Critical analysis of constructive dismissal in South African employment law: Issues and perspectives

By

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Dedication

To my late grandmother Meadi Molepo my late aunt Ida Mapula Mojapelo and my mother Welheminah Molepo for being my greatest pillar of strength.

THE DECLARATION BY STUDENT

I, MR Molepo with student number [redacted], declare that the contents of this mini dissertation are my own work. The proposed research project titled **Critical analysis of constructive dismissal in South African employment law: issues and perspectives** is my own proposed work for the study of LLM. All sources used in this study have been indicated and acknowledged by means of referencing. I have not used work previously produced by another student or any other person nor any Organisation to hand in as my own. I know and understand what plagiarism is including the policy of the University of Limpopo concerning plagiarism. I am the sole author of this work.

MR Molepo 15 May 2024

SIGNATURE DATE

DECLARATION BY SUPERVISOR

I declare that **Critical analysis of constructive dismissal in South African employment law: Issues and perspectives** is the work of MR Molepo proposed for the study of LLB at the University of Limpopo. The proposal completed under my supervision, is the candidate's own innovation and implementation thereon. All materials contained have been specified and acknowledged by means of complete references.

15 May 2024

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(PROF... C I TSHOOSE)

ABSTRACT

In common parlance employment relationship can be terminated by either the employer or the employee. Termination of employment by the employee is referred to as resignation and termination by the employer's conduct is defined as constructive dismissal. Dismissal with particular reference to section 186(e) of the Labour Relations Act 66 of 1995 ('the LRA') forms the main subject of this study. The above-mentioned section fully explains dismissal to include a position where an employee resigns due to the conduct of the employer who made continued employment intolerable. This dissertation explores decided case laws and various labour legislations related to constructive dismissal. Furthermore the study considers and describes the forms of behaviour that have been and those that will be considered by the courts to be offensive conduct on the part of the employer, and to what end these can be said to necessitate a case of constructive dismissal. The study also looks at definition of constructive dismissal, definition of intolerable conduct of the employer and test to determine constructive dismissal.

Keywords: Employer, employee, constructive dismissal, intolerable conduct, stress, resignation, grievance, subordinates, and harassment.

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List of abbreviations

PTSD	**Post-traumatic stress disorder**
ILO	**International Labour Organisation**
LRA	**Labour Relations Act**
EEA	**Employment Equity Act**
ESA	**Employment Standard Act**
CCMA	**Commission for Conciliation, Mediation and Arbitration**

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CHAPTER ONE: INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction

Employment contract can be terminated by either one of the parties in the context of employment relationship. Section 23(1) of the Constitution of the Republic of South Africa states that "everyone has the right to fair labour practices".[1] Furthermore, the Labour Relations Act, 1995 ('the LRA') confers on all employees the right not to be unfairly dismissed.[2] The issue of whether an employee can claim constructive dismissal in terms of the LRA is central to the discussion of this study.

The notion of "constructive dismissal" was introduced into the South African legal system by English law in 1986 [3] by means of the case of *Small& others v Noella Creations (Pty) Ltd*.[4] In this case, workers in a clothing boutique resigned as they were not willing to work for the company under a contractual stipulation which entailed that they would have to pay for "stock shortages at the end of every month". After the workers services were terminated, they were reinstated in terms of section 43 of the Labour Relations Act, 1956[5] (hereinafter referred to as 'the 1956 LRA').

The concept of constructive dismissal falls under the umbrella of unfair dismissal, in our law. The 1956 LRA[6] gave statutory status to constructive dismissal. Section 186(1)(e) of the 1956 LRA determine that "dismissal" means, among other things, that "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."

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[1] S 23 (1) of the constitution declares that ,'everyone has right to fair labour practices'
[2] Labour Relations Act 66/1995 (hereafter 'the 1995 LRA ').
[3] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); (2008) 29 *ILJ* 1369 (SCA) 8.
[4] *Small & Others v Noella Creations (Pty) Ltd (*1986) 7 *ILJ* 614 (IC) 615 H-I.
[5] Labour Relations Act 28 of 1956.
[6] The 1995 LRA.

The issue of whether an employee can claim constructive dismissal due to work-related post-traumatic stress in terms of the LRA, 1995 is central to the discussion of this study. Most of the existing research (local and international) does not cover challenges experienced by employees for constructive dismissal. It is submitted that work stress is real in the workplace, stress also has adverse effects on workers' mental health.[7] In certain cases, the amount of work stress endured by employees makes their continued employment intolerable, as a result they may claim constructive dismissal.[8] Work stress is a threat in the workplace and courts are not certain on how to deal with employees who resigned due to stress.[9]

Furthermore, employers are unable to deal with cases of employees suffering from post-traumatic stress arising from constructive dismissal[10] as there is no legal duty on employers to assist employees. A work-related stress can be one of the factors that can make the continued employment intolerable, this might be a ground for the employee to resign.[11] According to Hodgins *et al*., work-related stress remains a major scourge of modern-day working life.[12] She acknowledges that there are many people for whom

