

“Constructive dismissal in South Africa Prospects and Challenges”

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A MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTERS OF LAWS (LLM) IN LABOUR LAW IN THE
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ABSTRACT

Constructive dismissal comes into the equation when an employer behaves in such a manner that eventually and ultimately leads to the employee, being the receiving party, in the employment relationship, to terminate the employment contract. This termination must be the direct result of the conduct of the employer that irreparably frustrated the relationship and made it impossible for the employee to remain in the service of the employer in question. The law of constructive dismissal requires a balance between the competing interests of employees and employers. The employee is the one who makes the claim and determines whether to accept the changes made to his position or to resign and seek damages for wrongful dismissal. A factor which creates further uncertainty is that the employee also controls when to make the claim. Although the employee has greater control over constructive dismissal claims, an employer can take steps to limit the risk of an employee making a claim of constructive dismissal.

DECLARATION BY SUPERVISOR

I, **Adv. RUEBEN LETSEKU**, hereby declare that this mini-dissertation by **MABJANA PERTUNIA THULARE** for the degree of Master of Laws (LLM) in Labour law be accepted for examination.

Signed-----

Date-----

Adv. RUEBEN LETSEKU

DECLARATION BY STUDENT

I, **Mabjana Pertunia Thulare**, declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Law (LLM) in Labour law has not been previously submitted by me for a degree at this university or any other university, that it is my own work and in design and execution all material contain herein has been dully acknowledged.

Signed-----

Date-----

Mabjana Pertunia Thulare

DEDICATION

I dedicate my dissertation work to my family and many friends. A special feeling of gratitude to my late parent, Dikeledi Josephine Thulare whose words of encouragement and push for furthering my studies. My Husband has never left my side and he was always encouraging me to study .I also dedicate this dissertation to my many friends and church family who have supported me throughout the process.

I will always appreciate all they have done, especially Podu Mamabolo for helping me develop my technology skills, Happy Tshikovhi for the many hours of proofreading, I dedicate this work and give special thanks to my Husband Dichechele Nelson Sebone and my wonderful daughters Motlatjo, Mancha and Motlhatlego for being there for me throughout the entire master's program. They have been my best cheerleaders.

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TABLE OF STATUTES

1. Constitution of the Republic of South Africa Act 108 of 1996.
2. Labour Relations Act 66 of 1995
3. Labour Relations Act of 1956.
4. Harassment Act no. 17 of 2011.
5. Employment Equity Act 55 of 1998.

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LIST OF ABBREVIATIONS

A I R C	Australian Industrial Relations Commission
CCMA	Commission for Conciliation Mediation and Arbitration
CD	Constructive Dismissal
EEA	Employment equity Act
LRA	Labour Relations Act
SH	Sexual Harassment

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2. Albany Bakeries Ltd v Van Wyk Labour Appeal Court CSA/04, 9
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15. Murray v Minister of Defence 2009 3 SA 130 (SCA)
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26. Western Excavating (ECC) Ltd V Sharp, 1978 irlr 27.
27. Whittaker v Unisys Australia Pty Ltd 2010 192 IR 311
28. WL Ochse Webb & Pretorious (Pty) Ltd v Vermeulen 1997 18 IJL 361
(LAC).

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Chapter one: introduction

1. Historical background of the study

1.1 Introduction

South African labour law is concerned with the attainment of fairness for both the employer and the employee. In weighing up the interests of the respective parties it is of paramount importance to ensure that a delicate balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity.¹ The history of constructive dismissals in South Africa imitated from the English law in 1986, when an employee successfully challenged the employer on this particular concept after an incident relating a forced resignation. The common law neither recognizes nor upholds the notion of fairness and equality in the work place.² It is premised on pure contractual principles, limiting the parties' enforceable rights and obligation to and sourcing their legal remedies in the terms of the agreement on which their relationship is based.³

From the literature it is clear that constructive dismissal, as we know it today, originated from our English counterparts.⁴ Constructive dismissal comes into the equation when an employer behaves in such a manner that eventually and ultimately leads to the employee, being the receiving party, in the employment relationship, to terminate the employment contract.⁵ This termination must be the direct result of the conduct of the employer that irreparably frustrated the relationship and made it impossible for the employee to remain in the service of the employer in question.⁶

Since the concept of constructive dismissal was imported into South African law from English law in the 1980s, English case law has, and may continue to have, a substantial influence on the development and interpretation of the law relating to constructive dismissal in South Africa. Modern labour law is a hybrid of status and contract. At different stages in history legislation has played a major role in regulating the employment relationship.⁷ During times that the employment relationship is heavily regulated by legislation, the relationship has been described as a status relationship as opposed to a contractual relationship.⁸ However, even when the employment relationship is heavily regulated in terms of legislation, a contract has

¹ Vettori S, The role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals, PELJ 2012(15) 4.

² Grogan J, *Dismissal, Discrimination and unfair Labour practices*. 2007. p.36.

³ *Ibid.*

⁴ This is an extract of the master's thesis by Loggerenberg. For a full discussion on Constructive Dismissal in Labour Law See the LLM thesis of Johannes Jurgens Van loggerenberg, University of Port Elizabeth.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Vettori S, Constructive Dismissal and Reputation of Contract: What must be proved? 2010. p.1.

⁸ *Ibid.*

always been a necessary foundation for the creation of the employment relationship.⁹

The law relating to constructive dismissal is no exception to being a hybrid of legislation and contract. It has its origins in the common law and is also regulated in terms of legislation in both England and South Africa. As is the case in English and American Law, the court has been willing to accept the concept of a constructive dismissal.¹⁰ The notion of “constructive dismissal” is derived from English law. Cameron JA in *Murray v Minister of Defence*¹¹ explains:

“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.”

An employee cannot make a claim for constructive dismissal on its own. Constructive dismissal is an argument that is typically made in the context of a dismissal-based claim where the employer is arguing (or is likely to argue) that a dismissal did not occur. Not every employee who leaves his or her employment because of his or her employer’s conduct will be able to successfully argue that a constructive dismissal occurred.¹² The employee must prove that the action of the employer was the principal contributing factor which led to termination of the employment relationship.¹³ The employee must show that something the employer did, or failed to do, left him or her with no other option but to resign.¹⁴

When an employee resign 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.¹⁵ The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment.

⁹ *Ibid.*

¹⁰ Le Roux *et al*, *The South African law of unfair dismissal* (2010) 9.

¹¹ 2009 3 SA 130 (SCA) para 8.

¹² <http://www.elcwa.org.au/factsheets/Fact%20Sheet%20-%20Constructive%20Dismissal.pdf>: found on the 17.07.2013.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Bedix S, *Industrial Relations in South Africa* (2010) 108.

1.2 The problem stated

A constructive dismissal claim premised on a change to a fundamental implied term in an employment contract is more complex because the pre-change state of the employment relationship is not easy to prove. Implied terms often figure prominently in any constructive dismissal claim and will frequently be the focal point in any dispute. Terms can be implied by the court based on either a policy rationale or on the evidence of the parties' common intentions at the time of contracting, similar to traditional contract law.

In claiming constructive dismissal the onus is on the employee to prove that the contract was repudiated by the intolerable working conditions.¹⁶ The assessment of the tolerability is based on the perspective of a reasonable person in the shoes of the employee with the same background, life experience and position. *In Masondo v Crossway*¹⁷ the employee was compensated for an automatically unfair constructive dismissal in circumstances where she resigned after being required to work a night shift which clashed with her family responsibilities.¹⁸ The commission was satisfied that discrimination had taken place, as the employee had been prevented from tending to her child by the allocation to her of a late shift, a requirement that the employer was unable to justify.¹⁹

It is as a result of the advance in the implied term and as a result of a claim in constructive dismissal being founded upon fundamental breaches of implied terms many a person would be inclined to think, that what is in reality a walk out is now being turned into a legal action guised as constructive dismissal.²⁰ Viewed differently, what started out as an effort to shield an employee from wrongful actions by an employer who is desirous of circumventing the employment protection regime has now become transformed into a sword which lies at the employee's disposal by which he may combat any act of employer which earns his displeasure.²¹

Employers need to ensure compliance with existing laws and need to be suitably informed in order to assess the potential effects of laws upon their businesses. Termination of employment is a subject that can be confusing and daunting for employers.²² Dismissal can expose employers to challenges to the fairness of the dismissal and several other legal actions. Many Employers are under the impression that if an employee resigns, they are safe from unfair dismissal claims, but there are situations that arise, where an employee may successfully institute an unfair

¹⁶ Riley T, *J South African Mercantile and company law*. 2010. p.46.

