RESIGNING IN THE FACE OF DISCIPLINARY ENQUIRY, OR PERFORMANCE EVALUATION: REFLECTIONS ON A SUBSEQUENT CONSTRUCTIVE DISMISSAL CLAIM

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Table of Contents

JURISDICTIONAL PUZZLE: HAS THE EMPLOYEE RESIGNED OR BEEN DISMISSED?

1.1 Introduction

The chapter sets tone of the inquiry by examining the complexities surrounding resignation. The ramifications of resignations insofar as the employee proving existence of dismissal brings to the surface jurisdictional disputes litigating parties before the Commission for Conciliation Mediation and Arbitration or bargaining council. Understanding the jurisdictional complexities of resignation requires knowledge of the tricky task of establishing employee status,[1] the second crucial step in opening the door into the labour dispute resolution forums created by the Labour Relations Act 66 1995 ('LRA') starts with an employee establishing the existence of dismissal.

The paramount issue to be determined in every unfair dismissal case is whether the act or event that gave rise to the termination of the employment relationship was in fact and in law a dismissal.[2] Hence, in any discussion of dismissals, the starting point is section 186 of the LRA. Dismissal of an employee for the purposes of the LRA is defined in section 186 which provides that:

(1) —Dismissal means:

(a) an employer has terminated a contract of employment with or without notice;[3]

[1] See Maloka, T and Okpaluba, C 'Making your bed as an independent contractor but refusing 'to lie on it': Freelancer opportunism' (2019) *South African Mercantile Law Journal* 54; Christianson, M 'Defining who is an employee: A review of the law dealing with the differences between employees and independent contractors' (2001) *CLL* 21; Manamela, E 'Employee and independent contractor: The distinction stands' (2002) *SA Merc LJ* 107; Benjamin, P 'An accident of history: Who is (and who should be) an employee under South African labour law' (2004) 25 *ILJ* 787; Van Niekerk, A 'Employees, independent contractors and intermediaries: The definition of employee revisited' (2005) *CLL* 11 and 'Personal service companies and the definition of "employee"' (2005) 26 *ILJ* 1909.

[2] See e.g. *Morna v Commission on Gender Equality* (2001) 22 *ILJ* 351 (W The court held that by law resignation on its own amounts to breach of contract of employment which the employers reserve the right to sue for specific performance); *Sihlali v SABC* (2010) 3 *ILJ* 1477 (LC); *Asuelime/University of Zululand* [2017] 12 BALR 1312 (CCMA); *Harnden and Christian Centre (Abbotsford) East London* (2017) 38 *ILJ* 2140 (CCMA).

[3] See e.g. *Council for Scientific & Industrial Research v Figen* (1996) 17 *ILJ* 18 (A).

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;[4]

(c) an employer refused to allow an employee to resume work after she –

(i) took maternity leave in terms of any law, collective agreement or her contract of employment,[5] or

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;[6]

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another;[7] and

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;[8]

(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of Sec 197 or 197A, provided employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.[9]

Determining the existence of dismissal is a complex exercise. The resignation, early retirement and reinstatement controversy involving disgraced former Eskom Group

[4] *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty)* (2015) 36 *ILJ* 1923 (LC); *SARPA v SA Rugby (Pty) Ltd* [2008] 9 BLLR 845 (LAC); *Buthelezi v Municipal Demarcation Board* (2004) *ILJ* 2317 (LAC). See also Geldenhuys, J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) *Potchefstroom Electronic Law Journal* 1; Gericke, E 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed term contracts as opposed to indefinite employment' (2011) *Potchefstroom Electronic Law Journal* 105.

[5] See e.g. *De Beers v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC); *Mnguni v Gumbi* [2004] 6 BLLR 558 (LC); *Wallace v Du Toit* [2006] 8 BLLR 757 (LC); *Lukie v Rural Alliance CC t/a Rural Development Specialist* [2004] 8 BLLR 769 (LC); *Mashavha v Cuzen & Woods Attorneys* (2000) 21 *ILJ* 402 (LC); *Collins v Volkas Bank (Westonaria Branch), A Division of ABSA Bank* [1994] 12 BLLR 73 (IC).

[6] See *Heath v A & N Paneelkloppers* (2015) 36 *ILJ* 1301 (LC); *Memela v Ekhamanzi Springs (Pty) Ltd* (2012) 33 *ILJ* 2911 (LC); *Swart v Greenmachine Horticultural Services (A division of Sterikleen (Pty) Ltd*) (2010) 31 *ILJ* 180 (LC).

[7] *FGWU obo Ndiya v Pritchard Cleaning* [1997] 11 BLLR 1513 (CCMA).

[8] See e.g. *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC); *National Health Laboratory Service v Yona* (2015) 36 *ILJ* 2259 (LAC); *September v CMI Business Enterprise CC* (2018) 39 *ILJ* 987 (CC).

[9] See e.g. *Lotz v Anglo Office Supplies* [2006] 5 BLLR 491 (LC). See also Workman-Davies, B 'The right of employers to dismiss employees in the context of unfair dismissal provisions of the Labour relations Act (2007) 28 *ILJ* 2133.

CEO, Mr Brian Molefe[10] is a case in point. The question whether dismissal has occurred is not necessarily a straightforward matter.[11]

Over the years many employees have resigned from their employment due intolerable working conditions[12] or in the face of a performance appraisal,[13] in order to avoid the outcome of these proceedings. The problem of determining the existence of dismissal turns into a labour dispute resolution nightmare in cases whereby an employee resigns supposedly to escape pending workplace disciplinary or incapacity hearing but later institute a constructive dismissal claim.

The most recent illustration is *Cape Peninsula University of Technology v Mkhabela*[14] further affirming importance of critical appraisal of this overlooked aspect of constructive dismissal jurisprudence. The dispute between the parties was on the basis that the applicant had lodged a claim for unfair dismissal against the respondent that she had been constructively dismissed as per the definition of dismissal in terms of section 186(1)(e) of the labour relations Act.

1.2 Scope of the Inquiry

A substantial body of literature on contemporary labour law has devoted considerable attention on examining[15] and re-examining developments concerning constructive

[10] *DA v Minister of Public Enterprises* 2018 ZAGPPHC 1 para 17. After being served with a notice to attend a disciplinary hearing, the applicant in *Nogoduka v Minister of Higher Education & Training* [2017] 6 BLLR 634 (LC) resigned 'with immediate effect'. The hearing proceeded in his absence and he was dismissed. The applicant claimed that the tribunal had no authority to him because he was no longer in the employer's employment when the decision to dismiss him was taken. The LC noted that the Public Service Act 103 of 1994 expressly prohibits executive authorities from accepting notice shorter than is required from employees charged with misconduct. It followed that when the decision to dismiss was taken, the applicant was still in employment. The application was dismissed.