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[7] Estie Smit, Constructive Dismissal and Resignation due to Work stress, 2011.
[8] Okpaluba C and Maloka T "Intolerability of the Employment Relationship in the Context of Constructive Dismissal: An Analysis of Recent Judgments from South Africa, Namibia, Lesotho and Eswatini/Swaziland (Part 1)" vol.37 (1) 2023 *Speculum Juris* 86. The Labour Appeal Court has observed that inherent in employment relationships are often considerable levels of irritation, frustration and tension (see *Jordaan v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 2331 (LAC) page 9 as articulated by Wagley DJP, Davis JA, Musi AJA,). The further held that generally speaking, these are insufficient in themselves to establish the intolerability of continued employment. Something more is required. As the court observed in *Experian Regent Insurance Co Ltd v Commission for Mediation & Arbitration and others* (2013) 34 ILJ 410 (LC), at para 53. In this case the court remarked that "The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it. The conduct of the parties is to be looked at as a whole and its cumulative impact assessed".
[9] Estie Smit, Constructive Dismissal and Resignation due to Work stress, 2011.
[10] *PE v Dr Beyers Naude Local Municipality and Another* (2021) 42 ILJ 1545 (ECG).
[11] Tshoose C "Constructive dismissal arising from work-related stress – A look at National Health Laboratory Service v Yona & Others" (2017) Vol.42 (1) *Journal of Juridical Science* 121-138.
[12] Hodgins et al. 2016:99.

work is still a source of excessive pressure, which, in turn, leads to stress, anxiety and depression.[13]

In the case of *Hendriks v Mercantile & General Reinsurance Co of SA Ltd*,[14] the court found the dismissal of the appellant to have been substantively and procedurally fair. The appellant had been dismissed based on the ground of incapacity. The employee was suffering from anxiety and depression, which was aggravated by the depressing circumstances at work place. The respondent had exhausted all possible solutions in an attempt to accommodate the appellant's depression and anxiety, while at the same time offering the appellant medical treatment the employer tried to accommodate the employee by offering him alternative, less stressful employment, which the employee declined.

1.2 Aims and objectives of the study

The aim of this study is to investigate causes of constructive dismissal, define constructive dismissal in the context of South African jurisprudence. The study also investigates forms of constructive dismissal and recommend a better way of dealing with stressed employees post constructive dismissal. The study further examines what is intolerable conduct and discusses the test for determining constructive dismissal. This study aims to better understand the meaning and origin of the concept of a constructive dismissal. This study adopts a desktop-based literature study. Qualitative method is used to gain in-depth insight of constructive dismissal. Finally, the study investigate the content and application of the principle of constructive dismissal in South African employment law.

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[13] Hodgins *et al.* 2016:99.
[14] *Hendriks v Mercantile & General Reinsurance Co of SA Ltd* 1994 15 ILJ 304 (LAC).

1.3 Problem statement

Very often scholars fail to address the psychological effects of post-traumatic stress suffered by employees because of constructive dismissal in the workplace. It is argued in this study that the constructive dismissal remedies provided by the LRA, 1995 fail to take in to account the post-traumatic stress disorder ('PTSD') suffered by the employees in cases of constructive dismissal. PSTD is considered a mental health disorder.[15]

Symptoms of PTSD may include re-experiencing the traumatic event through vivid nightmares, flashbacks or excessive thoughts of the event.[16] Oftentimes, people may experience a change in their thoughts and mood, at times expressed through irritability and feeling 'on edge' or nervous. Some people may be startled easily, have a hard time concentrating or have trouble with sleep. Generally, an individual who suffers from PTSD may often feel like something terrible is about to happen and may experience a disassociation with self and their environment.[17]

Scholars illustrate how constructive dismissal has been accepted by the courts to mean actions on the part of the employer, which drive the employee to leave his/her workplace.[18] Accordingly, work-related stress can be one of these factors that can make the continued employment intolerable; hence, the employee decides to resign.

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[15] Bichitra N et al "Adjustment Disorder: Current Diagnostic Status" (2013) 35(1) *Indian J Psychol Med* 4–9.
[16] Botha M "Psychological sequelae of political imprisonment, specifically post-traumatic stress disorder, in 491 Days by Winnie Madikizela-Mandela" (2018) 39(1) *Journal of Literary Criticism, Comparative Linguistics and Literary Studies* 2-5.
[17] Skinner A and Challis S "Post-Traumatic Stress Disorder (PTSD) in San Forager theories of disease, and its implications for understanding images of conflict in Southern African Rock Art" (2023) 33(4) *Cambridge Archaeological Journal* 673-691.
[18] Du Toit et al. 2015:430. See also Tshoose CI "Constructive dismissal arising from work-related stress – A look at *National Health Laboratory Service v Yona & Others*" (2017) Vol.42 (1) *Journal of Juridical Science* 121-138.

