."[21]

In other words, by resigning the employee is saying in effect that the situation has become so unbearable that they could no longer fulfil their duties.[22] Unlike in the context of normal dismissal, where the employer terminates the contract of employment by itself; in a constructive dismissal situation, by resigning, the employee terminates the employment relationship due to

16 On constructive dismissal generally, see Grogan *Dismissal* 3ed (2017) 75–87; Grogan, *Workplace Law* 12 ed. (2017) 152–156. See also Whitear-Nel and Rudling "Constructive Dismissal: A Tricky Horse to Ride *Jordaan v CCMA* 2010 31 *ILJ* 2331 (LAC)" 2012 *Obiter* 193. Query, does the issue of constructive dismissal arise in a situation where the chief magistrate re-assigned a magistrate from judicial to administrative duties as was contested in *President of the RSA v Reinecke* 2014 3 SA 205 (SCA) paras 20–22. A similar situation arose in *Gilham v Ministry of Justice* 2019 UKSC (16 October 2019) para 5. See also Nkosi "*President of the RSA v Reinecke* 2014 3 SA 205 (SCA)" 2015 *De Jure* 232.

17 Section 186(1)*(e)* of the LRA. Reading the Supreme Court of Appeal judgment in *Unilong Freight Distributors (Pty) Ltd v Muller* 1998 1 SA 581 (SCA) which was decided on the basis of the Labour Relations Act 28 of 1956 and prior to the 1995 enactment of s 186(1)*(e)*, one does not come across the language of "intolerability" or emphasis on the breakdown of the employment relationship caused by the employer. The employee in that case never intended to, nor did he resign. He was coerced into accepting a voluntary retrenchment package after what would appear to be a lot of fumbling on the part of the employee/manager — acting in instances: without authority or in excess of authority; inadequate performance related to personality problems and lack of judgment and insight; lack of support by subordinates bordering on incompatibility even when he was being initiated into the corporate culture; and the improper handling of the matter by the employer within the short period of two months he was employed at the transport industry. At no stage was he specifically warned that unless his performance improved, he was running a risk of dismissal. In effect, he should have been given an ultimatum — *Performing Arts Council of the Transvaal v PPWAWU* 1994 2 SA 204 (A); *James v Waltham Holy Cross Urban District Council* 1973 ICR 398. The Supreme Court of Appeal held that in all the circumstances of the case, fairness and good sense required that the employee/manager should have been given an ultimatum which was reasonable and explicit rather than acting with undue haste in effectively terminating his employment on 30 November 1993. The LAC's finding that he was constructively dismissed and that such dismissal was procedurally unfair and constituted an unfair labour practice could not be disturbed.

18 2018 39 *ILJ* 987 (CC) ("*September*").

19 *September* paras 53–54.

20 *September* paras 81 and 102.

21 See also *Jordaan v CCMA* 2010 31 *ILJ* 2331 (LAC) ("*Jordaan*"); *Minister of Home Affairs v Hambidge NO* 1999 20 *ILJ* 2632 (LC); *Sappi Kraft (Pty) Ltd v Majake NO* 1998 19 *ILJ* 1240 (LC) ("*Sappi Kraft*") – setting the two-stage inquiry.

22 *Pretoria Society for the Care of the Retarded v Loots* 1997 18 *ILJ* 981 (LAC) 984E-F ("*Loots*").

the employer's conduct.[23] The employee has the burden of proof to establish that the employer unlawfully created an unbearable work environment. Such a circumstance could easily be translated as a repudiation of the employment contract which, in turn, presents the employee with a choice: either to stand by it; or to accept the repudiation and terminate the contract.[24] It is not necessary for the employee to show that such repudiation was intended.[25] Nor does the test for constructive dismissal require that the employee had no choice but to resign, it is only that the employer made continued employment intolerable.[26] Here, the fundamental shift is from the test of whether the employee had no option but to resign, to the test of whether no option was reasonably available to the employee other than to resign.[27] It is immaterial whether the employer intended to repudiate the employment relationship.[28] It is enough if the employer had acted in a manner inconsistent with the employment relationship and employee production ethos. And, as Whitcher J put it in *Bakker*:

> Constructive dismissal is not inherently unfair. Once, it has been proved that a constructive dismissal has occurred, the onus shifts to the employer to prove that it did not act unfairly. A two-stage approach is thus envisaged.[29] The central question is then whether the conduct of the employer that prompted the employee to resign was fair or unfair.[30] A court will consider the circumstances with a view to establishing whether the employer's conduct was justified.[31] The focus will be on the substantive fairness of the dismissal as procedural fairness plays little or no role in most constructive dismissal cases.[32]

2 1 Constructive Dismissal and Order of Reinstatement: A Contradiction in Terms?

The Labour Court made the point in *Ideal Patternmakers and Tooling (Pty) Ltd v Metal Engineering Industries*,[33] that a distinction needed to be drawn between the "dismissal" in section 186(1)*(a)*[34] and "constructive dismissal" in section 186(1)*(e)*. First, the section 186(1)*(a)* dismissal relates to the dismissal of the employee by the employer which is not *prima facie* unfair, whereas the dismissal in section 186(1)*(e)* termed "constructive dismissal" is *ipso facto* unfair because it relates to the scenario where an employee resigns from an intolerable working environment. These two types of dismissal cannot be claimed at the same time, not jointly and

23 *Jooste*. See also *Woods v WM Car Services (Peterborough)* 1982 IRLR 413 (CA).

24 For constructive dismissal seen from the angle of repudiation see the discussion by Vettori "Constructive Dismissal and Repudiation of Contract: What must be Proved?" 2011 *Stell LR* 173.

25 *Mahlangu v Amplats Development Centre* 2002 23 *ILJ* 910 (LC) para 19. See also *CEPPWAWU v Glass and Aluminium 2000 CC* 2002 23 *ILJ* 695 (LAC).