¹⁷ 1998, 19 ILJ 171 (CCMA)

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ R, Sivagnanam *Constructive Dismissal – A walkout or a dismissal?* 5

<http://rsachambers.com/files/legal%20updates/Constructive%20Dismissal.pdf>: found on the 17.07.2013.

²¹ *Ibid.*

²² *Termination of your Employment: A hand Book for your Business*,

<http://www.australianbusiness.com.au/ABSG/media/Lawyers/termination-extract.pdf>: found on the 17.07.2013.

dismissal claim despite the fact they're the ones who terminated the employment relationship.²³

The test for whether an employment term is a “fundamental term” is not a subjective test. An employee’s personal distress as to the gravity of the change is not determinative as to whether the change will ultimately be viewed as a “fundamental change”. The Supreme Court in *Farber v. Royal Trust Co.*,²⁴ stated that the court must consider whether “a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were substantially changed” The contextual objective test set by the Supreme Court was applied by the Ontario Court of Appeal in *Smith v. Viking Helicopter Ltd.*,²⁵ In this case, the Court of Appeal found the trial judge to be in error for “concentrating on the state of mind of the respondent in this case to the virtual exclusion of a consideration of the company's announced policy.”

1.3 Literature review

In terms of Section 186(1) (e) of the Labour Relations Act²⁶, constructive dismissal takes place where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable. When an employee claims that he has been dismissed under Section 186(1)(e) of the LRA, it is not necessary for the employee to prove that the employer committed a breach of contract or that the employer’s conduct amounted to a repudiation of the contract of employment. What needs to be proven is that the conduct of the employer created circumstances that are, objectively speaking, intolerable for the employee.

*In Alibauy Bakeries Ltd v Van Wyk*²⁷ & others, the Labour Appeal Court noted that, before section 186 (e) in the labour Relations Act, the common law had usually been invoked in cases, based on allegations of constructive dismissal in terms of common law, a repudiation of contract would have constituted insufficient grounds for resigning and bringing a case of constructive dismissal.²⁸ However, Section 186(e) of the LRA, makes no mention of repudiation of contract. It states instead that reason for resignation should be that the employer has made continuation of the relationship impossible. In situations where a contract was repudiated but where working life of the employee did not become intolerable, no constructive dismissal could be alleged.

The mere existence of a breach is not necessarily a sufficient condition to prove intolerability. This type of dismissal occurs in circumstances when the employee abandons the contract, either by resigning or by leaving the place of employment and not returning. At first blush, it appears as if almost any type of conduct by the

²³ *Ibid.*

²⁴ 1997(1) S.C.R. 846 (SCA).

²⁵ 1989 (2) 228 (C.A).

²⁶ Act 66 of 1995

²⁷ Labour Appeal Court CSA/04, 9 November 2004: 13 May 2005

²⁸ Labour Appeal Court CSA/04, 9 November 2004: 13 May 2005.

employer may be regarded as having the potential for a complaint of constructive dismissal. Initially, it was thought that “unreasonable conduct” by the employer could form the basis for a complaint of constructive dismissal. It has been repeatedly held by our Courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer’s conduct was unfair or unreasonable (‘the unreasonableness test’) but whether “the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he evinced an intention no longer to be bound by the contract”.

*In Mahlangu v Amplats Development Centre*²⁹ the resignation of an employee on the basis of what he perceived to be racial discrimination that manifested itself in a different rated salary was not treated as a dismissal, as the employee reacted emotionally and disregarded the true reasons for this differentiated salary. Not all constructive dismissals are unfair. In the case of *WL Ochse Webb & Pretorious (Pty) Ltd v Vermeulen*³⁰, the resignation of an employee after a change in his conditions of employment was found to be a fair constructive dismissal, because the change was for a sound commercial reason and his employer did consult him beforehand.

The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded v Loots*³¹, the LAC found that the test is whether the employer, without reasonable and proper cause, conducted itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract.

It is the court's function to look at the employer's conduct as a whole and determine whether its effect, judged reasonable and sensibly is such that the employee cannot be expected to put up with it. *Van Greunen v Johannesburg Fresh Produce Market (Pty) Ltd* – (2010) 19 LC 6.13.1 is one such example where the applicant just could not satisfy the court as to the facts of constructive dismissal. The employer changed her terms and conditions of employment, which can be a ground for constructive dismissal, however the conduct of the employer must be unjustified and the working conditions intolerable, in this case it was not.

It is not enough to look at the subjective feelings of the employee alone, attention must rather be given to the belief of the employee which must be a reasonable belief.³² The employee must also prove that the employer was in fact responsible for creating the conditions that induced this belief.³³ A mere claim by employees that

²⁹ 2002 23 ILS 910(LC).

³⁰ 1997 18 IJL 361 (LAC).

³¹ 1997 18 ILJ 981 (LAC)

³²This is an extract of the Masters’s thesis by Smit. For a full discussion on Constructive Dismissal and Resignation due to Work Stress see the LLM thesis of Estie Smit, North-West University (Potchefstroom Campus).

³³ *Ibid* at 10.

they believed that there was no point in continuing with the employment relationship is not in itself sufficient. The employee must also prove that the belief was reasonable. Reasonableness in this context firstly means that the circumstances which the employees' concerned claim induced their belief was such as to justify their claim; secondly that the circumstances in fact existed. Unreasonable conduct on the part of the employer may be construed as conduct which is repudiatory of the contract and may give rise to a claim of constructive dismissal.

The onus is on the employee to prove that it was the employer who was responsible for creating conditions that induced the employee's belief.³⁴ For a complaint of constructive dismissal to succeed, it is essential that the employee should act with promptness. It is fatal to a claim based on constructive dismissal if there is undue delay in responding to the changes that were imposed by the employer or generally, in reacting to the repudiatory conduct of the employer.

It is therefore, essential that the employee make up his mind soon after the changes to the terms of the contract are implemented by the employer.³⁵ The concept of constructive dismissal is derived from the non-consensual unilateral variation of the contract of employment by the employer.³⁶ Hence, the dissatisfied employee is entitled to consider the variation to be a repudiation of his contract and is entitled to complain that he had been constructively dismissed and so he must, as soon as he perceives that his contract has been varied without his consent, walk out of his employment. If he stays on without protest and continues to work under the new terms/conditions imposed on him by the employer, the employee will be regarded as having affirmed the contract and impliedly consented to the changes.

In context of a constructive dismissal claim, an employer's breach of a term and/or condition of the employment contract must be unilateral. In other words, for a breach to exist there must be an absence of consent on the part of the employee to any change in the terms and/or conditions implemented by the employer.³⁷ An employee's express or tacit consent to a fundamental change will be fatal to a constructive dismissal claim. In the context of a constructive dismissal claim employers frequently argue that the employee has, by their conduct, agreed to or condoned the changes to their employment and therefore waived any right to claim constructive dismissal. The existence of an employee's consent to a fundamental change will always be determined on a case by case basis.

³⁴ *Ibid.*

³⁵ R,A Applasamy The Doctrine OF Constructive Dismissal 6. See also, <http://www.unioncimb.org.my/home/news/TheDoctrineOfConstructiveDismissal.pdf>. Accessed on the 16.07.2013.

³⁶ *Ibid.*

³⁷ E, A. Schirru, J, CONSTRUCTIVE DISMISSAL –A PRIMER Brown 3, see also, http://www.kmlaw.ca/site_documents/EAS_ConstructiveDismissalAPrimer_6feb12.pdf. Accessed on the 16.07.2013

In *Old Mutual Group Schemes v Dreyer*³⁸ Conradie JA cautioned that constructive dismissal is not for the asking. He held that generally it will be difficult for an employee who resigns to show that he has actually been constructively dismissed, because the onus of proof on the employee in this regard is a heavy one.³⁹ It shows that even where an employee experiences a loss of job security as a result of attempts by the employer to protect his business, and this leads to the employee's resignation, it will not rise to the standard of constructive dismissal.