1.4 Constructive dismissal as an unfair dismissal

Section 186(1) (e) of the LRA,[19] details dismissal as the termination of the employment contract by the worker, with or without notice, because the employer made continued employment intolerable for the worker. Generally, the employer is the one who gives notice for dismissal and if the employee terminates the employment contract, this will constitute a resignation and not a dismissal, unless the termination falls under, Labour Relations Act.[20]

It is currently common that unlawful behaviour on the part of an employer that causes a worker to terminate employment is regarded as a constructive dismissal.[21] Where an employee resigns because the employer made continued employment intolerable for the employee, it will constitute a 'dismissal', better known as a 'constructive' dismissal.[22] For example, X works for ABC as receptionist. Her manager has tried to kiss her on a number of occasions and he kept on sending nude pictures of himself to X by email. ABC just ignored all of X's complaints and she resigns because she feels that she can no longer work under these circumstances.[23] In order to succeed with a claim of constructive dismissal the court made it clear that the following three elements should be present to succeed with such a claim. The employee must show that:[24]

(a) She /she resigned;
(b) The reason for the resignation was that continued employment became intolerable.

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[19] Labour Relations Act 66/1995.
[20] Labour Relations Act Section 186(1) (e).
[21] Section 186(1) (f) of the LRA.
[22] M McGregor *et al Labour Law Rules* (2021) 100.
[23] M McGregor *et al Labour Law Rules* (2021) 100.
[24] M McGregor et al Labour Law Rules (2021) 100.

(c) It was the employer‘s conduct that created the intolerable circumstances.[25]

The courts have interpreted this to mean that resignation was a matter of last resort.[26] The employee should not have had other ulterior motive for resignation and employee would still be employed had the employer not displayed intolerable or undesirable conduct. The employee must proof on balance of probabilities that the employer made continued employment intolerable because of employer’s conduct.

In the case of *Eagleton & Others v You Asked Services (Pty) Ltd*,[27] the Court regarded the three elements that a worker must establish to petition constructive dismissal. The fundamentals are:[28]

a) The worker terminated the contract of employment;
b) Continued employment had become intolerable for the employee; and
c) The employer must have made continued employment intolerable.[29]

It is the sole responsibility of the employee to proof that the resignation formed a constructive dismissal. Furthermore, it must be proved that the worker did not act voluntarily. Lastly, it must be shown that the worker did not plan to resign.[30]

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[25] M McGregor et al Labour Law Rules (2021) 100.
[26] M McGregor et al Labour Law Rules (2021) 100.
[27] *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) 8.
[28] *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) 8.
[29] *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) 8.
[30] Labour Relations Act 66 of 1995, section 192.

1.5 Scope and limitation of the study

The study is an exploration of the principle of constructive dismissal in South African employment law. The study also investigate the different approached that courts have adopted in implementing subjective test in cases dealing with constructive dismissal. The study explores what is intolerable conduct and the intention of the legislature in terms of section 186 of the Labour Relations Act, 1995. The study does not include a discussion on the termination of contract by employee when he/she got employment on other company. The study further addresses the psychological effects of post-traumatic stress suffered by employees because of constructive dismissal in the workplace.

1.6 Research question(s)

This study seeks to answer the following question: What does intolerable conduct constitute? In endeavouring to answer this research question, the following issues are examined:

(a)What is the meaning and origin of the concept of a constructive dismissal?

(b) What is the difference between constructive dismissal in terms of the LRA, 1995 and the common law?

(c) What are the challenges in determining constructive dismissal?

(d) What are the remedies for dismissed employees for unfair constructive dismissal?

(e) What is the test for establishing constructive dismissal?

(f) Whether workplace stress can cause constructive dismissal?

1.7 Literature review

According to ssection 186(1) (e) of the LRA, 1995 constructive dismissal takes place where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable. Employees will be breaching contract of their employment, however they will have a choice to allege that they were constructively dismissed in terms of LRA or repudiation of the contract in common law, depending on the circumstances. There is no conclusive list in terms of what may constitute a valid claim for constructive dismissal. "There is a variety of employer actions that can give rise to a claim of constructive dismissal". [31]

Grogan,[32] states that in dismissal proceedings, the onus in on the employees to prove that they were in fact dismissed and on the employer to show that the dismissal was fair. The difficulty with the concept of constructive dismissal is determining when continued employment has actually become intolerable. Our courts failed to develop general principle thus far. To date there has not yet been consistency regarding the test to be followed when dealing with claims of constructive dismissals. Each case is treated on its own merit. In some cases, courts held that constructive dismissal claims would only be successful where all internal processes have been exhausted before the employee resign.[33]