26 *Strategic Liquor Services v Mvumbi NO* 2010 2 SA 92 (CC) para 4 ("*Strategic Liquor Services*").

27 *Bakker* para 7; *Experian Regent Insurance Co Ltd v CCMA* 2013 34 *ILJ* 410 (LC) para 47. *Bakker* represents the proposition that where an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such intolerable conduct by taking some course of action which is reasonably within her power, then the employee should follow that course rather than resigning. Thus, where the employee's management categorically offered to provide the employee support, but she chose to spurn same and lodge a constructive dismissal dispute, whilst there is no evidence of the employee's job being in jeopardy, then the employee, as in the present case, would have acted irrationally. It is even far from being constructive dismissal where management regards the applicant as a valued employee and was requested to change her mind when she submitted her resignation.

28 *Loots* 985A-C.

29 *Jordaan* 2335.

30 *Jonker v Amalgamated Beverages Industries* 1993 14 *ILJ* 199 (IC) 211.

31 *Jooste*.

32 *Bakker* para 10.

33 2004 ZALC 16 (13 February 2004) paras 9–10 ("*Ideal Patternmakers"*).

34 Hereinafter referred to as "normal" or "ordinary" dismissal.

not alternatively, arising from the same facts.[35] Another point of departure between normal dismissal and constructive dismissal is that the date of dismissal spelt out in section 190(1) of the LRA does not apply to a constructive dismissal because, the employee in this instance, makes the final decision as to when he/she cease providing services. In terms of section 186(1) *(e)*, an employee can cease to provide services with or without notice and may refer a dispute to the CCMA alleging constructive dismissal. The employment relationship terminates on the date he/she leaves service. According to Rabkin-Naicker J: "in any case of constructive dismissal dispute the date of termination of the contract of employment and the date of leaving the service of an employer are contemporaneous — on that date, an employee will no longer be remunerated or tender her services."[36] The court referred to *Chabeli v CCMA*[37] where a different situation pertained. The employee had claimed constructive dismissal after giving notice of termination and it was held that the date of his dismissal was the date he ceased to provide services to the employer. It was therefore necessary that he referred his dispute to the CCMA within 30 days of ceasing to provide services.[38] Similarly, in *Avgold-Target Division v CCMA*[39] the court held that the referral to the CCMA was premature because it was made before the employee was actually dismissed. In *Helderberg International Importers*, Rabkin-Naicker J held that the referral was made before a "dismissal" as contemplated in section 191(1) took place. This means that the CCMA lacked the jurisdiction to conciliate or arbitrate the dispute.[40]

The third point, and the main difficulty here, is intolerability which appears in the context of constructive dismissal as well as being one of the grounds for which an order of reinstatement cannot be made if a dismissal is found to be unfair. In the case of constructive dismissal, an employee whose employment has been made intolerable may resign and claim unfair dismissal on constructive dismissal grounds. Whereas in terms of section 193(2)*(b)*, the language adopted in that context pertains to the circumstances surrounding the dismissal that "continued employment would be intolerable." In the case of constructive dismissal, what is intolerable is "continued employment" on the part of the employee while in a normal dismissal circumstance, it is the relationship between the employer and employee that has become intolerable because the trust and confidence binding that relationship no longer exists. While, on the one hand, the employer can attend to and fix the matter by removing whatever made the employment intolerable for the employee; on the other hand, the employer cannot fix the relationship between the two where the tolerability would depend on the mutual interests of both parties to the employment relationship. At first glance, it may seem contradictory that an employee who found his/her employment intolerable due to the employer's conduct could resign and then ask for reinstatement. This is because the intolerability of the employment relationship is a non-reinstatable ground and the matter becomes even more perplexing. The matter, however, becomes clearer if it is borne in mind that the intolerability requirements in both instances contemplate different circumstances.

The LAC in *Western Cape Education Department v The General Public Service Sectorial Bargaining Council*[41] entertained no doubt that both the arbitrator and the Labour Court were correct in finding that Gordon was not treated fairly by the Department. The LAC had agreed

35 *Ideal Patternmakers* para 12.

36 *Helderberg International Importers (Pty) Ltd v McGahey NO* 2015 36 *ILJ* 1586 (LC) para 8 ("*Helderberg International Importers*").

37 2010 31 *ILJ* 1343 (LC).

38 *Helderberg International Importers* para 9.

39 2010 31 *ILJ* 924 (LC) para 30.

40 *Helderberg International Importers* paras 12–14.

41 2014 35 *ILJ* 3360 (LAC) ("*Western Cape Education Department*"). See also *Western Cape Education Department v Gordon* 2014 ZALAC 113 (26 June 2014).

with the LC's observation that the circumstances of the present case were analogous to that in *Murray v Minister of Defence,*[42] and the approach adopted in that case should apply *mutatis mutandis* to the facts of the present case. It was said in *Murray* that: "The plaintiff's subjective condition of suspicion, demoralisation and depression, which was evident to those dealing with him, was materially relevant to how fairness required the Navy to deal with him."[43] This is precisely what fairness dictated that Gordon should be treated similarly for, there was no way he could have been expected to put up with the cumulative impact of the conduct of the employer. The LC was thus correct to have described the attitude displayed by the appellant's officials as "obtuse".[44]