[11] At issue in *NUMSA v Abancedisi Labour Services CC* (2012) 33 *ILJ* 2824 (LAC) was whether the removal of employees in terms of section 198(2) from work by client against the will of labour broker who insisted that they are still employed constituted dismissal in terms of section 186(1), read with sections 187, 188 or 189 of the LRA.

[14] [2021] ZALAC 30(30 September 2021)

[15] See for e.g. Whitear-Nel, N 'Constructive dismissal: A tricky horse to ride - *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC)' (2012) *Obiter* 193; Van Zyl, B 'Complexity of constructive dismissal' (2016) *HR Future* 40. See generally; Van der Walt, A Abrahams, D and Qotoyi, T 'Regulating the Termination of Employment of Absconding Employees in the Public Sector and Public Education in South Africa' (2016) *Obiter* 140;; Dekker 'Gone with the wind and not giving a damn; problems and solutions in connection with dismissal based on desertion' (2010) *South African Mercantile Law Journal* 104; Le Roux, PAK 'Resignations – an update: The final, unilateral act of an employee' (2010) *CLL* 51; Kasuso, **TG**

dismissal.[16] Despite wide acknowledgement of its significance, however, the issue of resigning to side-step a disciplinary hearing and thereafter pursuing a constructive dismissal remains by far less examined aspect of section 186(e) jurisprudence. The study turns attention on the elusive aspect of constructive dismissals jurisprudence. Put simply, vexed question of the implications of resigning to elude ongoing disciplinary or incapacity proceedings on subsequent constructive dismissal claim.

Beyond the critical question of whether the employer's conduct rendering continued employment intolerable, thus justifying employee forced departure, the problem of disgruntled employees resigning to avoid internal disciplinary inquiry but later instituting constructive dismissal claims impinges upon labour dispute resolution system created under the LRA 1995. The cardinal principle concerning the requirement to exhaust internal remedies is implicated. The first port of call labour dispute resolution is the workplace disciplinary processes.

Where an employee had lodged grievance or disciplinary process are undergoing both the employer and employee are expected, and more importantly, to see the process through. Resort to specialist labour dispute resolution fora is premised on the exhaustion of internal dispute or grievance processes. Also arising is the fact the resignation ostensibly to avoid disciplinary procedure has the effect of subverting labour dispute resolution processes.

Granted that resignation to avoid internal disciplinary inquiry may often prove fatal, under what circumstances would an employee prevail with a constructive dismissal claim notwithstanding resignation in the face of impending disciplinary hearing? Does the fact the disciplinary hearing in process is a sham or its outcome a foregone conclusion forestalls an employee who resigned pre-emptively from claiming constructive dismissal? What are emerging trends concerning constructive dismissal claims where the claimed resigned in order to bypass internal disciplinary proceedings?

Termination of employment or dismissal cases often present one particularly vexing issue: whether the employee has been dismissed? Put simply, was termination of

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'Resignation of an Employee Under Zimbabwean Labour Law: A Unilateral Act' (2017) 3 *Midland State University Law Review* 46**;** Munro L 'Constructive dismissal' (2008) *South African Radiographer* 18.

[16] Nkosi, TG '*The President of RSA v Reinecke* 2014 (3) SA 295 (SCA)*'* (2015) *De Jure* 48.

employment caused by the employer? The question of existence or proof thereof, is an important jurisdictional prerequisite for accessing purpose-built statutory dispute resolution forums. If there is no dismissal, the CCMA) or the Bargaining Council lacks jurisdiction to adjudicate the dispute at hand.[17] Section 192 of LRA place the onus of proving the existence of dismissal on the employee. If the claimant cannot prove the existence of dismissal, then the CCMA or any other labour tribunal lacks requisite jurisdiction to adjudicate the dispute.

Constructive dismissal disputes often present the hurdle of determining whether a resignation was a voluntary or forced one. Cameron JA in *Murray v Minister of Defence*[18] 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.[19]

The following questions are important in order to determine whether or not constructive dismissal has occurred or not:

1. Did the employer intend to bring an end to the employment relationship?

2. Was the employment relationship intolerable?

3 Was the resignation the only reasonable option available to the employee in the circumstances?

As already indicated, constructive dismissal disputes are the epicentre of the law of unfair dismissal. The purpose of the study is to contribute to existing literature on constructive dismissal. In wrestling with the implications of pre-emptive resignation on subsequent constructive dismissal dispute, the study sheds light on the importance of adherence to workplace dispute resolution procedure before resort to purpose-built labour dispute resolution mechanism created under the LRA 1995.

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[17] *Naidoo and Bonitas Medical Board* (2005) 26 *ILJ* 805 (CCMA); *Janmin Retail (Pty) Ltd v Mokwane* [2010] 4 BLLR 404 (LC), *SACWU v Dyasi* [2001] 7 BLLR 731 (LAC); Maloka, T and Mangammbi, J 'The Complexities of Conditional Contracts of Employment' (2020) *South African Mercantile Law Journal* 295.

[18] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) (*Murray*).

[19] *Murray* para 8.

1.3 Literature Review

It is beyond contention that constructive dismissal remains a heavyweight topic in the law of unfair dismissal. A substantial body of literature on contemporary labour has lavished considerable examining and re-examining development concerning constructive dismissal. For instance, some commentators have deconstructed the problematic issue of emotional breakdown as trigger for constructive dismissal claim.[20] Others have drawn attention to the tight link between the common law contractual repudiation and statutory constructive dismissal.[21] In addition, LLM dissertations continue to revisit the familiar terrain of constructive dismissal but within the narrow compass.[22]

Beyond the critical question of whether the employer's conduct rendered continued employment intolerable, thus justifying employee forced departure, the problem of disgruntled employees resigning to avoid internal disciplinary inquiry but later instituting constructive dismissal claims impinges upon labour dispute resolution system created under the LRA 1995. The cardinal principle concerning the requirement to exhaust internal remedies is implicated. The first port of call in labour dispute resolution is the workplace disciplinary processes.