This means that employees before considering to resign, she/he must file grievance to the attention of the employer and give the employer opportunity to respond to the allegations and the opportunity to rectify the matter. In *Aldendorf v Outspan International Ltd* ,[34] an employee who could reasonably

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[31] Eagleton supra; See also *Minister of Home Affairs v Hambidge* 1999 (20) ILJ 2632 (LC) at para 12. The concept of constructive dismissal is flexible because the circumstances that may give rise to it are so infinitely various".
[32] *Workplace Law* 9th ed (2007).
[33] Grogan Workplace Law 152
[34] Aldendorf v Outspan International Ltd (1997) 18 ILJ 810 (CCMA).

have lodged a grievance but failed to do so before resigning could not persuade the arbitrator that he had no option but to resign. The commissioner had the following to say "[W]here employees could reasonably have lodged a grievance regarding the cause of the unhappiness, and failed to do so before resigning, they may be hard put to persuade the court or arbitrator that they had no option but to resign".

In many instances, courts have cautioned applicants to seek internal remedies before resigning. Courts argued that where employees realise that their life is intolerable at their work place, they need to find practical solution before resigning. This assertion was confirmed in the case of *Albany Bakeries v Van Wyk & others*.[35] In this case, the presiding officer had this to say ".....It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desired". Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, It might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem."

Generally, constructive dismissal cases are always difficult to win. It is almost practically impossible if you resign without following internal procedures in workplace and claimed for constructive dismissal. Employees tend to struggle to prove constructive dismissal cases at the Commission for Conciliation, Mediation and Arbitration (CCMA) in circumstances where they did not exhaust all internal avenues. The CCMA has similarly advised that an employee needs to show they had attempted to resolve the intolerable situation prior to resigning as the employee bears onus to prove constructive dismissal.

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[35] *Albany Bakeries Ltd v Van Wyk & others* (2005) (LAC).

It can be simply established from case law that a case for constructive dismissal will almost certainly fail if the employee has not exhausted the internal grievance procedures. Labour Court confirmed this statement in the case of *Conway v Ulster Bank Limited*.[36] In this case, the court held that "in constructive dismissal cases, where the complainant claims that the employer acted unreasonably the Court must examine the conduct of the parties. In normal circumstances, a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. Furthermore, parties must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign".[37]

It is important that any employee to utilise and exhaust all internal remedies made available to him or her before resigning. This statement is further confirmed by the decision of Adjudicating Officer in *Reid v Oracle EMA Limited*,[38] in which the Tribunal held "it is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair". One incident will not be sufficient to establish a valid claim for constructive dismissal. Employee will have to proof on balance of probabilities in order to succeed with a claim. It is desirable for the employee to exhaust all avenues internally before lodging successful claim for constructive dismissal.

Employee is duty bound to persuade court or Arbitrator that resignation was the last resort and the employee has exhausted all internal procedures. In

[36] *Conway v Ulster Bank Limited*, UDA474/1981.
[37] *Conway v Ulster Bank Limited UDA474/1981*
[38] *Reid v Oracle EMA Limited,* UD1350/2014.

Jordaan v CCMA,[39] the Labour Court held that "an employee must give evidence to justify that the employment relationship has indeed become so Intolerable that no reasonable option, save for termination is available to her". Justice Davis found in favour of the company. He held that “there was no justifiable conclusion that the appellant (Jordaan) employment had become intolerable or that there was a clear, objective and immediate threat of dismissal, justifying the act as constructive dismissal”. The appeal was dismissed with costs.

In another related case of *Smith v Magnum Security*,[40] the arbitrator found that "a dismissed employee has a legal duty to establish a lack of reasonable alternatives to resignation. In addition, the court noted that mere unreasonableness or illegitimate demands by the employer, according to this approach, do not amount to constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship”.[41] The court in this case concluded that “there is no compelling reason for the applicant to simply resign without raising the issue with the respondent. If the employee chose to resign rather than seeking to resolve the dispute with the employer, he is not constructively dismissed”.[42] This clearly shows that courts in most instances encourage employees to follow internal processes before thinking of resigning.

Here is another case where a Judge dismissed a claim of constructive dismissal as the employee dismally failed to engage with his employer internally. In *Nduna Bantubonke v South African National parks*.[43] The respondent holding a senior position of financial manager reporting directly

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[39] *Jordaan v CCMA and Others* (2010) 12 BLLR 1235 (LCA).
[40] In *Smith v Magnum Security* (1997) 3 BLLR 336 CCMA.
[41] In *Smith v Magnum Security* (1997) 3 BLLR 336 CCMA.
[42] In *Smith v Magnum Security* (1997) 3 BLLR 336 CCMA.
[43] *Bantubonke v South African National Parks* (C288/2000) [2002] ZALC 55 (19 June 2002).

at the Cape Town regional office hired the applicant. On 27th a month of October 1999, the applicant and other employees in the finance section based in Cape Town resigned. The applicant resigned after the employer wanted to transfer him to Pretoria. He also alleged that he was discriminated. However, the respondent vehemently denies that the applicant was discriminated against or that he was dismissed based on operational requirements. The respondent's case is that the applicant resigned. The manager met with all staff and informed them the intention of relocation to Pretoria in order to save costs. No other staff member challenged the relocation to Pretoria. Other employees stated categorically that they will never relocate to Gauteng Province and instead requested information regarding the severance package. Mr Nduna (Applicant) and other staff members never raised any grievance about their transfer. Again, the respondent denied the constructive dismissal and further extended the invitation to all affected employees with intention settle the matter amicably.