Reinstatement was ordered by the arbitrator and upheld by the LC in this case. Before the LAC, it was contended that because the arbitrator found that the employee was constructively dismissed in circumstances where the employee had resigned due to an intolerable employment relationship, the order of reinstatement granted flouted the provisions of section 193(2)*(b)* of the LRA.[45] The L C reasoned that although it might seem anomalous that the employee sought reinstatement having resigned alleging intolerability of the employment relationship, however, the employee's wish to be reinstated was not destructive of the finding that the employment relationship was, at the time of the employee's resignation, intolerable.[46] One of the questions before the LAC was whether the remedy of reinstatement was appropriate where the claimant had alleged that the employment relationship had become intolerable as a result of the employer's conduct.[47] The LAC upheld the order of reinstatement made by the arbitrator and the LC as not unreasonable[48] in the circumstances where the test for, and elements of constructive dismissal were met, and no evidence was advanced to show that reinstatement would be reasonably impracticable or intolerable. Molemela AJA, conceded, quite rightly, that: "At first blush, the granting of the remedy of reinstatement in constructive dismissal disputes may seem to be an anomaly, considering that the basis for termination of the employment contract is that the employer made the continuation of an employment relationship intolerable."[49] The Acting Justice of Appeal however observed that such a remedy is not always incongruous with the provisions of section 193(2)*(b)* of the LRA and then proceeded to offer the following credible explanation:

> The fact that an employee resigns on the ground that the employer made the employment intolerable for him or her should not, without more, serve as a bar to reinstatement. It seems to me that what is of the essence is the stage at which intolerability occurs. An employee that avers that he or she was constructively dismissed must prove that at the time of termination of the employment contract he or she was genuinely under the impression that the employer had rendered the continuation of the employment relationship intolerable. If such an employee subsequently seeks the remedy of reinstatement, then such an employee must show that the intolerable circumstances prevailing at the time of termination of the employment contract are no longer extant. In a matter like the present, where the employee has placed facts showing that the circumstances prevailing at the time of seeking reinstatement are different to those at the time of his or her resignation and the employer had chosen not to refute them, then the notion of fairness dictates that the employee's uncontested evidence be accepted and that he or she be reinstated into his or her position. It follows that there is no merit in the appellant's

42 2009 3 SA 130 (SCA) ("*Murray*").

43 *Murray* para 59.

44 *Western Cape Education Department* para 31.

45 *Western Cape Education Department* para 13.

46 *Western Cape Education Department* para 14.

47 *Western Cape Education Department* para 16.

48 *Western Cape Education Department* para 33.

49 *Western Cape Education Department* para 34.

proposition that Mr Gordon's desire to be reinstated served as proof that he did not regard the employment relationship as sufficiently intolerable.[50]

3 THE TWO-STAGE INQUIRY[51]

What has become a launching pad for the determination of whether an employee has been constructively dismissed and therefore can claim unfair dismissal is the two-stage inquiry which keeps popping up in literally every case dealing with the subject in that this discussion is kept within the confines of a few illustrations. This said, the two-stage inquiry imposes: (a) the onus on the employee who resigned or left his employment to prove that continued employment was made intolerable by the employer; and (b) upon the employer the duty to prove that the dismissal was not unfair.[52] It was held in *Murray,* that an employee who claims constructive dismissal must prove that the resignation was not voluntary and that it was not intended to terminate the employment relationship. The next question would be whether the employer had without reasonable and probable cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the two. "Looking at the employer's conduct as a whole and its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to keep up with it."[53]

In *Value Logistics Ltd v Basson*[54] where it was held that the Commissioner did not heed the injunction by Basson J in *Eagleton v You Asked Services*[55] to the effect that an applicant can only claim relief if he/she would have satisfied both the employee's onus that there was a dismissal, not a voluntary resignation, and the employer's failure to establish the fairness of the

50 *Western Cape Education Department* para 34.

51 In the Canadian Supreme Court case of *Potter* paras 32–46, where the Justices were unanimous in upholding P's claim of constructive dismissal, Wagner J identified two "branches" of the test for constructive dismissal that have emerged. While the first branch is that of a single unilateral act that breaches an essential term of the contract, the second consists of a series of acts which, when taken together, clearly shows that the employer no longer intended to be bound by the contract. Under the first branch, the test is whether there has been a breach of the employment contract and whether that breach was of such a nature that it substantially altered the contract. On the other hand, the test for the second branch is whether there has been "conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments … that on its own constitutes a substantial breach." Rather, "the focus is on whether a course of conduct pursued by the employer evince(s) an intention no longer to be bound by the contract." See also *Baraty v Wellons Canada Corp.* 2019 BCSC 33 (CanLII) (11 January 2019) paras 6–10 where the plaintiff argued that both of these branches and the tests apply to his case, even though he need only to prove one of the two branches in order to meet the *Potter* test for constructive dismissal. Similarly, in the recent case of *Gibb v Palliser Regional School Division No. 26* 2020 ABQB 113 (CanLII) (13 February 2020) paras 69–70 where the employee had resigned claiming constructive dismissal, alleging a toxic work environment rife with bullying, inappropriate touching, and intimidation tactics which resulted in an ultimatum being put to her that if she did not discipline a subordinate employee as directed, her job was at risk. After extensively analysing the facts and the law, Madam Justice Kubik of the Alberta Queen's Bench held that the plaintiff's particular or unique circumstances did not define the reasonable person and although she was generally disliked by her subordinates, it could not be said that the work environment was generally toxic, there was no evidence that continued employment was intolerable as to justify a claim of constructive dismissal.

52 See e.g. *Loots* 984E-F; *Old Mutual Group Schemes v Dreyer* 1999 20 *ILJ* 2030 (LAC) paras 16–17.

53 *Murray* paras 11–12. See also *Metropolitan Health Risk Management v Majatladi* 2015 36 *ILJ* 958 (LAC) para 21.

54 2011 32 *ILJ* 2552 (LC) para 64 ("*Value Logistics*").