In *Mqolomba v Vodacom Group Ltd*,⁴⁰ the applicant resigned and claimed that she was constructively dismissed by her employer, Vodacom. Ms. Mqolomba testified that she transferred to another department and that in this department the following happened to her:

- She was overlooked when work was distributed;
- Her manager hinted that he only wanted employees with legal degrees and she did not have such a degree;
- She was overloaded with work when other employees left the department;
- Pressure was put on her to delay her studies since her manager could not afford her taking study leave during the year;
- Her performance was assessed on the wrong system and she only scored 68% for the year;
- Other "intangible people issues" caused her to feel that her employment had become intolerable.

Mqolomba did not lodge a grievance or report her concerns to a senior person in Vodacom. After deciding to resign *Mqolomba* gave notice and served her notice period.

The Commissioner stated that; "A final key concept is that one has to understand who the employer actually is. In the case of small businesses where the owner actually manages the business himself, he is the employer. In larger or corporate environments, there is generally always someone who is in a higher position than the person who is allegedly making life intolerable for one. In situations such as this, the alleged perpetrator is not the employer.

The employer becomes that person, or persons, who are more senior to the alleged perpetrator and who are divorced from the alleged intolerability that is occurring in the employee's specific working area. Thus, if senior management is not aware of what is allegedly happening to a specific individual, then the employer has not made

³⁸ 1999 20 ILJ 2030 (LAC)

³⁹ *Ibid.*

⁴⁰ (2011) 20 CCMA 6.13.1

anything intolerable because they are completely unaware of it and are not party to it. Hence, the test that has developed in our law relating to constructive dismissals, which is, that the employer must be given the opportunity to remedy the wrong. How is this accomplished? The employee must bring this to the attention of senior management. This can be done formally through a grievance process, with grievance documents being served on either senior management or the HR department, or informally to the same individuals.

A claim for constructive dismissal will only be possible where all internal processes have been exhausted, before resignation.⁴¹ This requires that an employee must bring the grievance to the attention of the employer and give the latter the opportunity to rectify the matter. In *Aldendorf v Outspan International Ltd*⁴² an employee who could reasonably have lodged a grievance but failed to do so before resigning could not persuade the arbitrator that he had no option but to resign. In *Albany Bakeries v Van Wyk and Others*⁴³ the Court held that it would be opportunistic for an employee to leave and claim that it was a result of intolerability, when there was a perfectly legitimate avenue open to solve his problem.

The Labour Court, however, took a different view on the matter in *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others*⁴⁴. In this case the employee did not follow an internal grievance procedure before she resigned (and claimed constructive dismissal), because she knew it would be futile. The Court held that the failure to institute a grievance did not influence her claim for constructive dismissal. There would have been no sense in following a procedure the outcome of which was pre-determined.⁴⁵

In *Pretoria Society for the Care of the Retarded v Loots*,⁴⁶ it was found that "the appellant (employer) had rendered the working environment intolerable for the respondent by, inter alia, "throwing the book at her", finding her guilty of matters for which she could not be held responsible, humiliating her by publishing the news of her final written warning to the parents of inmates, and depriving her of keys." The appeal (against the finding that the constructive dismissal was proved) was accordingly dismissed. It is common practice for employers to "throw the book" at employees who, for various obscure reasons, are suddenly "no longer suitable." Very often, the true reason is that cheaper labour can be found. Employers would do well to take note that while constructive dismissal may be difficult to prove, it is not impossible. A claim for constructive dismissal will only be possible where all internal processes have been exhausted, before resignation. This requires that an employee

⁴¹ Dekker A, H, *Did He Jump or Was He Pushed? Revisiting Constructive Dismissal*. 2009. p.349.

⁴² 1997 18 ILJ 810 (CCMA).

⁴³ 2005 26 ILJ 2142 (LAC) in par 28).

⁴⁴ 2008 29 ILJ 356 (LC).

⁴⁵ *Supra* (n 11).

⁴⁶ [1997] 6 BLLR 721 (LAC)

must bring the grievance to the attention of the employer and give the latter the opportunity to rectify the matter.⁴⁷

The mere fact that one's job is precarious is clearly not sufficient to establish constructive dismissal.⁴⁸ Likewise, the existence of "tension in the office" should "never satisfy the requirements for a constructive dismissal because the courts would then be inundated" with alleged constructive dismissals which were really just "controversial engagements" between employer and employee. In deciding whether the employee was forced to resign as a result of the employer's conduct, relevant factors include "the timing of the resignation, the education and literacy of the employee and the availability of professional or other assistance.

It is clear that under the broad concept of "constructive dismissal", the Courts are adding more and more responsibilities on employers. Employers have to now shoulder greater responsibilities towards its employees in the context of health and safety, co-operation and trust and confidence.⁴⁹ In conclusion, we may say that for the future, more emphasis will be placed on the employer's conduct with respect to express terms and the way in which the express terms are invoked or utilized, as well as the employer's conduct with respect to implied terms, particularly the implied term relating to co-operation and mutual trust and confidence. Employers would be well advised to give much thought to their actions and should refrain from conduct which is likely to lead the employee to think that he/she is being squeezed out of employment.⁵⁰

Constructive Dismissal in other Jurisdictions

According to Australian law 'Constructive dismissal' is a common law concept to describe, in a shorthand way, the result of an employee's acceptance of an employer's repudiation of the contract of employment.⁵¹ The repudiation must be, in Lord Denning's phrase,⁵² 'conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

Constructive dismissal has been held to extend to cases where an employee resigned after the employer threatened to report the employee to the police, and where an employee under investigation resigned after the employer failed to provide reassurances that they would not be terminated.⁵³ However, a recent decision of the

⁴⁷ *ibid.*

⁴⁸ N, Whitear-Nel and M Rudling, *Constructive Dismissal A tricky horse to ride* (2010) P.9.

⁴⁹ *Supra* (n 14).

⁵⁰ *Supra* (n 27).

⁵¹ M, Rinaldi, Repudiation of Employment Contracts and Constructive Dismissal: Where are we at? See also, <http://150.203.86.5/COAST/events/LabLaw/abs/rinaldi.pdf>: found on the 17.07.2013.

⁵² *ibid.*

⁵³ A, A, Robinson, Resignation and constructive dismissal 1, Issue 21 March 2003.

Australian Industrial Relations Commission (AIRC) suggests that this wider interpretation may no longer find favour.⁵⁴

The elements of constructive dismissal were outlined by the Supreme Court of Canada in *Farber v. Royal Trust*,⁵⁵ which was an appeal from Quebec. The Supreme Court of Canada held that the law regarding constructive dismissal was similar as between Quebec and the common law provinces, and referred to common law cases in reaching its decision. The Court, however, noted that each case must be decided on its own facts.⁵⁶

The British Columbia Court of Appeal has stated that if an employee asserts that he has been constructively dismissed,⁵⁷ he or she must establish that there has been conduct on the part of the employer which breaches an express or an implied term of the contract of employment that is fundamental in that it goes to the very root of the contract. If no such term is breached, then the employee has not been constructively dismissed. For instance, reducing the vacation pay entitlement is unlikely to give rise to a constructive dismissal. Also, a constructive dismissal does not occur where the “core” responsibilities of the employee remain, notwithstanding changes to the employee’s other duties and responsibilities.

It has been recognised by most courts in recent years that employment contracts are subject to the doctrine of repudiation and the need for the employee to elect either to accept the repudiation and treat the contract as at an end, or affirm the contract and treat it as continuing on foot. The legal principles are now reasonably well settled, and were well summarised by the new Fair Work Australia president, Justice Iain Ross, when sitting as a judge of the Supreme Court of Victoria in *Whittaker v Unisys Australia Pty Ltd*⁵⁸.

More recently the Common Law has recognised certain implied terms in employment contracts which may have a bearing on the obligations on an employer in relation to dismissal. An implied obligation of good faith or a duty of mutual respect between the parties has been recognised by the Industrial Relations Court of Australia.⁵⁹

⁵⁴ *Ibid.*

⁵⁵ <http://documents.idsupra.com/56fe2576-2247-42d8-9cd1-8cb554e55250.pdf>, see also, Managing Flexibility in the Workplace While Avoiding Constructive Dismissals,p2.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ (2010) 192 IR 311.