The respondent summoned Mr Nduna and other staff members for proposals with intention to resolve the harmoniously. No proposals came from Mr Nduna or other staff members. Mr Nduna, during his testimony in court conceded that he was aware of the concept of restructuring until 1998. In mid-1998, he decided not to attend any meetings. He did not attend any workshops in 1999. Court held that the applicant argued that he was constructively dismissed because he was not offered a specific post in Pretoria. The Judge in this case ruled that this argument cannot be accepted if the applicant had a problem with transferring to Pretoria or had doubts as to the work he was going to perform, he was fairly invited to attend several meetings, however he declined. Furthermore, it was open to him to make inquiries and he never bothered to make any queries. The applicant and other employees were told that the work was available for them.

According to the court, the fact that there was no list of alternatives is no ground for not responding to the request that the employees indicate their

intentions. The applicant did not identify any alternatives. In the circumstances the court rejected the argument that the applicant was not asked to negotiate alternatives as none were identified by him". Justice Ngcamu remarked that "the fact that the respondent wanted the applicant to move to Pretoria in my view cannot amount to constructive dismissal as alleged by the applicant. And that there is no compelling reason for the applicant to simply resign without raising the issue with the respondent. If the employee chose to resign rather than seeking to resolve the dispute with the employer, he is not constructively dismissed".[44]

In the case of *Kruger v Commission for Conciliation, Mediation and Arbitration and Another,*[45] employee in this case entirely failed follow an internal grievance procedure as she believed that the grievance procedure was no longer an option and waste of time. The Court ruled that employees should not second-guess the outcome of lodging a complaint in terms of the employer's grievance procedure, especially in cases where employee is planning to resign and later lodged unfair constructive dismissal case. It is always advisable for employee to follow grievance procedure before resigning.

The Court held that ". . . when there are remedies available to an employee which had not been exhausted, as in this case, the employee has not discharged the onus of proving that she was constructively dismissed…". An employee may not choose constructive dismissal while other options are available. The court's function is to look at the employer's conduct as a whole and to determine whether its effect, judged reasonably and sensibly, is such that the employee could not have been expected to put up with it".[46]

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[44] *Bantubonke v South African National Parks* (C288/2000) [2002] ZALC 55 (19 June 2002).
[45] *Kruger v Commission for Conciliation, Mediation and Arbitration and Another* (2002) 23 ILJ 2069 (LC).
[46] *Kruger v Commission for Conciliation, Mediation and Arbitration and Another* (2002) 23 ILJ 2069 (LC).

The above judgment in *Kruger* emphasised the view that an employee cannot resign and claim constructive dismissal while other options are available internally. As already alluded to, the test is whether a reasonable alternative existed. Other case to support internal processes before employee resign is the case of *Copeland and New Dawn Prophesy Business Solutions (Pty) Ltd*,[47] the court held that an employee alleging constructive dismissal had to show "...convincingly that his resignation…came about as a consequence of the employer being the "villain" in the employment scenario who made the employment relationship "intolerable" to him, to such an extent that he finally in desperation, having exhausted all internal mechanism of the employer available to him, was left with no other viable alternative but to resign".[48]

The courts have interpreted that resignation must be a last resort after other avenues have been followed. This statement was further confirmed in the matter of *LM Wulfsohn Motors v Dispute Resolution Centre & Others*. [49] *In casu*, the third Respondent Ms Nel claimed that the Applicant constructively dismissed her in that it had made continued employment intolerable for her. The claim surfaced from an incident that occurred at her place of work on, the 11th of November 2007 when she wanted to have access to, and to be permitted to review some 24 months of clock cards as she had a query as to her overtime payment. In support of the allegation of constructive dismissal, the respondent, also relied on other incidents that had transpired in the month of November when Mr Wulfsohn (the dealer principal) reprimanded by yelling at her and an incident where she was accused by the Applicant's financial manager Mr De Waal of having made mistakes with warranties to the extent that other staff could not take leave. She alleged

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[47] *Copeland v New Dawn Prophesy Business Solutions (Pty) Ltd* (2010) 31 ILJ 204 (CCMA).
[48] *Copeland v New Dawn Prophesy Business Solutions (Pty) Ltd* (2010) 31 ILJ 204 (CCMA).
[49] *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & Others* (2008) (LC).