55 2009 30 *ILJ* 320 (LC) para 25 ("*Eagleton*"). See also *Loots* 983; *Halgreen v Natal Building Society* 1986 *ILJ* 769 (IC) 775D-776I; Grogan *Rickert's Basic Employment Law* (2ed 1993) 69; Le Roux and Van Niekerk *The SA Law of Unfair Dismissal* (1994) 84; *Khonjelwayo and Nura Powering Opportunity* 2009 30 *ILJ* 2186 (CCMA) para 19.

dismissal. The Commissioner had awarded compensation after considering the first leg of the test and without considering the second leg of constructive dismissal — whether the dismissal was unfair, that is, the fairness enquiry — probably under the misapprehension that proof of constructive dismissal at that stage automatically entitles the employee to the relief sought.[56] Then, Steenkamp J agreed with the arbitrator in *SAPS v Safety and Security Sectoral Bargaining Council*[57] that the employer was primarily responsible for making the continued employment intolerable; and in the words of *Murray*, the employer must in some way be culpably responsible for the intolerable conditions: the conduct must have lacked "reasonable and probable cause".[58] The court cited the Constitutional Court judgment in *Strategic Liquor Services*[59] where it was stated that the two-stage test for constructive dismissal does not require that the employee have no choice but to resign but that the employer should have made continued employment intolerable; and held that: "That was the case here."[60]

As Ndlovu JA held in *NHS v Yona*,[61] a constructive dismissal occurs when an employee resigns from employment under circumstances where he/she would not have resigned, but for the unfair conduct on the part of the employer toward the employee, which rendered continued employment intolerable for the employee. In this case, Ms Yona terminated her employment relationship with the employer by resigning with a month's notice because another employee, subordinate to her, was appointed in an acting capacity to a position in which she had acted on several previous occasions. As a result, she suffered severe depression and generalised anxiety disorder. After several sick leaves and having been denied the benefits of her extended sick leave to which she was entitled, she resigned. The LAC held on the facts that Ms Yona's resignation was neither voluntary nor intended to terminate her employment with the appellant. Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant through Mr Abraham whose mistreatment of Ms Yona was such that she was subjected to psychological and traumatic degradation of her dignity. Whether by his conduct Mr Abraham intended to repudiate her employment with the employer was immaterial since it was the unfair conduct that rendered Ms Yona's continued employment with the appellant intolerable.[62] Reinstatement was not ordered in this case as compensation was in issue.

Reiterating the two-stage test in *Armaments Corporation of SA Ltd v Nowosenetz NO*,[63] as laid down in *Loots* and affirmed in *Murray*, Ram AJ interpreted the two-stage enquiry of a constructive dismissal referral to mean that the employee must present evidence to the Commissioner to establish that the employer made his/her employment intolerable (that is, his/her had not resigned). Should it be established that the employee resigned, and the enquiry ends. However, once it is established that his/her has not resigned, then the Commissioner has jurisdiction to entertain the constructive dismissal referral. Thus, this first-stage enquiry concerns jurisdictional issue.[64] However, Ram AJ admonished that the matter is not necessarily over at this stage once the first stage is complete. The employer must still show that the dismissal was not unfair at the second stage, which raises the issue of reasonableness. The court reiterated

56 *Value Logistics* paras 35–36.

57 2011 ZALCCT 61 (26 August 2011) paras 34 and 40 ("*SAPS*").

58 *Murray* para 13.

59 *Strategic Liquor Services* para 4.

60 *SAPS* para 40.

61 2015 36 *ILJ* 2259 (LAC) para 30 ("*Yona*"). See Tshoose "Constructive dismissal arising from work-related stress: *National Health Laboratory Services v Yona & Others*" 2017 *JJS* 121.

62 *Yona* paras 42 and 44.

63 2015 ZALCJHB 241 (5 August 2015) ("*Armaments Corporation of SA*").

64 *Armaments Corporation of SA* para 40. See also *SA Rugby Players' Association (SAPRA) v SA Rugby (Pty) Ltd* 2008 9 BLLR 845 (LAC).

what was said in the earlier case of *Sappi Kraft*[65] that the two stages of constructive dismissal are not independent stages because facts which are relevant to the first stage may also be relevant to the second stage. There may also be cases where facts relating to the first stage may be determinative of the outcome of the second stage while it is not necessary that any principle could or should be laid down.[66] After an exhaustive review of the facts and the applicable law in this case, the learned Acting Judge held that there was no constructive dismissal; the third respondent member resigned from the employment of the applicant; and that the Commission lacked jurisdiction to entertain the constructive dismissal referral of the third respondent.[67]

4 THE EMPLOYEE MUST EXHAUST AVAILABLE ALTERNATIVE REMEDIES

In addition to the two-stage test and the three elements of constructive dismissal, there is the rule that equally trends since the LAC judgment in *Albany Bakeries* in the determination of whether there existed in any given instance, a constructive dismissal. As highlighted and illustrated in *HC Heat Exchangers*,[68] it is the requirement on the part of the employee that he/she must exhaust available alternative remedies before resigning. This duty is a valuable and necessary requirement of the law,[69] and a common feature of the jurisdictional aspect of judicial review of the law with the enactment of section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 and given expressions by the Constitutional Court in *Koyabe v Minister of Home Affairs*;[70] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd*;[71] and the Supreme Court of Appeal in *Nichol v Registrar of Pension Funds*.[72] Insofar as resignation on the ground of constructive dismissal is concerned, the rationale for the exhaustion of internal remedies or processes is meant to serve the purposes expressed in the following four cases:

- In *Bakker*,[73] it was held that where the employee was too impatient to wait for the outcome of the employer's attempts to find a solution to the perceived intolerable solution and resigns, then constructive dismissal would be out of the question.[74]

- In *Foschini Group v CCMA*,[75] it was held that, it has been established that an employee should make use of the employer's grievance procedure where such exists in order to resolve the problem before resigning, and failure to take that route might compromise a subsequent claim for constructive dismissal.