⁵⁹ *Ibid.*

1.4 Aims and objectives of the study

- The study aims to benefit prospective students and the academic body of knowledge with regard to constructive dismissal as a component of our South African labour law.
- The study will serve as an eye opener for prospective students and practitioners of labour law with special interest and speciality in labour law.
- To evaluate the impact of constructive dismissal in the work place

1.5 Research Methodology

The research methodology to be adopted in this study is qualitative. The researcher will go on historical excursion and exposition based on robust jurisprudential analysis. The research is library based and reliance is based on materials such as journals, textbooks, case law, conference papers, law reports, legislation and electronic sources.

1.6 Scope and limitation of the study

The study consists of five chapters. Chapter one is the introductory chapter laying the foundation of the study. Chapter two, the position of the law will be discussed, together with issues under constructive dismissal; and the grounds or factors relating to constructive dismissal. Chapter 3 the test to determine constructive dismissal will be discussed. Chapter 4 Sexual Harassment as a factor which constitutes constructive dismissal will be discussed. Chapter 5 will consist of Recommendations and Conclusions.

Chapter two: factors relating to Constructive dismissal

2.1 Introduction

In the modern business environment, organisations must adapt to increasingly complex technological, political, economic and legal frameworks. Various authors and academics endeavoured to define constructive dismissal and all had the same or at least some of the elements present, to justify constructive dismissal. The most glaring element being the termination of employment as a result of the any conduct that is tantamount to a breach going to the root of the relationship by the employer, that frustrated the relationship between the employer and the employee and rendered it irreparable.

2.2 Definition of Constructive Dismissal

Although there is no common law definition of constructive dismissal, the term was defined by the authors Cameron *et al* quoted with approval in *Howell v International Bank of Johannesburg Ltd*.⁶⁰

“Actions on the part of the employer which drive the employee to leave (whether or not

there is a form of resignation) will amount to a constructive dismissal.”

The concept of “constructive dismissal” was first imported into the South African jurisprudence from the English law in our labour courts in 1986 in the matter of *Small & others v Noella Creations (Pty) Ltd*.⁶¹ In this case certain employees in the employment of the respondent resigned because they were not willing to work for the respondent under a contractual stipulation that stock unaccounted for would have to be paid for by staff. Having resigned, the employees were reinstated in terms of section 43 of the LRA,⁶² and the concept of constructive dismissal became part of unfair dismissal law.

The law silent on what circumstances can bring about a constructive dismissal. This is determined by the common law which “holds that there must be circumstances amounting to a fundamental or repudiatory breach of contract by the employer.”⁶³ In short therefore, there is no difference in the circumstances that will bring about a constructive dismissal in terms of the common law and those which will result in a constructive dismissal in terms of statute.⁶⁴

Until 1995, it was clear that decisions and academics favoured the view that element of constructive dismissal was that the employer breached a material term of the

⁶⁰ (1990) 11 ILJ 790 (IC) at 795C-D. See also J, Van Loggerenberg, *Constructive Dismissal in Labour Law*: 2003.

⁶¹ (1986) 7 ILJ 614 (IC).

⁶² Act of 1956

⁶³ Constructive Dismissal and Repudiation of Contract: What Must be Proved? STELL LR 2011 , P178.

⁶⁴ *Ibid*.

contract of employment, justifying the employees' decision to terminate the contract of employment.

However, such act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified.⁶⁵ Thus, like an actual dismissal, a constructive dismissal may or may not be unlawful (in the sense of constituting a breach of the employment contract) and may or may not be unfair. It is not, as is sometimes mistakenly thought, either inherently unlawful or unfair.⁶⁶ Broadly construed to embrace the circumstances in which the employer's conduct had made the continued and future relationship between the employee and the employer impossible.⁶⁷ In the case of *Pretoria Society for the Care of the Retarded v Loots*⁶⁸ the Labour Appeal Court dealt with constructive dismissal under the previous Labour Relations Act and laid down a number of features:

(a) When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he would have carried on working indefinitely had the unbearable situation not been created.⁶⁹

(b) She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.⁷⁰

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

d) It is the employer's unlawful act which has precipitated the refusal to work and the acceptance of the employer's repudiation. The two envisaged steps are not always easily separable as the enquiry into whether the employee intended to terminate the employment by accepting the repudiation will often involve an enquiry into whether such resignation was voluntary or not.

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

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ *Supra* (n2) at 15.

⁶⁸ 1997 6 BLLR 721 (LAC).

⁶⁹ *ibid*

⁷⁰ *ibid*

(f) The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended any repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

The conduct of the parties has to be looked at as a whole and its cumulative impact assessed. In *Beets v University of Port Elizabeth*,⁷¹ it was found that the constructive dismissal takes place only if the employee resigned because of the employer's harsh, antagonistic and hostile conduct, and in another instance it was held that the resignation must be ascribed because the prospect of continued employment was intolerable.

In *Murray v Minister of Defence*⁷² a naval officer sued his employer in the High Court (naval officers are excluded from the LRA) for constructive dismissal and consequent damages. This SCA decision is important in two respects: (a) it developed the common law to incorporate the concept of constructive dismissal and (b) explicitly incorporated the concept of 'employer culpability' or 'blameworthiness' to the requirements for a claim of constructive dismissal. Regarding the first, the court stated:⁷³

"Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees."⁷⁴The court held that employees' may rely in civil claims on the notion of constructive dismissal because employees' rights under the common law have become virtually indistinguishable from their rights under labour legislation. In respect of the test for constructive dismissal, the SCA reiterated the High Court's summary of requirements as set out below:⁷⁵

"In order for the employee...to succeed on a claim based on constructive dismissal...the employee must be able to prove that he or she has terminated the employment contract; that the conduct of the employer rendered the continued employment relationship intolerable; that the intolerability was of the employer's making; that the employee resigned as a result of the intolerable behaviour of the employer and that the resignation or termination of employment was a matter of last resort. Finally, the employee bears the onus to prove that there has been constructive dismissal and that he or she has not in fact resigned voluntarily. And the

⁷¹ 2000 8 BALR 871 (CCMA)

⁷² 2008 6 BLR 513 (SCA)

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

employee should not delay too long in terminating the contract in response to the employer's intolerable conduct."⁷⁶

However it added the following consideration:

"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.⁷⁷ 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...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 this is the case."

2.3 Essential Considerations of constructive dismissal

This first consideration is focused on whether the employer's conduct indicates an intention to no longer be bound by one or more of the fundamental/essential terms and/or conditions of the employment contract, thereby repudiating it.⁷⁸ An understanding of the fundamental/essential terms and/or conditions of the employment contract is therefore essential, as the constructive dismissal claim is premised on a change to one or more of these terms and/or conditions.⁷⁹

An Action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by the employee.⁸⁰ The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or a unilateral change of a significant term of that employment.⁸¹ Employment contracts are made up of express and implied terms. The express terms of an employment contract will often include such things as remuneration, rank, hours of work etc.

Express terms set out in any employment contract provide the courts with a clear expression of the pre-change state of the employment relationship.⁸² Assuming the change to the employment relationship giving rise to a constructive dismissal claim is

⁷⁶ *Ibid.*

⁷⁷ Whitcher B, *Illegal contracts and unfair dismissal actions*, (2011) p 2.

⁷⁸ Ernest A *etal*, *Constructive Dismissal –A primer*,(2011), p131 See also http://www.kmlaw.ca/site_documents/EAS_ConstructiveDismissalAPrimer_6feb12.pdf. Found on the 21.10.2013 at 15:30.

⁷⁹ *Ibid.*

⁸⁰ John C.F, *Recent Developments in the Law of Constructive Dismissal* p2, see also http://www.hicksmorley.com/images/pdf/2012/Recent_Developments_in_the_Law_of_Constructive_Dismissal_JCF_1_.pdf. Found on the 22.10.2013 at 17:45.