that Wulfsohn forcefully dragged her by her arm and demanded to know whether she was able to count properly. [50] It is a fact that, Nel has never raised any grievances with on how she was treated by the Applicant's management despite the fact that it was common cause that the Applicant had a grievance procedure in place that would have authorised Nel to lodge grievances. She opted to resign without following internal procedures. The labour Court held that her resignation could not be regarded as constructive dismissal for the situation lacked the necessary requirements. The court further indicated that she failed to exhaust all internal process to resolve her labour disputes.[51]

Almost all employers have internal grievance procedures as per collective agreements between employers and employees in the context of employment contracts. Ordinarily employers will have grievance procedures at the workplace, which should be adhered to by an aggrieved party before approaching courts or CCMA .It is advisable to resolve disputes internally before opting to resign. A resignation should be resorted to as the last option. Labour Relations Act,[52] protects the rights of a worker who finds himself in an environment that is toxic and unbearable. The worker is empowered to terminate the employment relationship and claim constructive dismissal in terms of the provision of the LRA.[53] Courts and tribunals expect parties to attempt to resolve issues themselves and employees are expected to exhaust the employer's internal processes before resigning.

There are instances where the courts and CCMA have pronounced that employee can claim constructive dismissal without lodging internal

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[50] *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & Others* (2008) (LC)
[51] *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & Others* (2008) (LC).
[52] Labour Relations Act 66 of 1995.
[53]Section 186 (1)(e) of the LRA, 1995.

grievances. In exceptional circumstances, an employee may resign over a single incident or over a pattern of misfortunes without exhausting other internal processes. This statement was confirmed in matter between *Wulfsohn Motors v Dispute Resolution Centre*.[54] The court held that in certain instances the use of internal processes would just not be helpful and were therefore unnecessary; examples include when available procedures cannot be trusted or decisions are often pre-determined.

1.8 Methodology

The study used a desktop-based literature study. It comprises of legislation, journal articles, books, reports, discussion documents, and online sources. The research methodology adopted in this study is qualitative.

1.9 Layout of the study

Chapter 1

This chapter introduces this study and provides a roadmap for this mini-dissertation. This chapter provided a background and conceptual clarification of the following aspects. First, this chapter defined the notion of constructive dismissal. Secondly, this chapter outlined the aims and objectives of the study, and including problem statement. Finally, this chapter, addressed the scope and limitation of the study and the issue of literature review.

Chapter 2

This chapter focuses on the legal framework related to the issue of constructive dismissal in the workplace. Furthermore, it examines the

[54] *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre & Others* (2008) (LC).

jurisprudence of the courts on how they have defined and given content and context to the issue of constructive dismissal.

Chapter 3

This chapter examines the conduct, which warrants constructive dismissal.

Chapter 4

This chapter looks at the definition and approach/tests that the courts have used in construing the notion of constructive dismissal. The chapter also explores challenges employees faces in dealing with constructive dismissal.

Chapter 5

This chapter provides the comparative study of constructive dismissal in the context of South Africa, in comparison with Canadian and United Kingdom's jurisprudence. This chapter also highlights the lessons that South Africa may draw from this states in view of implementing constructive dismissal.

Chapter 6

This study ends with conclusions and Recommendations.

This chapter provides conclusions and recommendations of the study.

1.10 Summary

In summation, the study has sought to bring a better understanding of constructive dismissal through a critical analysis of the existing law and literature review. In finding the existing law and literature, the study utilised the internet as well as the University of Limpopo Library and other accessible libraries. The study is an exploration of the principle of constructive dismissal in South African employment law. Chapter 2 examines legal framework on constructive dismissal.

CHAPTER 2: LEGAL FRAMEWORK ON CONSTRUCTIVE DISMISSAL

2.1 Introduction

This chapter deliberates on the various legal framework on constructive dismissal. It looks at the South African Constitution, Labour Relations Act, Employment Equity Act, the National Minimum Wage Act, and the Skills Development Act amongst others. The aim of this chapter is to look at the South African legal position with regard to constructive dismissal as it currently stands and propose viable solutions to this problem. The legal framework compiled in this chapter will also be used to compare South Africa's legal position with countries such as Canada and United Kingdom.

2.2 The constitutional framework

The Constitution is the supreme law of the land. No other law or government action can supersede the provisions of the Constitution.[55] Section 23 of the Constitution is an embodiment of fundamental labour rights. Section 23(1) reads as follows: "(1) everyone has the right to fair labour practices." Every employee has the right not to be subjected to an unfair labour practice.

In terms of section 186(1)(e) of the Labour Relations Act,[56] constructive dismissal occurs when an employee terminates an employment contract with or without notice at the instance of the employer where the employment relationship has become unbearable. Employees will be breaching contract of their employment, however they will have a choice to allege that they were constructively dismissed in terms of Labour Relations Act[57] or repudiation of the contract in common law, depending on the circumstances.