Where an employee had lodged grievance or disciplinary process are undergoing both the employer and employee are expected, and more importantly, to see the process through. Resort to specialist labour dispute resolution fora is premised on the exhaustion of internal dispute or grievance processes. Also arising is the fact the resignation ostensibly to avoid disciplinary procedure has the effect of subverting labour dispute resolution processes.[23]

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[20] Tshoose 'Constructive Dismissal Arising from Work Related Stress' (2017) *Journal for Juridical Science* 121. See also Smit, E *Constructive Dismissal and Resignation due to Work Stress* (LLM-dissertation UNW Potchefstroom Campus, 2013). See too, *Metropolitan Health Risk Management v Majatladi* (2015) 36 *ILJ* 958 (LAC) and *National Health Laboratory Service v Yona* (2015) 36 *ILJ* 2259 (LAC) (*Yona*), *Cairncross/Legal and Tax (Pty) Ltd* [2019] 2 BALR 137 (CCMA).

[21] Vettori, S 'Constructive Dismissal and Repudiation of Contract' (2011) *Stellenbosch Law Review* 173.

[22] See Mabiana, PT *Constructive Dismissal in South Africa Prospects and Challenges* (LLM-dissertation University of Limpopo 2014); Ngcobo, S *An Analysis of Intolerable Conduct as a ground for Constructive Dismissal* (LLM-dissertation University of Kwa-Zulu Natal 2014).

[23] See Van Niekerk, A 'Speedy Social Justice: Structuring the Statutory Dispute Resolution Process' (2015) 36 *Industrial Law Journal* 837 and 'The Labour Courts, Fairness and the Rule of Law' (2015) 36 *Industrial Law Journal* 2451; Wallis, M 'The Rule of Law and Labour Relations' (2014) 35 *Industrial Law Journal* 849.

The sentiments articulated by Zondo J warrant repetition in full:

> The LRA tells us when a person acquires the right not to be unfairly dismissed. It says that happens when you are an employee. The LRA also tells us how or when that right gets infringed. It says that that happens when an employer dismisses an employee without following a fair procedure and/or when there is no fair reason to dismiss. It also tells us that that right is infringed if the reason for the dismissal is listed in section 187 of the LRA. That is a provision for automatically unfair dismissals. The LRA also tells us what processes are to be employed by an employee who seeks a remedy for an alleged infringement of that right. Those processes are conciliation and, thereafter, either arbitration or adjudication, depending on the alleged reasons for the dismissal.
>
> The LRA also tells us what remedies are available for the vindication of the right not to be unfairly dismissed or for the enforcement of that right. Those remedies are reinstatement, re-employment and compensation. It also tells us which fora an employee must go to in order to obtain a remedy for the infringement of that right. It says that these are the CCMA, bargaining councils, Labour Court and even a private arbitration forum where this is agreed to between the parties.[24]

Given that resignation to avoid internal disciplinary inquiry may often prove fatal, under what circumstances would an employee prevail with a constructive dismissal claim notwithstanding resignation in the face of impending disciplinary hearing? Does the fact the disciplinary hearing in process is a sham or its outcome a foregone conclusion forestalls an employee who resigned pre-emptively from claiming constructive dismissal? What are emerging trends concerning constructive dismissal claims where the litigants resigned in order to bypass internal disciplinary proceedings?

1.4 RESERARCH METHODOLOGY

The method to be employed in this research will be a desk top research method and will not in any manner involve the interactions with any member of the society. The research will be based on the analysis of recent literature, legislation and court decisions in order to make a finding at the end of the research. Upon gathering and analysis of all the information in support of the argument advanced in this research, conclusion shall be drawn on the basis of the information analysed as well as the recent court decisions on constructive dismissal claims.

[24] *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (39) *ILJ* 1213 (CC) paras 130-131.

1.5 Summary

The preceding discussion has shown that despite wide acknowledgement of its significance, however, the issue of resigning to side-step a disciplinary hearing and thereafter pursuing a constructive dismissal remains by far less examined aspect of section 186(e) jurisprudence. The study turns attention on the narrow but highly pertinent aspect of constructive dismissals jurisprudence. Put simply, vexed question of the implications of resigning to elude ongoing disciplinary proceedings on subsequent constructive dismissal claim. On the flipside, there is also worrying trend concerning opportunistic resignations in the face of looming and/or uncompleted disciplinary or performance proceedings.[25]

The next chapter delves into the overarching role off workplace dispute resolution processes. Chapter three sheds light on the repercussions of pre-emptive resignation for subsequent constructive dismissal claim. The concluding chapter brings together the major findings of the study.

CHAPTER TWO

THE OVERARCHING ROLE OF WORKPLACE DISPUTE RESOLUTION PROCESSES

2.1 Introduction

The beginning of wisdom in labour dispute resolution begins with an aggrieved employee activating workplace disciplinary and grievance processes. The importance of the employee exhausting grievance procedures or vindicating himself or herself before internal disciplinary hearing is closely to the constitutional right to fair labour practices

[25] See *Mzotsho v Standard Bank of SA (Pty) Ltd* (unreported case number J2436/18 of 24 July 2018), *Coetzee v Zeitz Mocca Foundation Trust* (2018) 39 *ILJ* 2529 (LC), *Naidoo v Standard Bank SA Ltd* (2019) 40 *ILJ* 2589 (LC); *Mthimkhulu v Standard Bank of SA* (2021) 42 *ILJ* 158 (LC).

and the statutory right not to be unfairly dismissed. Chapter two examines the requirement to exhaustion of workplace dispute resolution processes before resorting to statutory dispute resolution process.

2.2 The Framework of Statutory Dispute Resolution Mechanism : Labour Relations Act 66 of 1995 ('LRA')

Section 1 of the Labour Relations Act 66 of 1995 ('LRA') provides that the statute's primary objective is to promote effective resolution of disputes. In terms of section 3, the LRA must be interpreted in line with its primary objects. It has been acknowledged that in interpreting section 23 of the Constitution an important source of international law[26] will be the conventions and recommendations of the International Labour Organisation.[27] Effective dispute resolution system is at the heart of statutory dispute resolution machinery. Steenkamp and Bosch explain:

> The LRA aimed to address these problems by providing 'simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration [was] established) and through independent dispute resolution services accredited for that purpose.' Section 1 of the LRA states that one of the primary objects of the Act is to promote 'the effective resolution of labour disputes' and, according to s 3, the LRA must be interpreted in accordance with its primary objects. It has been said that an effective dispute resolution system is one that is properly structured and functioning, and resolves disputes quickly and finally.[28]

Statutory dispute resolution processes were designed to be accessible, speedy and inexpensive.[29] In this regard, it is important to bear in mind that speedy resolution of labour disputes is largely to the benefit of employees.