- In *Johnson v Rajah NO*,[76] it was laid down that an employer should be made aware of the alleged intolerable condition so as to have the opportunity of dealing with it. An employee cannot lawfully resign and claim constructive dismissal where reasonable alternative options existed. The question is whether there was a reasonable alternative to dismissal.

- In *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor*

65 *Sappi Kraft* para 38.

66 *Armaments Corporation of SA* para 36.

67 *Armaments Corporation of SA* para 55.2.

68 *HC Heat Exchangers* para 55.

69 *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC) paras 38–39 ("*Koyabe*"*); Madondo v Safety and Security Sectoral Bargaining Council* 2015 36 *ILJ* 2314 (LC) para 65.

70 *Koyabe* paras 38–39.

71 2014 5 SA 138 (CC) para 132.

72 2008 1 SA 383 (SCA) para 15.

73 *Bakker* para 13.

74 See also *SmithKline Beecham (Pty) Ltd v CCMA* 2000 21 *ILJ* 988 (LC) 997D-E and 998 ("*SmithKline Beecham*").

75 2008 29 *ILJ* 1515 (LC) paras 33 and 37.

76 2017 ZALCJHB 25 (26 January 2017) para 74.

Industry Bargaining Council),[77] the court held that: "If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would … undermine the right to fair labour practices enshrined in section 23 of the Constitution which requires that fairness be viewed from the perspective of both employer and employee."

5 SEXUAL HARASSMENT AS CONSTRUCTIVE DISMISSAL

The problematic issue of sexual harassment by its very nature tends to blur the boundaries of employers' direct liability and the law of vicarious liability. In South Africa, sexual harassment had in the past been encountered in the courts and labour tribunals in connection with unfair dismissals from employment.[78] That was the case in *Ntsabo v Real Security CC*,[79] which was contested on the basis of section 60 of the Employment Equity Act 1998.[80] In *Ntsabo*, the plaintiff had resigned from her position in the company as a security guard on the ground that her supervisor had over a period of time sexually harassed her. She claimed that she was constructively dismissed on the ground that she had reported the harassment to the employer, but no action was taken. Pillay AJ upheld the constructive dismissal claim since the harassment had created a hostile and intolerable working environment for the plaintiff. The employer was similarly held vicariously liable since the harassment by the supervisor was a clear case falling within the EEA and the Code of Good Practice on the Handling of Sexual Harassment Cases. This case must be contrasted with the decision of the LC in *Mokoena v Garden Art (Pty) Ltd*,[81] where it was held that for the applicants to succeed in their claim for sexual harassment, they must prove that the alleged conduct amounted to sexual harassment; that the employer knew about it, and failed to take proper steps to prevent or eliminate or prohibit the sexism and 'genderism'; and that it is that failure that makes the employer liable. The applicants' claim failed to address the five crucial questions arising from the construction of section 60 of the EEA.

77 2013 34 *ILJ* 3184 (LC) para 131 ("*Distinctive Choice*").

78 It needs to be pointed out that prior to the introduction of s 187(1)*(f)* of the LRA, and later, s 60 of the Employment Equity Act 55 of 1998 (EEA), the proper avenue for pursuing sexual harassment claims was for the complainant to lodge a constructive dismissal claim. For instance, in *Intertech v Sowter* 1997 *ILJ* 689 (LAC) where a female employee who had experienced severe sexual harassment by a fellow employee had claimed constructive dismissal and was awarded damages — compensation in modern parlance. See also Calitz "Sexual Harassment: Why do Victims so often Resign? *E v Ikwezi Municipality* 2016 *ILJ* 1799 (ECG)" 2019 *PELJ* 1; Whitear-Nel "'Do you Want a Lover Tonight?" *Simmers v Campbell Scientific Africa (Pty) Ltd* (2016) 37 *ILJ* 116 (LAC)" 2017 *ILJ* 769; McGregor "'Do you Want a Lover Tonight?' Does this Question Constitute Sexual Harassment? *Simmers v Campbell Scientific Africa (Pty) Ltd* (2014) 35 *ILJ* 2866 (LC)" 2016 *TSAR* 322; Mukheibir and Ristow "An Overview of Sexual Harassment: Liability of the Employer" 2006 27 *Obiter* 248; Whitcher "Two Roads to an Employer Liability for Sexual Harassment: *S Grobler v Naspers Bpk en ander and Ntsabo v Real Security CC*" 2004 *ILJ* 1907; Le Roux "Sexual Harassment in the Workplace: Reflection on *Grobler v Naspers*" 2004 *ILJ* 1897; Rycroft and Perumal "Compensating the Sexually Harassed Employee" 2004 *ILJ* 1153; Zalesne "The Effectiveness of the Employment Equity Act and the Code of Good Practice in Reducing Sexual Harassment" 2001 *SAJHR* 507, 509.

79 2003 24 *ILJ* 2341 (LC) ("*Ntsabo*").

80 Act 55 of 1998 ("EEA").

81 2008 29 *ILJ* 1196 (LC). See also *Liberty Group Ltd v M* (2017) 38 *ILJ* 1318 (LAC) where the LAC found that the company/employer failed to act or even assist an employee who complained of four incidents of sexual harassment. The court held the employer liable for a substantial amount of compensation due to their inaction.

5 1 The *Bandat v De Kock Engineers'* Case

One of the questions that arose in *Bandat v De Kock*[82] was whether the resignation of the applicant from her employment amounted to constructive dismissal and whether such dismissal was automatically unfair within the contemplation of section 187(1)*(f)* and that she was discriminated against in terms of section 10 of the EEA in that she had been subjected to sexual harassment by the first respondent. The court made it clear that there was no link between constructive dismissal and sexual harassment in this case which, as a separate claim, does not depend on dismissal — constructive or otherwise — to succeed. It is a distinct and separate cause of action under the EEA.[83] Thus, the conclusion is that the dismissal or constructive dismissal question raised above does not affect the sexual harassment question.[84] In order to answer the above questions in this case, which was ultimately decided on the issue of absolution from the instance, the main issue here was whether the applicant was dismissed in the first instance. The second was whether there was any proven case of sexual harassment in this case, which is not discussed in the present context.