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[55] *www.gov.za (accessed 2022.10.10).*
[56] Section 186 (1)(e) of the Labour Relations Act 66 of 1995 ('the LRA').
[57] Section 186 (1) (e) of the LRA, 1995.

Section 5 of the Employment Equity Act 55 of 1998 (EEA)[58] provides that '[E]very employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice". Section 6 of the EEA,[59] titled 'Prohibition of unfair discrimination' provides as follows:

'*(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.*

(2) It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

In terms of the BCEA,[60] with regard to protection of rights as provided in section (1), "employee" includes a former employee or an applicant for employment. Furthermore, the BCEA provides that:

> (2) No person may discriminate against an employee for exercising a right conferred by this Part and no person may do, or threaten to do, any of the following:
>
> (a) Require an employee not to exercise a right conferred by this Part;

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58 Section 5 of EEA.
59 Section 5 of the EEA.
60 Basic Conditions of Employment Act no. 75 of 1997 ('BCEA').

(b) prevent an employee from exercising a right conferred by this Part; or

(c) prejudice an employee because of a past, present or anticipated—

(i) failure or refusal to do anything that an employer may not lawfully permit or require an employee to do;

(ii) disclosure of information that the employee is lawfully entitled or required to give to another person; or

(iii) exercise of a right conferred by this Part.

Similarly, the EEA[61] provides for prohibition of unfair discrimination at workplace. Section 6(1) of the EEA provides that "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground". The EEA promotes equity in the workplace, ensures that all employees receive equal opportunities and that their employers treat employees fairly. The EEA aims to protect all employees from unfair treatment and any form of discrimination. The purpose of the EEA[62] is to achieve equity in the workplace, by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. This means that the EEA discourages employers to dismiss employees unfairly, including making the employment condition intolerable.

The National Minimum Wage Act, 2018 ('the NMWA') aims to advance economic development and social justice by protecting workers from being paid unreasonably low wages. The main purpose of the NMWA is the

[61] Employment Equity Act no. 55 of 1998, section 6(1) ('EEA').
[62] EEA.

protection of low-earning (vulnerable) workers in South Africa and providing a platform for reducing inequality and huge disparities in income in the national labour market. In many instances, workers approach courts alleging that they were constructively dismissed as they are paid low wages and they have been unfairly demoted. In terms of the NMWA, it is an unfair labour practice for an employer to unilaterally alter hours of work or other conditions of employment in implementing the national minimum wage.[63] The employee will not resign because he/she wants to, but because the employer made continued employment intolerable for the employee.

In the case of *Solidarity obo Van Der Berg,*[64] the employee referred a dispute for constructive dismissal because of a unilateral change of employment terms including halting employee's salary. The employee was found to have been performing his work poorly. As a result, the employer decided to stop paying him his salary and replaced it with a commission structure. The employee resigned and went to the CCMA, where it held that the employee had been a victim of unfair constructive dismissal. This was because the employee could not be expected to continue employment under such intolerable circumstances. The employer made continued employment intolerable for the employee.

In *Ferrant case,*[65] it was held that the court should only determine whether the actions of the employer had driven the employees to leave. If the answer is in the affirmative, then such actions will amount to a constructive dismissal.'[66]

In the case of *Schindler*, the employee was employed by Metal and Engineers Industries as a team leader based at Maponya Shopping complex in Soweto. On 14 August year 2010, a baby sustained injuries as a result of using the elevator at the said shopping mall. It is common cause

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[63] Section 4 (8) NMWA.
[64] *Solidarity obo Van Der Berg v First Office Equipment (Pty)* Ltd (2009) 4 BALR 406.
[65] (1993) 14 ILJ 464 at 468I.
[66] (1993) 14 ILJ 464 at 468I.

that the employee in his capacity as the line manager was informed about the incident immediately after the incident took place. In terms of the applicant's policy the employee as a manager was mandated to inform senior management of the incident within 24 hours. He argued that was on leave and he told another employee to report the incident. The employee appeared before disciplinary hearing and he was dismissed. He appealed the judgment and he was given demotion as alternative. He resigned and claimed constructive dismissal. In response to the sanction of a demotion, the arbitrator, ruled to be a "drastic incursion into the employee's contractual rights". According to the arbitrator, the common law and policy of the applicant supported the view that the demotion is a severe sanction.[67] According to Grogan,[68] demotion occurs if the employee's remuneration, responsibilities or status is materially reduced.