2.3 Workplace Disciplinary Process and Grievance Procedures

2.3.1 Management disciplinary authority

[26] *SANDU v Minister of Defence* 1999 (4) SA 469 (CC) para 25 (*SANDU*); *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) para 26 (*Bader Bop*).

[27] Convention 158 of 1982 is titled *Termination of Employment at the Initiative of the Employer*. This Convention superseded Recommendation 119 of 1963 of the ILO upon which the Industrial Court relied in formulating its guidelines regarding unfair dismissal.

[28] Steenkamp, A and Bosch, C 'Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential' (2012) *Acta Juridica* 120 (Steenkamp and Bosch).

[29] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 63.

The LRA clearly recognises and cements the employer's prerogative to effect workplace discipline.[30] It has also been emphasised that disciplinary authority lies with the person who manages employees, or the body that manages an enterprise.[31] The LRA further envisaged discipline within its provisions in order to ensure that the employees are also in a position to know and understand what is required of them in terms of the level of discipline within the workplace.[32] The Code of Good Practice enjoins the employers to try to correct employee's behavior by a systematic of graduated disciplinary measures rather than to fire from the hip.

The Code of Good Practice provides that any person (which includes an arbitrator or the labour court) who is determining whether a dismissal for misconduct was unfair should consider:

A. Whether or not the employee contravened a rule or standard regulating conduct in, or relevance to, the workplace; and
B. If a rule or standard was contravened, whether or not-
    i. The rule was a valid or reasonable rule or standard;
    ii. The employee was aware, or could reasonably have been expected to be aware of that rule or standard;
    iii. The rule or standard has been consistently applied by the employer;
    iv. Dismissal was an appropriate sanction for the contravention of the rule or standard.

Although the negotiated codes for disciplinary measures generally take precedence over the LRA code of Good Practice,[33] an arbitrator has a latitude depending on the circumstances at hand to invoke the latter in preference of the former.[34] In brief, workplace rules and standards are designed to ensure fair and consistent application of disciplinary procedures, at all stages of the process.[35]

2.4 Dispute Resolution Forums

[30] Section 3(1) of the Code of Good Practice.
[31] See for e.g. *NUM v Impala Platinum Mine* (2017) 38 *ILJ* 1370 (LC); *Dyasi v Onderstepoort Biological Products* (2011) 32 *ILJ* 1082 (LC).
[32] Item 3(2) of the Code of Good Practice; LRA.
[33] See *Free State Buying Association t/a Alpha Farm v SACCAWU* (1998) 19 *ILJ* 1481 (LC).
[34] See *County Fair v CCMA* (1999) 20 *ILJ* 2609 (LC).
[35] Grogan, J *Dismissal, Discrimination and Unfair Labour Practices* 2ed 199.

2.4.1 The Commission for Conciliation Mediation and Arbitration (CCMA)

The CCMA was established as an independent dispute resolution body in terms of the LRA. The CCMA plays a central role in the statutory dispute resolution process[36] by promoting fair labour practices and resolve labour disputes in the workplace. An employee can refer a dispute to the CCMA on the basis of dismissal, wages and working conditions, unfair labour practice, workplace changes and discrimination. The most important question to be answered in all matters which are referred to the CCMA is whether it has got the jurisdiction to entertain such matters.[37] This may include types of disputes which may not relate to dismissal claims or unfair labour practices or even matters which falls under the jurisdiction of a registered bargaining council.

2.4.2 The Bargaining Councils

A bargaining council is a body that is established by one or more employers' organisations and one or more trade unions. It must be registered under the Labour Relations Act for a particular industry. Once accredited by the CCMA, the bargaining councils perform similar dispute resolution functions as the CCMA.[38]

2.4.3 The Labour Court

The LC is the heartland of labour dispute adjudication. Section 157(1) empowers the LC to hear matters that are explicitly assigned within its exclusive jurisdiction in terms of legislation. According to the Constitutional Court 'section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145.'[39] The dominant feature the LC proceedings to review and set aside arbitration awards revolve around application of the test established in *Sidumo*.[40] The key question is whether a reasonable decision-maker could not have

[36] Grogan, J *Workplace Law* 13th ed 444.
[37] *Joy Global Africa (Pty) Ltd v CCMA* [2015] ZALAC 1 para 3.
[38] Section 51(8) of the LRA.
[39] *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) para 70.
[40] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para 110.

arrived at the decision reached by the Commissioner.[41] The *Sidumo* test has been confirmed in many cases.[42]

2.4.4 The Labour Appeal Court

The LAC hears appeals from litigants aggrieved by the outcome of LC proceedings. The LAC is a court of law and equity and has a status similar to that of the Supreme Court of Appeal.[43] Access to the LAC is obtained only with the leave of the judge who granted the order or delivered the judgement against which an appeal is sought, or with the leave of the judge president on petition[44]. The decision of the LAC is binding on all lower courts, including the LC. This is further confirmed by the general principle of our law commonly known as *stare decisis.*

2.4.5 The Supreme Court of Appeal and the Constitutional Court

Although SCA's jurisdiction in labour is circumscribed by the LRA 1995, which established the LAC as the final court of appeal in matters falling within the jurisdiction of the LC,[45] however, the right of appeal from the LC to the former was approved in *NUMSA v Fry's Metals (Pty) Ltd*.[46]

The CC is the highest and final appellate court in the judicial hierarchy of South Africa.[47] Party which are not happy with the decisions of the LC and LAC may appeal further to the constitutional court, or in exceptional circumstances directly approach the constitutional court. It must be noted that the CC has jurisdiction over labour disputes because they implicate among other things,[48] the right to fair labour practices in terms of section 23 of the Constitution.

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[41] *Sidumo* paras 110-268.
[42] See for e.g. *Masscash (Pty) Ltd t/a Jumbo Cash & Carry v Mtsotsoyi* [2022] ZALAC 117 paras 20-22; *Austin-Day v ABSA Bank Ltd* [2022] 6BLLR 514 (LAC) para 25-26; *Idwala Industrial Holdings v CCMA NO* [201] ZALCJHB 176 para 14-16.
[43] Section 151 of the LRA.
[44] Section 166(1) and (2) of the LRA.
[45] See *Khoza v Gypsum Industries Ltd* (1998) 19 *ILJ* 53 (LAC); *Kem-Lin Fashions v Brunton* (2002) 23 *ILJ* 882 (LAC).
[46] (2005) 26 *ILJ* 689 (SCA).
[47] Grogan, J *Workplace Law* 13TH ed 459
[48] Section 34 of the Constitution provides:

The CC is the highest court in the country when it comes to the interpretation, protection and enforcement of the Constitution. It deals exclusively with constitutional matters, those cases that raise questions about the application or interpretation of the Constitution.