5 2 Was the Employee Dismissed?

In order to claim unfair dismissal, the employee must prove that he/she was dismissed in the first instance, and in order to allege constructive dismissal, an employee who resigned from his/her employment must prove that the employer made the continued employment intolerable for the employee within the contemplation of section 186(1)*(e)* of the LRA. In order to resolve this question in *Bandat*,[85] Snyman J drew attention to the principles of determining constructive dismissal enunciated in:

> *(a) Solid Doors (Pty) Ltd v Commissioner Theron*,[86] where it was held that to succeed in a claim for constructive dismissal, the plaintiff must scale over all the following three hurdles: (i) the employee must have terminated the contract of employment; (ii) the reason for the termination must be based on the continued employment having been made intolerable; and (iii) it must be the employer who made the relationship intolerable.
>
> *(b)* In *Albany Bakeries*,[87] the court specifically referred to the judgment in *Loots* where it was held that an employee alleging constructive dismissal is in effect saying that he had to resign because the employer had made his work unbearable whereas he would have remained and worked indefinitely were it otherwise. In other words, his or her resignation is an indication that the employer will never abandon or reform the unbearable work environment.

Summing up the judgments in *Albany Bakeries* and *Loots*, Snyman J held that, in order for the employee to show that a continued working environment was intolerable, he has to convince the court that he, the employee, had a genuine belief that the employer will never change its ways, which the employee could do by using available alternative remedies such as raising a grievance or using remedies provided for in the LRA.[88] In addition, the intolerable conduct of the employer in question must be without proper or at least reasonable cause. As it was stated

82 2015 36 *ILJ* 979 (LC) ("*Bandat*").

83 *Dial Tech CC v Hudson* 2007 28 *ILJ* 1237 (LC) para 63.

84 *Bandat* para 70.

85 *Bandat* paras 49–57.

86 2004 25 *ILJ* 2337 (LAC) para 28.

87 *Albany Bakeries* paras 28–30.

88 *Bandat* para 52.

in *Murray*:

> It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances 'must have been of the employer's making'. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions; the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.[89]

The conduct of the employer must be judged objectively.[90] In concluding the legal principles on the constructive dismissal aspect of this judgment, Snyman J considered apt the opinion expressed in *Distinctive Choice.*[91] In this case, it was held that where an employee finds her/himself confronted by conduct he/she considers intolerable, and the employee can actually avoid such intolerable conduct by taking some form of action, reasonably within the employee's power, other than resignation, it would be appropriate to follow that alternative course of action. To hold that the employee is nonetheless entitled to resign in such circumstances and claim constructive dismissal would undermine the right to fair labour practices enshrined in section 23 of the Constitution which entrenches the fairness to be viewed from the perspectives of both the employer and the employee. With regard to the application of the law to the facts of the case, the court had no hesitation in finding that the applicant was not able to show that her continued employment was rendered intolerable to the extent that she had no other reasonable option than to resign.[92] The court considered that the main reason for the employee's resignation was the written warning of 24 June 2013, without which the employee would not have acted the way she did. It was this written warning that motivated her subjective point of view. From an objective standpoint, she had a close relationship with the first respondent; they were close friends as well as employer and employee. Clearly, "she simply could not accept that a friend would give her such a warning or take her to task. Whilst the applicant may view this as subjectively intolerable, from an objective point of view it simply is not. As an employer, the first respondent on behalf of the second respondent was reasonably entitled to dispense the warning."[93] Yet, the written warning of 24 June 2013 was never intended to orchestrate the departure of the applicant, and her belief that the warning was a result of her unwillingness to play the first respondent's "sexual games" was out-rightly rejected by the court. The warning merely invited the applicant to discuss the matters contained therein and did not suggest that the applicant's continued employment was at risk.[94] While the employer could not be found culpably responsible for issuing the warning as he had reasonable cause to do so, the applicant should have engaged the employer on the issues raised in the warning instead of taking offence, and raising all kinds of meritless accusations in defence.[95] In the final analysis, although the only true events that could justify intolerability, in this case, are the issuing of the written warning of 24 June 2013, and the altercation of 3 July 2013, but none of these events fall short of establishing intolerability needed to lay a proper foundation for constructive dismissal.

89 *Murray* para 13.

90 *SmithKline Beecham* para 38; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen* 2012 33 *ILJ* 363 (LC) para 38; *Jordaan* 2336A-B, D-E.

91 *Distinctive Choice* para 131.

92 *Bandat* para 58.

93 *Bandat* para 59.

94 *Bandat* para 60.

95 *Bandat* para 61.

Besides, the applicant did not follow any internal dispute procedure, nor did she have recourse to any alternative available remedy, hence resignation was not the last resort. On the other hand, the first respondent had reasonable cause to issue the warning and was certainly not culpably responsible. This led the court to the conclusion that the applicant had failed to make a *prima facie* case that she was constructively dismissed hence she was not dismissed, rather, she had simply resigned from her employment.[96]