⁸¹ *Ibid.*

⁸² *Ibid.*

a change to a fundamental/essential and express term set out in an employment contract, the task of making a constructive dismissal claim is more straightforward because it simplifies the before-and-after comparison required to make a successful constructive dismissal claim.⁸³

A constructive dismissal claim premised on a change to a fundamental/essential implied term in an employment contract is more complex because the pre-change state of the employment relationship is not as easy to prove. Implied terms often figure prominently in any constructive dismissal claim and will frequently be the focal point in any dispute.⁸⁴ Terms can be implied by the court based on either a policy rationale or on the evidence of the parties 'common intentions at the time of contracting, similar to traditional contract law.

Once the enquiry is framed by the question whether or not the employer breached the implied term of mutual trust and confidence, it broadens again to something approaching the disapproved test of reasonableness. Questions about degrees of fault, responsibility for what has gone wrong, and how intolerable the situation of the employee has become, all become relevant factors to the question of the breach of the implied term. The reintroduction of these factors brings back considerations of reasonableness and inevitably reduces the predictability of the test of constructive dismissal, one of the alleged advantages of the contract test.

2.4 Conclusion

When litigating a constructive dismissal claim, it is important to keep in mind that express or implied terms may operate to not only restrict employer conduct and support a constructive dismissal claim but also to permit certain employer conduct that otherwise could be viewed as a constructive dismissal. Therefore, each constructive dismissal case involves a contextual analysis of the individual workplace and the changes that occurred. There is no "one-size fits all" approach to constructive dismissal. The specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed. The Court will inquire into whether a reasonable person in the same position as the Plaintiff would have reached the same conclusion. While the abuse of employees and conduct by employers which indicate that the continuation of the employment relationship is futile are classic justification for claims of constructive dismissal, the counts and arbitrators have also accepted that employees were constructively dismissed if they were tricked in to resigning in the circumstances in which they would not otherwise have resigned

⁸³ *Ibid.*

⁸⁴ *Ibid.*

Chapter 3: The test to determine constructive dismissal

3.1 Introduction

The termination and dismissal of workers has always been a matter of great anxiety and inevitably poses a common equitable and legal problem to the employer on the one part and the employee on the other.⁸⁵ To minimize and prevent any inequality and injustice in industrial relations and to secure industrial harmony, certain law and regulations have been established. It is trite law that legal rules not only enumerate rights and duties of the employer and employee before and during the course of employment, but it also seeks to provide provisions governing the process of termination and dismissal.⁸⁶ This transparency between employer and employee ensures that disputes arising will be dealt with objectively and in accordance with equity and justice.⁸⁷

The test for establishing whether a person have been constructively dismissed should partly be subjective and partly objective regard must had to the perceptions of the employee at the time of the termination of the contract, as well as to the circumstances in which the termination took place.⁸⁸ A claim for constructive dismissal should only succeed if the repudiatory breach was the main cause, or in other words, “the effective cause” of the resignation.

The test for constructive dismissal can also be determined by the contract, i.e. did the employers conduct amount to breach of contract which entitled the employee to resign? The breach must be significant and go to the root of the contract. There is no unreasonable conduct test for constructive dismissal; the fact that there is constructive dismissal does not necessarily mean that the dismissal was unfair. The test for constructive dismissal is to be determined by the contract, i.e. did the employers conduct amount to breach of contract which entitled the employee to resign? The breach must be significant and go to the root of the contract.⁸⁹ There is no unreasonable conduct test for constructive dismissal; the fact that there is constructive dismissal does not necessarily mean that the dismissal was unfair.⁹⁰

Where the employee himself terminate the contract, with or without notice in circumstances where he is entitled to terminate it without notice by reason of employers conduct , this would amount to constructive dismissal; for although the employee resigns, it is the employers conduct which constitutes a repudiation of the contract and the employee accepts that repudiation by resigning.⁹¹ The employee must clearly indicate that he is treating the contract as having been repudiated by the

⁸⁵ Abdul R, *The test to Determine Constructive Dismissal: Malaysian Perspective: 2010*, P1.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2010) 199.

⁸⁹ Zimmerman R, Whittaker, S, *Good faith in European contract 14th ed* (2006) 334

⁹⁰ *Ibid.*

⁹¹ Selwyn, N *Law of employment 2nd ed* (2003) 399

employer and if he fails to do so by word or by conduct, he is not entitled to claim that he has been constructively dismissed.⁹² The doctrine of the constructive dismissal has had a somewhat chequered history.

3.2 Challenges in determining Constructive dismissal

The real problem was to determine the nature of the conduct of the employer which entitles the employee to resign.⁹³ Did such conduct have to amount to an actual breach of contract by the employer, or could any unreasonable conduct by the employer be sufficient to entitle an employee to resign? For a long time the latter theory held sway leading to some of the most bizarre and eccentric decisions in the whole of employment law.⁹⁴ This view has firmly disposed of by the court of appeal in *Western Excavating (ECC) Ltd V Sharp*,⁹⁵ and all previous decisions must be read subject to this case. The facts were that the employee was dismissed for taking unauthorised time off work. He appealed to the international disciplinary board which substituted a penalty of five days suspension without pay. This he accepted, but being short of money, he asked his employers if he could have an advance on his accrued holiday pay. This was refused; consequently he resigned and brought a claim for unfair dismissal, alleging that he was forced to resign by virtue of the employers conduct.

Constructive dismissal may occur in a last straw situation, in *Lewis V Motor world savagers cta*⁹⁶ it was stated that the breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to breach of the term, even though each incident may not do so. The last straw need not itself, be a breach of the implied term of trust and respect.⁹⁷

In *Bezuidenhout v Metrorail, Mr Bezuidenhout*⁹⁸ resigned in despair after he was charged with a number of offences he alleged were trumped up. Days before the contract expired by virtue of his resignation, the company held a disciplinary inquiry and dismissed him. The arbitrator held that, although the termination of the contract by the employer constituted a dismissal for purposes of Sec 186 1(a),⁹⁹ this did not preclude the employee from pursuing a claim for constructive dismissal. The arbitrator reasoned that the employee's resignation was a unilateral act by which the employee signified his intention to bring the contract to an end when the notice period expired.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ 1978 irlr 27.

⁹⁶ 1977 irlr 299.

⁹⁷ *Supra* (n28) at 404.

⁹⁸ 2001 9 BALR 926.

⁹⁹ LRA 66 of 1995.

Resignation therefore had the effect of terminating the contract for purposes of Sec 186 1(e). That the employee was contractually obliged to work during the notice period did not alter the legal consequences of the resignation. That a conventional dismissal occurred during the notice period did not therefore preclude *Bezuidenhout* from claiming that his resignation constituted a constructive dismissal.

The converse question arose in *Van der Merwe v Becker*,¹⁰⁰ in that case; Ms Becker was told on 21 January that her salary would be reduced from 1 March, failing which she would be retrenched. She resigned on 31 January, and claimed that she had been constructively dismissed. The commissioner found that, because the notice of termination of Ms Becker employment constituted a dismissal in terms of Sec 186 1(e), she could not possibly have resigned and claimed constructive dismissal after she was dismissed. As the commissioner put it, an employee cannot be dismissed twice, this analysis is debatable. The commissioner was apparently influenced by the fact that, after she received the notice of termination, Ms Becker could have referred a dispute concerning her dismissal to the CCMA in terms of Section 191(2A).¹⁰¹ However, that provision merely procedural; it allows employees to refer a dispute concerning their dismissal after they have received notice even though they have not yet been dismissed.

In terms of Section 190(1),¹⁰² a contract terminates on the date on which the contract is terminated: a contract terminated on notice terminates when the notice expires, not when the notice is given. That being the case, nothing prevents an employee from resigning and claiming constructive dismissal before or during a notice period.¹⁰³ Indeed, an employee in this position could possibly claim to have been both constructively and conventionally dismissed.¹⁰⁴ The test for establishing whether a constructive dismissal has taken place is therefore partly subjective and partly objective i.e. regard must be had to the perceptions of the employee at the time of the termination of the contract, as well as to the circumstances in which the termination took place.¹⁰⁵

3.3 The objective test to determine Constructive dismissal

Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may, amount to constructive dismissal. The test to determine constructive dismissal is objective: it is whether the conduct of the employer was such that a reasonable person in the circumstances of the employee should not be expected to persevere in the employment. As the particular

¹⁰⁰ 2004 (25) IU 139 (CCMA).