2.5 Conclusion

The primary objective of this chapter was to provide an overview of the purpose-built labour dispute resolution institutions established by the LRA. Foremost, labour dispute resolution forum is the workplace disciplinary inquiry. The importance of exhausting internal grievance process can hardly be overstated.

One of the oldest tricks in the book is for employees to resign with immediate effect, immediately upon being informed that they are to attend a performance inquiry or disciplinary hearing in order to avoid being part of such processes.[49] Employees perceive that by doing so, they might escape the repercussions of being fired for misconduct and also prevent a blemished disciplinary record that may jeopardise their chances of finding work elsewhere in the future. It may be preferable to encourage employees to give their employers a fair and reasonable opportunity to correct the 'intolerable' circumstances that may lead to their resignations.

CHAPTER THREE

THE REPERCUSSIONS OF A PRE-EMPTIVE RESIGNATION, FOR A SUBSEQUENT CONSTRUCTIVE DISMISSAL CLAIM

3.1 Introduction

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[49] Grogan, J *Workplace Law* 13th ed 119.

A question that has been the subject of numerous conflicting judgments in the labour Court in recent years relates to what the legal implications are, where an employee resigns with immediate effect in the face of a disciplinary action. It is a well-established principle that resignation is a unilateral act that does not require the acceptance of an employer, when an employee resigns, the employment relationship terminates automatically.[50]

The questions that our courts have been grappling with relate to the timing of such a termination of the employment contract, that is, when does it become effective and what are the legal implications thereof? Employees, in trying to escape facing the consequences of disciplinary processes, typically for allegations relating to misconduct, decide to resign with immediate effect in order to avoid the disciplinary proceedings.

This decision often denies the employer the opportunity to conduct and conclude a fact-finding inquiry in the form of a disciplinary hearing and further denies the employer the opportunity to have the contractual or statutory notice period honored by the employee. This chapter will deal with the legal implications of such conducts on the part of resigning employees and the remedies available to the employers in terms of the South African Labour Law jurisprudence.

3.2 Three-stage inquiry into determining the existence of Constructive Dismissal

The determination whether an employee has been constructively dismissed mandates a three-stage inquiry.[51] Insofar as the first stage is concerned the employee who resigned or left his employment bears the onus of proving that the employer effectively dismissed her or him rendering continued employment intolerable.[52] Should it be established that the employee resigned, the inquiry is at an end. With respect to the second stage (b) upon the employer the duty to prove that the dismissal was not unfair.[53] In order to establish the existence of

[50] Dube, S and Tshabuse, K 'Does resigning in the face of disciplinary action let you off the hook?' Published 16 October 2020; Mondag.com.

[51] *Murray v Minister of Defence* 2008 29 *ILJ* 1369 (SCA) paras 11-12 (*Murray*). See also *Metropolitan Health Risk Management v Majatladi* 2015 36 *ILJ* 958 (LAC) para 21 (*Majatladi*).

[52] *Value Logistics Ltd v Basson* (2009) 30 *ILJ* 320 (LC) para 25.

[53] See e.g. *Pretoria Society for the Care of the Retarded v Loots. Nicholson* (1997) 18 *ILJ* 981 (LAC) 984E-F (*Loots*).

constructive dismissal, an applicant must satisfy at least three requirements. In in *Solid Doors (Pty) Ltd v Commissioner Theron*,[54] the LAC restated prerequisites as follows:

> …The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. …If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.[55]

Likewise, LAC in *National Health Laboratory Service v Yona*[56] held that

> …a constructive dismissal occurs when an employee resigns from employment under circumstances where he or 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…The test for proving a constructive dismissal is an objective one. The conduct of the employer toward the employee and the cumulative impact thereof must be such that, viewed objectively, the employee could not reasonably be expected to cope with. Resignation must have been a reasonable step for the employee to take in the circumstances.[57]

Eagleton v You Asked Services[58] three Applicants who had referred a complaint of an unfair dismissal on the basis of operational requirements to the CCMA. In the referral it is alleged that the Applicants were dismissed and that their dismissal was Automatically unfair as falling within the definition of section 187(1)(c) of the LRA. Alternatively, A constructive dismissal within the definition of section 186(1)(e) of the LRA, further alternatively Substantively and procedurally unfair on the basis of operational requirements as set out in section 189 of the LRA.

The Respondent took exception against the statement of claim on the basis that the statement is vague and embarrassing in that, the remedies claimed by the Applicants are mutually exclusive. The Respondent contended that mutually exclusive remedies cannot be claimed in the alternative as evidence in support of one remedy will necessary exclude the other. The court upheld the exception as raised by the respondent on the basis that It would appear that

[54] (2014) 35 *ILJ* 3360 (LAC) *Solid Doors*).
[55] *Solid Doors* para 19.
[56] (2015) 36 *ILJ* 2259 (LAC) (*Yona*).
[57] *Yona* para 30.
[58] (2009) 30 *ILJ* 320 (LC) (*Eagleton*).

the argument in respect of the statement of claim disregards the fact that section 192 of the LRA provides for two distinct and different onuses: The onus to prove a dismissal, which rests on the employee, and the onus to prove the fairness of the dismissal (provided of course that the employee has successfully proven the existence of a dismissal) rests on the employer. It is therefore safe to submit that the court in this case has laid a solid foundation for future references that an applicant may not plead all three different dismissals as an alternative. Each type of dismissal is made up of its own requirements which must be fully ventilated. Without having to redefine constructive dismissal, the court has also outlined the most basic requirements for one to succeed in a claim for constructive dismissal.

3.3 Intolerability is a High Threshold

The message emerging from constructive dismissal case law is that intolerability is a high threshold. In other words, constructive dismissal should be confined to situations in where the employer behaved oppressively and left the employee no alternative but to resign.

The employee complained in *Conti Print CC v CCMA*,[59] that the air conditioning located in adjacent workplace partially partitioned from her workstation was impairing her health. The employer offered to move employee and promised to close the gap in the partition. The employee not only refused to move but also abruptly left employment and claimed constructive dismissal. It was held that the evidence show that the employer reacted reasonably to ameliorate the adversity to the employee whose reaction, in return, proved to be grossly unreasonable. Do the proven facts establish a constructive dismissal? The LAC held that assessing the employer's conduct, it cannot be said to have been responsible for creating an intolerability of continuation of the employment relationship hence, there was no constructive dismissal.