6 NAMIBIA

It has already been shown earlier in this article that although constructive dismissal is a concept derived, not expressly but impliedly, from the interpretation of the meaning of "dismissal" in both the South African Labour Relations Act and the Lesotho Labour Code, no such provision can be found in the Labour Act of Namibia 2007. In other words, the concept of constructive dismissal in Namibia is not a derivative of statute but remains a common law concept. The next point to make is that constructive dismissal does not appear to have been a more frequent appearance in Namibian labour law in the past than it is in recent times. For instance, a perusal of Juta's *Index to the Namibian Law Reports 1990–2016* records only one case: *Cymot (Pty) Ltd v McLoud*,[97] which gave a brief meaning of the concept and the *onus* of proof thereof. The third observation is that in none of the cases discussed here was there any mention of the source of the concept except that in *Kavekotora v Transnamib*[98] where Smuts J said that the Labour Court in *Cymot*[99] had followed the South African authority of *Jooste*[100] which, in turn, cited English authorities in adopting employer induced-termination as a species of dismissal. This is an indication that the constructive dismissal concept which the South African courts applied at the material time was the common-law approach prior to the coming into effect of the LRA in 1996. Smuts J then went further to confirm in no uncertain terms that the concept of constructive dismissal as applicable in Namibian Labour Law, "was eloquently explained"[101] by Cameron J in *Murray*[102] in three valuable passages of that judgment,[103] otherwise already discussed earlier in different parts of this article, but which for the avoidance of repetition, are summarised as follows:

> (a) Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and that the latter remains responsible for the consequences;[104]
>
> (b) That the onus rests on the employee to prove that the resignation constituted a constructive dismissal; in effect, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship;[105]
>
> (c) Once that is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and probable cause conducted itself in a manner calculated or likely to destroy or seriously damage the

96 *Bandat* paras 67 and 69.

97 2002 NR 391 (LC) 393 ("*Cymot"*).

98 2012 NALC 1; 2012 2 NR 443 (LC) (3 February 2012) para 27 ("*Kavekotora*").

99 See also *Kasuto v Namibia Wildlife Resort* 2013 NALCMD 37 (6 November 2013)

100 *Jooste* 638B.

101 *Kavekotora* para 27.

102 2009 3 SA 130 (SCA) paras 8, 12 and 13.

103 As affirmed by the CC in *Strategic Liquor Services* para 94.

104 *Murray* para 8.

105 *Murray* para 12.

relationship of confidence and trust with the employee;[106] and

(d) That the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked reasonable and probable cause.[107]

Apart from the issue of jurisdiction, another question that the LC had to determine in *Labour Chain Namibia (Pty) Ltd v Hambata*[108] was whether there was a constructive dismissal where an arbitrator had found that the respondent had resigned her position with the appellant who contended that the arbitrator had applied incorrect principle in determining the matter.[109] The arbitrator had incorrectly approached the enquiry on the basis that the appellant had the burden of proof of essentially establishing that there had not been a constructive dismissal. Smuts J reiterated what the court had said earlier in *Cymot*[110] that constructive dismissal arises where an employee terminates or agrees to terminate the employment relationship due to the conduct of the employer and under the circumstances that render termination tantamount to termination by the employer. And, in line with the South African approach and as "lucidly explained by Cameron JA" in *Murray*,[111] an employee has the burden of proving that there was a dismissal, and when that is shown the burden shifts to the employer to prove the fairness or otherwise of the dismissal. The arbitrator in this case clearly misunderstood not only the concept of constructive dismissal but also the test for establishing its existence.[112] It would seem that the ultimate unhappiness of the respondent was rather a consequence of not having received the incentive which she contended she had been promised for her resignation. As she was a fixed-term contract employee, her employment would end in a couple of months. It was clear to the Judge that the respondent did not establish a constructive dismissal, hence the arbitrator erred in coming to a contrary conclusion.[113]

In *Kavekotora*, the appellant, a senior manager, had applied for an unpaid leave in order to run for the National Assembly in the 2009 general election. He had been alerted to a company policy which stated that employees who run for political office are deemed to have resigned. The appellant resigned but was unsuccessful in the election. He sought reinstatement which was refused. An arbitrator dismissed his complaint of unfair dismissal. The appellant contended that the company policy did not apply to him. Meanwhile, two other employees who had indicated their desire to run for political office changed their minds when alerted of the policy. Smuts J held that despite the arguments of the appellant, the most fundamental point in this case is that the appellant did not establish, as he was duty bound to do, that he was constructively dismissed in the circumstances of the case. After referring to the principles laid down in *Murray,* the court held that the appellant was aware of the company policy before resigning, and that by resigning, he was in effect, complying with the policy. The company was therefore entitled to assume that he was prepared to bear the consequences of his action including that unpaid leave for that purpose will not be paid. The appellant was therefore placed before an election of either to proceed with his nomination and being deemed to have resigned, or to withdraw and continue his employment. He was bound by the election he made.[114] It could not be said that

106 *Murray* para 12.

107 *Murray* para 13.

108 2012 NALC 2 (3 February 2012) para 26 ("*Labour Chain Namibia*").

109 *Labour Chain Namibia* para 5.

110 *Cymot* 393.

111 *Murray* paras 12–13.

112 *Labour Chain Namibia* paras 26–28.

113 *Labour Chain Namibia* paras 30–31.

114 *Kavekotora* para 30.

the employer had engaged in conduct that rendered the further employment of the appellant intolerable. It had properly relied on the policy which it applied to other employees in the same situation as the appellant. The employer was thus not culpably responsible for the appellant's resignation in the sense that expression was used in *Murray.* Finally, the arbitrator was correct in finding that the appellant had not discharged the *onus* to establish that he was constructively dismissed in the circumstances.[115]

6 1 Voluntary Resignation or Constructive Dismissal

The applicants/employees in *Van Zyl v Namibia Sales & Marketing CC*[116] were employed as sales representatives and a sales manager respectively, and had resigned from the respondent's employment when it became apparent that the respondent faced financial difficulties. After their resignation, the respondent embarked on a retrenchment process and terminated the contracts of employment of all its employees. An arbitrator dismissed their complaint of constructive unfair dismissal. The LC held that the appellant/employees had voluntarily resigned and that there had been no constructive dismissal. The *onus* was on them as employees to prove that they did not intend to terminate the contract and that constructive dismissal would be present where the employer forces the employees to resign, or where the work environment was too difficult to continue working there.[117] In a scenario where the employee terminates the contract or agrees to its termination, that agreement must be prompted or caused by the conduct of the employer.