¹⁰¹ LRA 66 OF 1995.

¹⁰² *Ibid.*

¹⁰³ Grogan J, *Work place Law 10th ed* 205 (2013) p 199.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied. An employer is entitled to be critical of the unsatisfactory work of its employees and, in general, to take such measures - disciplinary or otherwise – as it believes to be appropriate to remedy the situation. There is, however, a limit. If the employer’s conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will be, in my view, constructive dismissal whether or not the employee purports to resign.

In *Chabeli v CCMA & others*¹⁰⁶ and the applicant, although he claimed to have been constructively dismissed, did not give any hint of a reason in his letter of resignation. Only in his founding affidavit in the review application had the applicant alleged that he had resigned because the respondent had made his employment intolerable by making unilateral decisions about his position. The application was dismissed.¹⁰⁷

In *Lang v GJP*¹⁰⁸ Services the Commissioner noted that “Intolerability” is not unfair per se, but also depends on who created the situation and how long it endures. The incident took place only once and the employer tried to rectify it. The employee should attempt to rectify the situation by all available means before terminating the employment relationship. The applicant had merely handed his keys to a colleague and declared that he would not be returning to work. He had made no attempt to seek advice or reason with his employer. While the owner’s conduct was unacceptable, the single incident was insufficient to render the employment relationship intolerable.¹⁰⁹

The law is clear that in assessing whether there has been a constructive dismissal of an employee the terms of the employment contract between the parties must be ascertained.¹¹⁰ The court must then consider whether the act or acts of the employer have been such as to constitute a repudiation of the fundamental terms of the contract. If so, the employee was constructively dismissed when the facts constituting the repudiation were completed.¹¹¹ Accordingly in a constructive dismissal action, if the employee is successful, they receive damages.¹¹² However, if the employee fails to meet the onus of showing on a balance of probabilities that the employer changed a fundamental term of employment, beginning an action will usually amount to repudiation of the employment agreement and result in the employee’s action being dismissed with the usual consequences.¹¹³

¹⁰⁶ (2009) BLLR 389 (LC)

¹⁰⁷ André Claassen & Jan du Toit Constructive Dismissal. 2010. P.25. Juta & Co. Cape Town.

¹⁰⁸ (2010) 19 CCMA 6.13.

¹⁰⁹ *Ibid.*

¹¹⁰ Janice Payne and Sonia Virc, Nelligan Constructive Dismissal Executive Employment Newsletter – (Volume VIII, No. 1, 2001)

¹¹¹ *Ibid.*

¹¹² Employment Law Conference- Changing Employment terms- Development in Constructive Dismissal 3

¹¹³ *Ibid.*

3.4 Two stage enquiry to determine Constructive Dismissal

There are no clear rules defining precisely when a constructive dismissal has taken place.¹¹⁴ The facts of each case must be established, interpreted and measured against general principles to determine whether the requirements for constructive dismissal have been met.¹¹⁵ The Supreme Court of Appeal (SCA) has held that very strict proof of constructive dismissal is required, and it has not readily found that circumstances complained of by employees constitute such a dismissal (*Murray v Minister of Defence*)¹¹⁶. In the case of *Old Mutual Group Schemes v Dreyer*¹¹⁷ Conradie JA cautioned that constructive dismissal is not for the asking. He held that generally it will be difficult for an employee who resigns to show that he has actually been constructively dismissed, because the onus of proof on the employee in this regard is a heavy one

It is well established that a two-stage enquiry is necessary to determine whether an unfair constructive dismissal has occurred.¹¹⁸ A failure to appreciate this has been held to be a reviewable irregularity in the proceedings by the arbitrating commissioner. The first stage of the enquiry places an onus on the employee to show that she resigned only because her employer made her continued employment intolerable; and thus that she was effectively dismissed by the employer.¹¹⁹ The second stage of the enquiry requires that the dismissal be proved to be unfair. A fair constructive dismissal would be a case in which the employee found her continued employment to be intolerable but in which the employer was not at fault for the situation.¹²⁰

Should the facts reveal that the reason behind the constructive dismissal was one contemplated in section 187 of the LRA, the constructive dismissal may be found to be automatically unfair.¹²¹ While the two stages are distinct enquiries, they should not be treated as completely independent of each other. Evidence relevant to the first stage of the enquiry may well prove to be relevant to the second stage of the enquiry. In assessing whether a constructive dismissal has taken place, the court must assess the employer's conduct holistically.¹²² The reason for this is to ascertain whether, objectively speaking, the work situation was so intolerable for the employee that she could not be expected to put up with it and so was forced to resign. The test for constructive dismissal is thus objective. An employee's subjective perception that

¹¹⁴ Whitear-N and Matthew R, Constructive Dismissal: A tricky horse to ride: 193 see also: http://reference.sabinet.co.za/webx/access/electronic_journals/obiter/obiter_v33_n1_a13.pdf

¹¹⁵ *Ibid.*

¹¹⁶ 2006 27 ILJ 1607 (SCA) par 29

¹¹⁷ 1999 20 ILJ 2030 (LAC)

¹¹⁸ *Supra* (n 53)

¹¹⁹ Section 192 of the LRA.

¹²⁰ *Supra* (n 58)

¹²¹ *Ibid.*

¹²² *Ibid.*

she is being forced to resign is not decisive. The employee's perception must also be objectively reasonable in all the circumstances.¹²³

3.5 Conclusions

In today's ever changing and dynamic workplace environments, understanding the nuances of a constructive dismissal claim is essential to the practice of employment law. The Court must be satisfied that the employer has fundamentally breached the terms of the employment contract. Actions for constructive dismissal must be founded on conduct by the employer.

The mere fact that one's job is precarious is clearly not sufficient to establish constructive dismissal. Likewise, the existence of "tension in the office" should "never satisfy the requirements for a constructive dismissal because the courts would then be inundated" with alleged constructive dismissals which were really just "controversial engagements" between employer and employee. Determining whether an employee has been constructively dismissed, in any given case, is a highly fact-driven exercise.¹²⁴ While the principles drawn for the past two years of constructive dismissal cases are not new, they confirm existing themes, and further establish employer and employee obligations in the face of fundamental changes.¹²⁵ This continues to be an area of law where its application is usually more difficult than the legal principles themselves and each case is decided on its unique facts. Therefore, each constructive dismissal case involves a contextual analysis of the individual workplace and the changes that occurred. There is no "one-size fits all" approach to constructive dismissal.

¹²³ *Ibid.*

¹²⁴ Jennifer M.F; Constructive Dismissal in Review: Lessons Learned from the Past Two Years, 2008. 29

¹²⁵ *Ibid.*

Chapter 4: Sexual Harassment constituting constructive dismissal

4.1 Introduction

Sexual harassment in the workplace refers to an verbal or physical act with a sexual nature, performed in recruitment or in the workplace by a boss, manager, employee, client or customer of a working unit, that is unwelcomed by the person receiving it and has caused the person to feel violated, insulted, and being in an unbearable hostile environment.¹²⁶ Workplace covers any place under the direct or indirect control of the employer that an employee needs to be present or go to in order to carry out work.¹²⁷ It includes office and other locations where the job responsibilities are undertaken, such as offices of clients, destinations of business trips, venues of business lunch/dinner, business branches, homes of clients, etc. and also the appropriate extension of the workplace, such as excursion, social activities, staff gathering after work that are organized by the company.¹²⁸

Undoubtedly, conduct by employees amounting to sexual harassment has always occurred. It is only in the last fifteen years that the legislature and judiciary have sought to introduce standards in the work place to eliminate sexual harassment. Subject to certain preconditions being met, employees are entitled to bring an action against their employer claiming relief for unfair dismissal, irrespective of the circumstances surrounding the dismissal. Accordingly, an employee dismissed in circumstances alleging sexual harassment can apply to the tribunal for a determination of the matter.