The issue in *Jooste v Transnet t/a SA Airways*[60] was whether when resigning, there was no other motive for the resignation, except for the fact that employee can no longer cope under the condition which he or she has been subjected to. In other words, the employee would have continued the employment relationship indefinitely had it not been for the employer's

[59] (2015) 36 *ILJ* 2245 (LAC).
[60] (1995) 16 *ILJ* 629 (LAC).

unacceptable conduct.[61] The court went further to state that when any employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer's behavior amounts to a repudiation of the employment contract, and in view of the employer's repudiation, the employee terminates the contract. The decision of the court in this case further emphasizes that in order for one to succeed in a claim for constructive dismissal the applicant must further prove that the aim was not to claim constructive dismissal.

It is common cause that as human beings in general, stress and anxiety go together with the nature of an employment relationship as a result of various expectations which are expected of employees. It is therefore important to determine whether or not an employee may rely on stress induces constructive dismissal to justify the termination of the employment relationship.

Yona involved an employee who tendered her resignation on the basis that the employer could not care less of the mental conditions which she suffered from as a result of her work-related stress. The employer contended that instead of applying for sick leave, the employee should consider incapacity leave, of which the employee perceived the employer's conduct as non-compassionate and therefore resigned.

The court stated that, the appellant, through its HR Manager failed dismally to accord fair and compassionate treatment to the applicant at the time of her desperate need when she was suffering from a severe work-related mental illness[62]. The court further stated Ms Yona's resignation was neither voluntary nor intended to terminate her employment relationship with the appellant. Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant towards her. Consequently, her resignation was ruled to be constructive dismissal.

Majatladi involved an employee who had made her intentions clear to the employer that she was not willing to continue acting as head advisory service after the contract had expired. The Employer however maintained that the applicant's refusal to continue acting on the position amounts to gross insubordination and failure to obey lawful and reasonable instructions. The court held that the situation had indeed become intolerable, as set out in the sequence of

[61] *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 *ILJ* 629 (LAC).
[62] *Yona* para 41.

events as they unfolded. It is clear that this was mainly of the employer's making. The employee reluctantly agreed to act in the HOD position, even though it was a much bigger job with far greater responsibilities, and she had reservations about doing it. But this was meant to be a short-term solution; the employer was meant to go on an urgent recruitment drive and to appoint someone else. It took almost five months to do so. And even then, it still instructed the applicant to report in a position that had already been filled.[63] These two cases cements the three requirements as pointed out in the act that the employer's own conduct must be to blame for the employee's termination of contract.

The LC in *SAPS v Safety and Security Sectoral Bargaining Council* [64] had to make a decision in respect of whether a resignation by an employee amount to a constructive dismissal, this was after an employee from SAPS whom was employed as dog handler tendered his resignation, but later lodged a claim for unfair dismissal with the bargaining council. The court held 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. There are many things an employer may fairly and reasonable 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". It is therefore submitted that in all constructive dismissal claims, the employees must always bear in mind that the onus of proof shifts from the employer to the employee to submit evidence which will satisfy the court that, had the employer not treated the employee in the manner that gave rise to the constructive dismissal claim, the employee would not have terminated the employee relationship.

3.4 The Employee's Duty to Exhaust Grievances Procedures

The case of *Koyabe v Minister of Home Affairs*[65] gives a clear picture of an applicant's duty to take into confidence the employers internal remedies and labour dispute resolutive processes before opting to resign and later claim constructive dismissal. It was held that the duty to

[63] *Majatladi* para 44.
[64] [2011] ZALCCT 61 (26 August 2011) paras 34 and 40 (*SAPS*).
[65] 2010 (4) SA 327 (CC) (*Koyabe*).

exhaust internal remedies before approaching a third body is a necessary requirement in terms of our law. However, the requirement should not be rigidly imposed nor used by administrators to frustrate the efforts of an aggrieved person or to shield the concerned disciplinary process from judicial scrutiny.[66]

Bakker v CCMA[67]establishes 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 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. In short, 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.

It was held in *Foschini Group v CCMA*[68] 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*[69] it was laid down that an employer should be made aware of the alleged intolerable condition so as 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?

The case of *Nampak Products Ltd t/a Nampak Glass v NBC for the Chemical Industry*[70]involved an application in terms of section 145 of the Labour Relations Act to review and set aside the arbitration award dated the 1st of August 2014 issued by the second respondent being the

[66] *Koyabe* para 343.
[67] (2018) 39 *ILJ* 1568 (LC) (*Bakker*).
[68] (2008) 29 *ILJ* 1515 (LC) paras 33 and 37.
[69] [2017] ZALCJHB 25 (26 January 2017) para 74.
[70] [2017] ZALCJHB 508 (*Nampak*).

arbitrator under the auspices of the first respondent being the bargaining council. The arbitrator found the dismissal of the third respondent being the employee to be substantively unfair. The brief of the facts of the matter were that the employee was charged with misconduct and ordered to appear for a disciplinary enquiry by the employer wherein he was subsequently dismissed upon conclusion of the disciplinary enquiry. The matter was referred to the bargaining council for arbitration, the commissioner ruled that the employee's dismissal was substantively unfair.

The court held that in determining the appropriateness of the sanction the arbitrator must enquire into the gravity of the contravention of the disciplinary rule, the consistency of application of the disciplinary rule and sanction, and the mitigating and aggravating factors[71]. The court further stated that it was not disputed that the employee was issued with two written warning and a final written warning prior to his dismissal, the arbitrator failed to take into consideration the evidence of the employee disciplinary record and that he was on a valid final warning prior to his dismissal. The appeal was upheld and the employee's dismissal was found to be fair. It is therefore submitted that this judgement embraces the importance of the internal grievance resolution proceedings as important factor to be looked at when determine fairness of a dismissal.

The applicant in *Solidarity obo Van Vuuren v Lekwa Local Municipality*[72] went to work and found his office locked. Without inquiring about the reason for his office to be locked, he just filled a sick leave form since he was booked off sick until 13 April 2007. Whilst at home, he thought about the possible reasons for his office to be locked and thereafter decided to tender his resignation on 13 April 2007. The court dismissed the appeal and held that Van Vuuren's suspension and the subsequent locking of his office did not amount to duress that would entitle him to bypass the internal Grievance Procedure[73]. The court agreed with the commissioner that Van Vuuren had enough time to consider and explore all possible options at his disposal before deciding to resign. He could have escalated his grievance to the Municipal Manager, alternatively referred it to the SALGBC in terms of the Grievance Procure. It is

[71] *Nampak* para 19.
[72] [2014] ZALCJHB 220 (*Solidarity obo Van Vuuren*).
[73] *Solidarity obo Van Vuuren* para 28.

therefore submitted that internal grievance procedure are essential tools at the employee's disposal before one decides to terminate the contract of employment.