The court further agreed with the submission that constructive dismissal takes place when the employer renders the relationship with the employee so intolerable that the employee feels that they have no option but to resign, the termination of the contract becomes that of the employer. This accords with the Namibian Labour Court approach in *Kavekotora*[118] where the South African approach to the concept of constructive dismissal was accepted.[119] It was held that from the evidence, both employees voluntarily opted to resign; in other words, they intended to terminate the employment relationship.[120] It could, therefore, not be said that the employer engaged in conduct that rendered the further employment of the appellants intolerable. The respondent was thus not culpably responsible for Van Zyl and Raath's resignations in the sense that the respondent had without reasonable and probable cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with Van Zyl and Raath. The arbitrator was right in finding that the appellants did not discharge the onus to establish that they were constructively dismissed in the circumstances.[121]

6 2 Forced Resignation or Constructive Dismissal

Unlike in *Kavekotora* and *Van Zyl* in which the Namibian Labour Court found the resignations by the employees to be voluntary and not constructive dismissals, the LC in *Kutewee v Lida Cleaning Services (Pty) Ltd*[122] found that the employees were misled into signing letters of resignation while the impression created was that they were signing letters of demotion. The employer – made up of husband, wife, and son – contended that the employees had resigned voluntarily while the employees argued that they did not, hence the only question before

115 *Kavekotora* paras 32–33.

116 2017 NALCMD 28 (1 September 2017) ("*Van Zyl*").

117 *Van Zyl* paras 13–14 quoting *Transnamib Ltd v Swartz* NLLP 2002 2 60 (NLC).

118 *Kavekotora* para 27.

119 *Van Zyl* para 15.

120 *Van Zyl* para 17.

121 *Van Zyl* para 19.

122 2018 NALCMD 6 (13 April 2018) ("*Kutewee*").

the Arbitrator was whether the employees/appellants had resigned voluntarily or not. After analysing the parties' evidence, the Arbitrator was convinced that the appellants failed to prove that they were forced, induced, or misled in any manner to resign.[123] Counsel for the appellants referred to the CCMA definition of "resignation" in *Newton v Glyn Marais Inc.*[124] to the effect that: "Resignation is a unilateral act by the employee. If the employer has a hand in the decision to resign, then that might well constitute a constructive dismissal and be the overt act by the employer that constitutes the proximate cause for termination."[125]

After considering the events leading up to the signing, the court could infer that an atmosphere of fear and intimidation was created, which became apparent when the appellants actually signed the documents. This atmosphere would negate any claim of freedom of choice or voluntariness on the part of the appellants. The happenings at this stage would lead one to conclude that the respondent had made a decision to get rid of the appellants *en masse*.[126] Given the hostile environment in the boardroom at the time of signing, coupled with accusations of collective guilt of fraudulently conducting private laundry business at the expense of the respondent, it is reasonably possible that the appellants felt intimidated and did not feel free to exercise their rights to refuse to sign the documents or and demand the presence of their Union representative before signing.[127]

Four further instances of the likelihood of involuntariness in signing the resignation of the employees, in this case, can be garnered from the following: first, considering the unequal relationship between the appellants and their employer's representatives it is fair to say that the respondent's representative stood over the appellants in a position of authority whereas the appellants were in a subservient or subordinate position *vis-à-vis* their employer. In such an unequal relationship, the appellants' courage to assert their rights such as demanding copies of the signed documents was limited, and they did not feel free to assert their rights.[128] Second, there was no evidence to show that the matter was urgent so much so that it could not wait for the Union's representatives to be present and assist the appellants with allegations levelled against them. The respondent's persistence to forge ahead with the signing of the documents in the absence of the Union representative was unconscionable, oppressive, and unfair.[129] Third, it was unconscionable for the respondent's representative to have unilaterally proceeded to subject the appellants to what appeared to be, a proverbial, kangaroo court, where Mr Lloyd Winterbach was, so to speak, the prosecutor, the interpreter, the judge, and the executioner. He drafted the documents, proceeded to explain the documents in English and Afrikaans, of which he was aware the appellants were not fluent; after the appellants had signed the documents, he withheld the documents from them allowing them no copies for their records.[130] Fourth, the appellants were under extreme duress and were deliberately placed under the wrong impression, if not outright hoodwinked that they were signing demotion letters.[131]

After taking all the relevant facts into account, the conclusion reached by Angula DJP was that the appellants had proved on the balance of probabilities that their purported resignations were not voluntarily made and that they were made to sign the letter of resignation under a coercive and intimidating atmosphere. Further, they were misled into believing that they were signing

123 *Kutewee* para 32.

124 2009 1 BALR 48 (CCMA) para 49.

125 *Kutewee* para 34.

126 *Kutewee* paras 48–49.

127 *Kutewee* paras 52–53.

128 *Kutewee* para 69.

129 *Kutewee* para 70.

130 *Kutewee* paras 54 and 71.

131 *Kutewee* para 72.

letters of demotion for the three supervisor appellants, and their non-supervisor appellant, a letter to be taken back to work and transferred to another branch.[132] Since the appellants had discharged the evidential burden that they had not voluntarily resigned, the only conclusion is that they were constructively dismissed by the respondent.[133] Finally, given the facts emerging from the evidence, the inevitable conclusion was that the appellants were constructively dismissed in the circumstances and that the appellants were held entitled to severance benefits due to them in terms of the Labour Act No 11 of 2007.[134]

TO BE CONTINUED.

132 *Kutewee* para 73.

133 *Kutewee* para 74.

134 *Kutewee* paras 83–84.