The case of *G v K*¹²⁹ was the first case in South Africa to address the problem of sex discrimination. After *G v K*, several employees who were subjected to continual sexual harassment, were held to have been constructively dismissed if they resigned in desperation. Harassment's now deemed a form of unfair discrimination by the Employment Equity Act,¹³⁰ and affords employees relief even if they do not resign. The Department of Labour has produced a' Code of Good Practice on the Handling of Sexual Harassment Cases.¹³¹

Item 3 (2) of that code provides that sexual harassment consist not of any sexual attention but only that:

- (a) Which is persisted in
- (b) The recipient has clearly indicated is offensive and

¹²⁶ Beijing Zhongze Women's Legal Consultation and Service Center – Women Watch China Guide on Prevention of Sexual Harassment in the Workplace December 2010, see also http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_157626.pdf accessed on the 10.04.2014 @ 21:10.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ (1988) 9 ILJ 314 (IC)

¹³⁰ Act 55 of 1998

¹³¹ *Supra*(n 42)

(c) Which the perpetrator should have known is unacceptable.

4.2 Legislative frame work on Harassment

On the 12th of April 2013 a proclamation was published in the Government Gazette, whereby President Zuma set 27 April 2013 as the date on which the Protection from Harassment Act¹³² came into operation. The purpose of this act is to provide for the issuing of protection orders against harassment and to afford victims of harassment with an effective remedy against such behaviour. In terms of this Act harassment is defined as either directly or indirectly engaging in conduct that the harasser knows or ought to know –¹³³

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

(i) Following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or

(b) Amounts to sexual harassment of the complainant or a related person. The word "harm" is defined as any mental, psychological, physical or economic harm. Sexual harassment is defined as any:

(a) Unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome:

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) Implied or expressed promise of reward for complying with a sexually oriented request; or

¹³² Act no. 17 of 2011

¹³³ <http://www.polity.org.za/article/protection-from-harassment-act-2013-07-16> accessed on the 10.04.2014 at 22:46.

(d) Implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;

In terms of the EEA,¹³⁴ the harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination. Section 10(6) of the EEA provides remedies for victims of inter alia sexual harassment in the workplace. Employers and employees should therefore take note provisions of this act since it could have far-reaching implications in the workplace.¹³⁵ As a result of the Protection from Harassment Act it will now be possible for an employee to obtain, in addition to the provisions of the EEA, a protection order against an abusive employer or colleague.¹³⁶

According to the code, sexual harassment covers a wide range of conduct from the obvious physical contact through to verbal forms such as innuendoes, suggestions and hints, comments about people's bodies made in their presence or directed at them' inappropriate inquiries about a person's sex life, unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects.

4.3 Case law on Sexual Harassment

In the case of *Grobler v Naspers bpk and another*¹³⁷, the plaintiff a secretary, resigned after she had been subjected for a number of months to repeated sexual advances from a trainee manager in the department in which she worked. The advances included sexual suggestions, kissing and other forms of physical contact, and ultimately accepted that the plaintiff had been sexually harassed and that she had suffered severe psychological harm and as a result was suffering from post-traumatic stress disorder.

In *Rajmoney and Telkom S A*¹³⁸ the employee was subjected to sexual harassment and decided to resign as the harassment she experienced was so unbearable, thus constituting a constructive dismissal. While in *Pretorius v Brits*¹³⁹ the applicant employee resigned after 18 months with the employer citing reason that she was the victim of continuous sexual harassment by her manager. The victim complained that her manager questioned her about her virginity, made unwelcome and unwanted suggestions, gave her gifts, including a set of g- string panties and had physically molested her on a number of occasions.

The CCMA ruled that the applicant's version was likely on a balance of probabilities. Questioning a female employee on her virginity was extremely degrading and thus

¹³⁴ Act 55 of 1998.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ (2004) 5 BLLR (C), see also Neethling L, The Effect of Sexual Harassment in the Work Place on Employee Well-Being 2005 p 15.

¹³⁸ (2000) 9 (CCMA)

¹³⁹ (1997) 5 BLLR 649

the commission awarded the plaintiff, who had found other employment, compensation equivalent to 9 months' salary, calculated at the rate of the employee salary at the time of "dismissal". In *Ntsabo v Real Security CC*¹⁴⁰ the applicant, a security guard, resigned after being sexually harassed by her immediate manager, which left her psychologically shattered.

The reason cited was that she had no alternative but to resign as her employer continued to ignore her requests for assistance, had transferred her to site on night shift, and informed her that she should resign when she complained. The applicant claimed compensation for unfair dismissal, damages for medical costs as well as contumelia, pain and suffering. The court ruled that the applicant had been sexually harassed, that she asked for respondents assistance and the said respondent had turned a deaf ear to the situation. The court held that Ms Ntsabo had been dismissed and that by effectively condoning the manager's behaviour, the organization had violated the provisions of the EEA, which makes harassment a form of discrimination, making the employer liable.

Employers and management are expressly required to take appropriate action when cases of sexual harassment come to their attention. In this respect, the EEA may differ slightly from the common law.¹⁴¹ An employee who has been the victim of sexual harassment may sue the employer under either the EEA or bring an action for damages in the civil courts. If the employer is sued under the Act, it will escape liability if it can prove that reasonable steps were taken to prevent the harassment.¹⁴²

This will not necessarily constitute a defence under the common law, where the employer is held vicariously liable if the offending employee was acting in the course and scope of his or her duty even if the employee has deviated from his or her ordinary duties, provided there's a relationship between the offence and the employee's position.¹⁴³

4.4 Conclusions

Although the amounts awarded in sexual harassment cases can be high in monetary terms, they are just the tip of the iceberg.¹⁴⁴ The hidden costs of sexual harassment are even higher and more risky than the litigation, as employers are likely to suffer from symptoms such as lower productivity, increased absenteeism and turnover, decreased morale, loss of professionalism, decreased loyalty, belief that the organization is not concerned about the individual's rights, employee distrust of the employer, and increased harassing behaviour.¹⁴⁵ Sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim,

¹⁴⁰ (2004) 1 BLLR 58

¹⁴¹ Grogan J, *Work place Law* 10th ed 205 (2013) 115

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Supra* (n 70)

¹⁴⁵ *Ibid.*

it undermines the dignity, integrity and self-worth of the employee harassed.¹⁴⁶ The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a victim.¹⁴⁷ All employees have a right to work in a pleasant and productive environment where the individual rights and dignity of each employee are respected. This includes the right to work in an environment that is free from conduct of a harassing or abusive nature. In order to maintain an atmosphere of mutual respect conduct characterized as sexual harassment cannot be condoned or tolerated. In order to manage risk of any claim for constructive dismissal by reason of a poisoned work environment, it is important for employers to have clear policies in place, which are uniformly enforced with respect to dignity in the workplace.¹⁴⁸ In addition, employers should ensure that interactions with and between employees are conducted with civility, dignity and respect.

¹⁴⁶ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).

¹⁴⁷ *Ibid* at p20

¹⁴⁸ Field J,C Recent Developments in the Law of Constructive Dismissal, (2012) P10.

Chapter 5: conclusions and recommendations

5.1 Introduction

Not every breach of contract will entitle an employee to resign and claim constructive dismissal. The breach must be a serious, or a repudiatory, one. There is no particular timescale within which the various incidents culminating in a last straw must take place.¹⁴⁹ However the last straw approach cannot be used to link together matters which took place before an employee affirmed his contract and matters which took place afterwards.¹⁵⁰ The slate is effectively wiped clean by an affirmation of contract by the employee. It is not enough for the employee to resign soon after the employer's breach of contract. In order to fall within the definition of constructive dismissal.¹⁵¹

The resignation must be because of the repudiatory breach. There is also no need for breach to be the sole cause of the employee's resignation. Once a repudiatory breach is established, if the employee leaves then, even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. The employee does not have to resign immediately on becoming aware of the breach. Employees are permitted a reasonable time to consider their position. However, if they wait too long, they are regarded as having waived the breach and therefore would be unable to resign and claim constructive dismissal.¹⁵²

In circumstances where an employee resigns as a consequence of a breach of the implied term of trust and confidence this often amounts to a constructive dismissal. However, if the employee resigns as a consequence of breaches of other material terms, such as a failure to pay wages or a fundamental change to terms and conditions of employment such as a demotion, this can also amount to a constructive dismissal.¹⁵³

¹⁴⁹ Bennet D, *Employment law Hand Book* 4th ed (2008) p181.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ Constructive Dismissal and Repudiation of Contract: What Must be Proved? STELL LR 2011 , P180, see also See for example Pretoria Society for the Care of the Retarded v Loots 1997 6 BLLR 721 (LAC) 725 where Nicholson JA stated that in determining whether there has been a constructive dismissal:

"The enquiry then becomes whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ..."