3.5 The Pitfalls of a Hurried Resignation on a Subsequent Constructive dismissal Claim

The preceding analysis has highlighted the importance of exhausting internal dispute process before resorting to resignation. The balance of case exposition brings to the surface the extent to which pre-emptive resignation can compromise subsequent constructive dismissal claim. Depending on the facts of each case, resigning to avoid disciplinary action would not always constitute a constructive dismissal. One would have to prove that the conduct was intolerable and warranted a termination of the employment contract, a free and voluntary resignation would not amount to a constructive dismissal claim. In the case *Hickman v Tsatsimpe NO,*[74] the court stated that an employee who resigns rather than face a disciplinary enquiry will not generally be held to have been constructively dismissed. This case is a review from the CCMA wherein it was held that the applicant had not been constructively dismissed. The applicant was shareholder in the third respondent's business, a director of the company and employed as sales director. Directors, during a meeting raised unhappiness with the applicant as a shareholder and director and his performance within the company. Subsequent to the meeting, the applicant tendered his resignation and later claimed constructive dismissal.

The employee in *Solidarity obo Van Tonder v Armaments Corporation of SA (SOC) Ltd*[75] acted hastily in resigning. According to the LAC the employee resigned before the grievance process had progressed beyond the first stage. The employee evinced that he had no confidence in the internal grievance process and preferred to resign and approach the CCMA instead even before step 5 of the process. He was too hasty in his decision to resign. In the LAC's view 'his conviction in the merit of his cause, fuelled by his obvious outrage and indignation, may well have been misplaced. HI assumption that his superior's views about the performance contract outputs and appointments were wrong or unacceptable needed to be tested and there was a legitimate, prescribed remedy available for that very purpose, which opted to pursue.'[76] The

[74] [2002] 5 BLLR 399 (LAC).
[75] [2015] ZALCJHB 241 (5 August 2015) (*Armaments Corporation of SA*).
[76] *Armaments Corporation* para 46.

employee's resignation was 'petulant, premature and ill-considered' thus taking his dispute completely outside the domain of constructive dismissal.

In reference to the case of *SALSTAFF v Swiss Port South Africa (Pty) Ltd,*[77] the employee was not expected to put up with the intolerable conduct and in this case the resignation did amount to a constructive dismissal. This is a review application of the commissioner's finding that the employee was not constructively dismissed based on the evidence which the applicant had brought in order to prove the intolerable conditions which the applicant was subjected to.[78] Resigning to avoid disciplinary action does not generally constitute a constructive dismissal. Moreover, the employee contended "that she was subjected to pressure and intimidation and that she was confronted with the choice either to resign or to face dismissal. Unless one can prove that the disciplinary action is a foregone conclusion, one cannot claim constructive dismissal. A resignation from the employee before disciplinary action does not always constitute a constructive dismissal.[79]

In the case of *Kynoch Fertilizers Ltd v Webster,*[80] the LAC found that the resignation of an employee who had resigned and whose resignation was accepted by an employer amounted to a settlement between them. This means that any rights that may have accrued to the employee by virtue of a dismissal are cancelled by the settlement, and the employee could not seek relief by way of reinstatement or compensation for a constructive dismissal after having elected to resign. Constructive dismissal occurs when an employer acts in such a way that eventually and ultimately leads to the employee, as the receiving party in the employment relationship, terminating the employment contract.[81] It is clear from the decision of the court that the law of contract still plays a role in the determination of the question of whether an applicant's case for constructive dismissal will be founded or not. This submission is based on the fact that the employee by terminating the agreement and refusing to serve a notice period amount to a breach of contract which the employer can sue for specific performance. However, in the event where the employer accepts the resignation such amounts to a settlement agreement between them which also results in the employee losing some of the relief, she/he

[77] (2010) 19 (LC).
[78] Selwyn *Law of Employment* 2nd ed 242.
[79] Selwyn (note 67 above) 246.
[80] [1998] 1 BLLR 27 (LAC).
[81](2006) 27 *ILJ* 1607 (SCA) para 29 (*Webster*).

would have been entitled to claim. This is evident in the case of *SALSTAFF abo Bezuidenhout v Metrorail,*[82] whereby an employee is charged with misconduct and subjected to disciplinary action in order to dismiss the employee. The employee filed a grievance stating that the managers are racist, where after the managers charged him with two alleged offences and a disciplinary hearing was scheduled. After this, the employee decided to hand in his resignation letter and subsequently filed for a constructive dismissal claim on the basis that the disciplinary proceedings were instituted with the sole purpose of dismissing him.[83] The court stated that it cannot believe that it can reasonably be argued, that an employee is precluded from claiming to have been constructively dismissed if he resigned to avoid disciplinary proceedings when an unfair result is a foregone conclusion. By resigning, the employee sought to avoid the unfair dismissal he suspected would occur, and which ultimately did occur. The court held that there was a constructive dismissal, and the employee was awarded compensation.[84] It can therefore be said that an employee's resignation in the face of a disciplinary action would only be justified if it can be said that the disciplinary action was a foregone conclusion to have the employee dismissed.

The applicant in *HC Heat Exchangers (Pty) Ltd v Araujo*[85] had brought an application in terms of section 145 as read with section 158(1)(g) of the LRA to review and set aside an arbitration award handed down by the third respondent in her capacity as an arbitrator of the Metal and Engineering Industries Bargaining Council being the second respondent. This was after the first respondent, who had resigned from his employment with the applicant, pursued an unfair dismissal dispute as contemplated in section 186(1)(e) of the LRA to the Bargaining Council, thus contending his resignation was a so-called 'constructive dismissal' by the applicant.

Upon the hearing of the appeal, the court stated that there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable.

[82](2005) 26 *ILJ* 2142 (LAC) 28.
[83]*SALSTAFF abo Bezuidenhout v Metrorail* para 12.
[84]*SALSTAFF abo Bezuidenhout v Metrorail* para 8.
[85] [2019] ZALCJHB 275 (8 October 2019) (*HC Heat Exchangers*).