Also in Murray v Minister of Defence 2009 3 SA 130 (SCA) para 12 Cameron JA states that with constructive dismissal, once the employee has proved that resignation was not voluntary

"the enquiry is whether the employer ... had without reasonable or proper cause conducted itself in a

In South Africa, a breach of the implied term of trust and confidence has been associated with the concept of constructive dismissal to such an extent that the two concepts have been equated.¹⁵⁴ Although it is true that when an employee resigns as a result of a breach of the implied term of trust and confidence this often amounts to a constructive dismissal, resignation as a result of breaches of other terms can also amount to a constructive dismissal. A material breach of contract will also normally amount to a breach of the implied term of trust and confidence.

The contractual test as laid down in *Western Excavating (ECC) Ltd v Sharp*¹⁵⁵ appears to be much narrower and more precise than the 'reasonableness' test and at first seemed to be a significant restriction on constructive dismissal. However, this has not been so, principally for two reasons.¹⁵⁶ The first is that the Court of Appeal, while firmly basing the law upon ideas of contract, did not mean to impose a rigid test and envisaged some flexibility in its application; this can be seen particularly in the judgment of Lawton LJ:¹⁵⁷

I do not find it either necessary or advisable to express any opinion as to what principles of law operate to bring a contract of employment to an end by reason of an employers conduct. Sensible persons have no difficulty in recognising such conduct when they hear about it. Lay members of the employment tribunals do not spend all their time in court and when out of court they may use, and certainly will hear, short words and terse phrases which describes clearly the kind of employer of whom an employee is entitled without notice to rid himself. This is what constructive dismissal is all about; and what is required for the application of this provision is a large measure of common sense.

When litigating a constructive dismissal claim, it is important to keep in mind that express or implied terms may operate to not only restrict employer conduct and support a constructive dismissal claim but also to permit certain employer conduct that otherwise could be viewed as a constructive dismissal. When an employee resigns or terminates the contract of employment as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil his/her duties.¹⁵⁸

manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee”

Regarding England, see the comments of Lord Justice Sedley in *Paul Buckland v Bournemouth University Higher Education Corporation* [2010] WL 605762 paras 27-28.

¹⁵⁴ *Ibid.*

¹⁵⁵ 1978 ICR 221.

¹⁵⁶ Smith I, Baker A, *Employment Law* 11ed (2010) P482

¹⁵⁷ *Ibid.*

¹⁵⁸ *Asara Wine Estate & Hotel (PTY) LTD v JC Van Rooyen and others* C 272/2010 at para 26. Smith Kline Beecham (supra) 997D-E and 998D, wherein it was held that if the employee is too impatient to await the outcome of the employer’s attempts to find a solution to the perceived intolerable solution, and resigns, then constructive dismissal is almost always out of the question. See also: Lubbe (supra) para 8; Kruger (supra) para 14; *Smith v Magnum Security* [1997] 3 BLLR 336 (CCMA) 341G.

The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created.¹⁵⁹ He does so on the basis that he does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If he is wrong in this assumption and the employer proves that his/her fears were unfounded, then he has not been constructively dismissed and his/her conduct proves that he has in fact resigned.

The Constitutional Court remarked in *Strategic Liquor Services v Mvumbi NO & others*¹⁶⁰ that the test for constructive dismissal does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable. One should bear in mind salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal.¹⁶¹ An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.”

In *Murray v Minister of Defence*¹⁶² -- cited with approval by the Constitutional Court in *Strategic Liquor Services* -- the Supreme Court of Appeal emphasised 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 circumstance must have been of the employer’s making. But even if the employer is responsible, it may not be to blame.¹⁶³ There are many things an employer may fairly and reasonably do that make an employee’s position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must have lacked „reasonable and proper cause“.¹⁶⁴

In other words, the Court held that in order to succeed in a constructive dismissal case in terms of the provisions of the LRA, as well as in the common law, the employer must have acted in a culpable manner.¹⁶⁵ Although it is not necessary for the employer to have acted intentionally in that it wanted to get rid of the employee, there must be fault on the part of the employer. The court came to this conclusion on the basis that the employer must have acted without “reasonable and proper cause”.

¹⁵⁹ *Ibid.*

¹⁶⁰ (2009) 30 ILJ 1526.

¹⁶¹ *Supra* (n 94).

¹⁶² (2008) 29 ILJ 1369 (SCA) at para 13. The position of the SCA was confirmed in the case of *Daymon Worldwide SA Inc v Commission for Conciliation, Mediation and Arbitration & others* (2009) 30 ILJ 575 (LC) at paras 27 and 40.

¹⁶³ *Asara Wine Estate & Hotel (PTY) LTD v JC Van Rooyen and others* C 272/2010

¹⁶⁴ *Ibid.*

¹⁶⁵ *Supra* (n 93).

But this is to confuse a constructive dismissal with the breach of the implied term of trust and confidence.¹⁶⁶

In conclusion, if the employer is not at fault, in that it did not act negligently or with intention, but nevertheless breached the contract, the employee would not succeed in a claim based on constructive dismissal. However, since fault is irrelevant when it comes to a common law claim based on repudiation of contract, the employee could succeed if the claim is based on common law repudiation of contract.¹⁶⁷ If the employer acted fairly but unlawfully, then an employee would not succeed in a claim based on constructive dismissal but could succeed in a claim based on common law repudiation of contract. Again, if an employee has a choice available to them other than resignation, then in order to succeed, the claim should be based on common law repudiation of contract rather than constructive dismissal.¹⁶⁸

5.2 Conclusions

Ultimately each case depends on its own facts, but there are many types of behaviour which have been found to breach trust and confidence including using obscene language; false criticism; giving an employee an unjustified warning with the intention of disheartening him/her causing him/her to resign and disciplining an employee in front of subordinates in a way which is humiliating.

However, it is important to note that not every instance of bad treatment or unreasonable behaviour amounts to a breach of trust and confidence, and employers who act in good faith but in error are less likely to destroy trust and confidence than those who act in bad faith. Developing area of constructive dismissal law remains somewhat unclear. It is likely to receive further consideration as employers seek to find ways of addressing progressive discipline in the working environment without having to resort to dismissal for cause of conduct which may not survive contextual analysis.

5.3 Recommendations

To reduce the risk of constructive dismissal claims, employers need to obtain the employee's consent for any substantial changes in the conditions of employment. Should the employee refuse to agree to the changes, terminating the employment, with an appropriate termination package, may be the only viable option. Further, at the outset of the employment relationship, a written employment contract will reduce the risk of constructive dismissal claims.¹⁶⁹

¹⁶⁶ *Ibid.*

¹⁶⁷ *Supra* (106)

¹⁶⁸ *Ibid.*

¹⁶⁹ Barry W. Kwasniewski, "Employment Contracts for Charities and Non-profit Organizations" in *Charity Law Bulletin* No. 159 (March 26, 2009), accessed on the 13 April 2014 online: <http://www.carters.ca/pub/bulletin/charity/2009/chylb159.pdf>.

An employment contract may allow for changes in job duties and responsibilities, compensation, benefits and relocation. However, as prospective employees may be reluctant to enter into contracts that would allow the employer such latitude, the extent of such changes may well become a matter of negotiation between the employer and the prospective employee. Having these discussions with the employee at the outset of the relationship may avoid problems that may lie ahead in the event the employer later needs to make changes in the way it carries on its activities. Proper standards as a yardstick to determine whether an employee has been constructively dismissed should be developed. Some amendments to the law of unfair dismissal in order to enhance the labour relations system by promoting job security, labour peace and advance economic development. This is in line with the purposes of the LRA, which is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of the Act.

It is therefore very important that the employers attempt to resolve a constructive dismissal dispute as soon as the possibly can so that they may avoid to face a financial risk. On the other hand, the employees should pursue their claims for constructive dismissal in an expeditious manner so that there would be no delay that would be attributed to them and lessen an award in cases where constructive dismissal is found to be substantively and procedurally unfair. And lastly there must be an amendment in the present legislative framework in order to clearly define constructive dismissal and its implications.

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