All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established.[86]

Once it is so that the employee terminated the employment relationship, then the next step in the enquiry is to establish whether the reason for that termination is because the employer made continued employment intolerable for the employee. In other words, there must be a proper link between the intolerability, and the termination. However, and at the heart of this part of the enquiry is establishing what is 'intolerable'. In my view, intolerability is far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly.

3.6 Conclusion

Disciplinary Hearings serve as way in which an Employee's alleged unbecoming behaviour can be addressed without the need to involve too many external structures. This allows for a proper and formal way for a decision to be made appropriately, linked to the severity of the alleged breach. It is always recommended that a clause be inserted in employment contracts stipulating that parties shall first fully exhaust the internal structures before referring the matter as this will allow for a proper investigation with the Employer then able to correct inconsistencies whilst saving resources. It is therefore submitted that it does not help the employee to escape the disciplinary proceedings hoping to get a relief in a subsequent constructive dismissal. It has already been shown that the employer is still entitled to proceed with the disciplinary action in the absence of the employee where there has been a notice period. Where the employee resigned with immediate effect the law still shows that the employer will automatically have a right to sue for specific performance and hold the employee to his contract and insists on a notice while instituting disciplinary proceedings. From the discussions above, it is clear that our courts have set a daunting burden for employees to prove that they were constructively dismissed and rightly so.

[86] *HC Heat Exchangers* para 47.

CHAPTER FOUR

SUMMARY AND CONCLUSION

4.1 Introduction

It is trite law, and as have already seen in this study that the South African Constitution grants everyone the right to fair labour practises. Moreover, in the same vein, the constitution states that every worker has a right not to be unfairly dismissed and not to be submitted to unfair labour practice.[87] The primary goal of labour law is to promote, preserve, and uphold the values of justice, rationality, lawfulness, and fairness in employment relationships by balancing the opposing interests of the employee and the employer.[88]

It is therefore important to ensure that legislations and internal grievance procedure, are adhered to in order to preserve a good working relationship between the employer and employee, without the possibility of one using any law principle for mischievous agendas, more in particular pre-emptive resignations for a subsequent constructive dismissal claim.

As we have already seen in chapter three of this study, one of the oldest tricks in the book is for employees who are notified that they are to attend a disciplinary hearing is to resign with immediate effect.[89] Employees perceive that by doing so, they might escape the repercussions of being fired for misbehaviour and so prevent a blemished disciplinary record that may jeopardize their chances of finding work elsewhere in the future.

4.2 Intolerability As a Requirement for Constructive Dismissal.

Without having to reiterate the definition of constructive dismissal, it has already been shown and supported by case law that the most important factor in any constructive dismissal claim, is for the applicant to prove that the reasons which lead to the termination of the employment contract was as a result of the employer's working conditions which the employee found to be intolerable, and had no alternative for redress except to terminate the employment relationship. As noted in the discussion

[87] Bendix *Industrial Relations in South Africa* 108.
[88] Vettori *African Human Rights Law Journal* 22.
[89] Grogan, J *Workplace Law* 68.

above, the worker bares the onus of proving that the harm was of such significance that it made it difficult for the worker to carry on with employment.

The most difficult challenge as we have already seen in the study, faced by the labour courts is to outline what constitutes intolerable conduct for the purposes of constructive dismissal. The court in *Value Logistic,* considered the word intolerable to signal the serious collapse of the employment relationship, which entailed that the worker could not carry on with the employment.[90]

4.3 Findings on the Legal Position for Pre-Emptive Resignation

Chapter three of this study has fully discussed the repercussions of Pre-Emptive resignation for a subsequent constructive dismissal claim. It has been shown that a contract of employment is nothing special of an agreement and thus should be regulated in accordance with the general principles of the contract Law. A resignation has already been defined as a unilateral act which further amounts to a breach of contract. Where an employee terminates the employment relationship without notice, the employer automatically assumes the right to enforce the terms and conditions of the agreement and sue for specific performance. This remedy ensures that the culture of resigning in order to evade disciplinary proceedings is nothing short of a myth. It is therefore submitted that resignation to avoid disciplinary has been proven to be unsuccessful.

4.4 Pre-empted Disciplinary proceedings against Employees.

One other aspect that was scrutinised in this study is the reality that some disciplinary hearings are conducted for the purposes of complying with the Labour relations Act, but the results thereof are already a concluded decision by the employer before the hearing could even commence. In such events, some employees have terminated their employment contracts after the realisation that their disciplinary proceedings are nothing but a procedural disguise with an already concluded outcome. The big question then became how does the law protect employees in such proceedings more

[90] *Value Logistics* para 22.

in particular in the event that such an employee was to institute a constructive dismissal claim.

This question was finally answered by the court in the case of *SALSTAFF abo Bezuidenhout;*[91] whereby the court held that: It cannot believe that it can reasonably be argued that an employee is precluded from claiming to have been constructively dismissed if he resigned to avoid disciplinary proceedings when an unfair result is a foregone conclusion by resigning, the employee sought to avoid the unfair dismissal he suspected would occur, and which ultimately did occur. The court held that there was a constructive dismissal, and the employee was awarded compensation.[92]

4.5 Conclusion

As already shown from the discussion above, the goal of this study was to investigate and comprehend incidents in which workers resigned in the face of a disciplinary or performance enquiry in connection to a critical assessment of current concerns on constructive dismissal. A voluntary resignation made just to avoid attending a disciplinary hearing will not always constitute constructive dismissal, and moreover, it will not stay the proceedings as same will proceed even in the absence of the employee who such proceedings are instituted against. Even the absence of the employee, the employer has the right to continue with the disciplinary hearing.

It is critical that the notion of constructive dismissal not be utilized as an easy exit by disgruntled employees, but rather as a legitimate tool for people who find themselves in work circumstances that are inhumane and intolerable to continue working under out of fear of being unable to get proper recourse[93].

Constructive dismissal cases are different to other claims of unfair dismissal in that the employee must have tendered his or her resignation. However, such resignation must have been induced by the conduct of the employer who made continued

[91] *SALSTAFF abo Bezuidenhout* 28.
[92] *SALSTAFF abo Bezuidenhout* para 8.
[93] Barry "Employment Contracts for Charities and Non-profit Organizations" in Charity Law (March 26, 2009), http://www.carters.ca/pub/bulletin/charity/2009/chylb159.pdf.

employment intolerable. The employee bears the onus of proving constructive dismissal and once that has been established, the employer must prove that the dismissal was fair.

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