The commissioner considered the test to apply in cases of constructive dismissal. When applying the test, the commissioner concluded that based on the evidence adduced, the employee was unfairly constructively dismissed. The Commissioner noted that the dismissal was unfair. The Commissioner held that, 'It is apparent that subsequent to the appeal hearing, the Applicant was left with three choices, namely, to accept the demotion, to refuse the demotion thereby reviving the dismissal, or to resign. It is clear that the Applicant intended to continue his employment with the Respondent and thus dismissal was an option he wished to consider. It is further apparent that the Applicant did not consider the demotion as reasonable or fair and that he had attempted to persuade the Respondent to consider its position. In the face of the Respondent's failure to consult or discuss his submissions and its unilateral imposition of the demotion. The court held that the Applicant was left with no other option but

[67] *Schindler Lifts SA (Pty) Ltd v Metal and Engineering Industries Bargaining Councils and Others* (JR 1551/11) [2013] ZALCJHB 248 (2013), par 14.
[68] Grogan J, Workplace Law, 10th ed (2009), par. 78

to resign. Indeed the Applicant's letter of resignation manifested no voluntariness to resign on the part of the Applicant'.[69]

There are four main objectives of the Health and Safety at Work Act,[70] this includes: adequately maintaining equipment and other systems to ensure their safety. Provide training and information on how to carry out work processes safely. Provide a safe place to work and working environment, develop a health and safety policy and undertake risk assessments. It is now clear that all employees must perform their duties in a healthy and free hazardous environment. Employees who are working in an unhealthy and hazardous environment will likely resign and claim for constructive dismissal.

The Labour Court had to decide on a constructive dismissal claim where the ill health (depression) of the employee was serious dilemma in the case of *National Health Laboratory Service case*.[71] In that case the LAC found that a constructive dismissal had taken place when it was undisputed that an employer dismally failed to assist an employee who resigned while suffering from chronic depression, even though the depression was not caused by the work-related situation. Using the reasonableness test as applied at that point of our jurisprudence, the LAC ruled as follows: "the appellant, through its HR manager Mr Abraham, failed dismally to accord fair and compassionate treatment to Ms Yona at the time of desperate need, when she was suffering from a severe work-related mental illness and impecuniosity resultant from her denial by Mr Abraham of extended sick leave benefits. As if that was not enough, Mr Abraham, in his letters of 17 February and 19 April 2010, accused Ms Yona of failing to contact or communicate with the appellant, which was factually incorrect because the

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[69] *Schindler Lifts SA (Pty) Ltd v Metal and Engineering Industries Bargaining Councils and Others (JR 1551/11) [2013] ZALCJHB 248 (2013),*par 15.
[70] *Occupational Health and Safety Act* 85 of 1993.
[71] *National Health Laboratory Service v Yona and Others* [2015] (LAC).

entire duration of her absence was covered by valid sick notes which were all submitted timeously to the appellant's HR department".[72]

The Skills Development Act ('the SDA'),[73] aims to expand the knowledge and competencies of the labour force in order to improve productivity and employment. The main aim of the SDA are; to improve the quality of life of workers, their prospects of work and labour mobility. Employers should ensure that workers are skilled, instead of making the environment intolerable for employees. Employer should not opt to dismiss, instead train or capacitate workers to perform accordingly. In the case of *MITUSA*,[74] the employer was held to have acted unfairly by denying training to a group of employees.

2.3 Summary

In brief, this chapter discussed the legal framework on constructive dismissal. The Constitution of the Republic of South Africa guarantees everyone a right to fair labour practice. LRA provides that an employee have a right not to be unfairly dismissed. The next will be chapter 3, titled conduct which warrants constructive dismissal.

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[72] *National Health Laboratory Service v Yona and Others* [2015] (LAC).
[73] Skills Development Act, 1998.
[74] (2000) 21 ILJ 2519 (CCMA).

CHAPTER 3: CONDUCT WHICH WARRANTS CONSTRUCTIVE DISMISSAL

3.1 Introduction

This chapter provides an analysis on conduct which warrants constructive dismissal. This chapter further shows that not all constructive dismissals conducts are unfair. The main aim of this chapter is to evince that the employee bears the burden of proof with regard to cases dealing with constructive dismissal. In summation, it must be proved that the employee did not act voluntarily, he/she left employment as the situation has become unbearable. Lastly, it must be shown that the worker did not plan to resign, circumstances forced him to resign.[75]

3.2 The LRA's perspective on constructive dismissal

Section 186(1)(e) of the LRA,[76] details dismissal as the termination of the employment contract by the worker, with or without notice, because the employer made continued employment intolerable for the worker. Generally the employer is the one who usually gives notice for dismissal and if the employee terminates the employment contract, this will constitute a resignation and not a dismissal, unless the termination falls under the LRA.[77]

Where an employee resigns because the employer made continued employment intolerable for the employee, it will constitute a 'dismissal', better known as a 'constructive' dismissal.[78] In order to be successful with

[75] LRA.
[76] Section 192 LRA.
[77] Section 186(1) (e) of the LRA.
[78] McGregor et al. 2021:100.

a claim of constructive dismissal scholars acknowledge that the following three elements should be available to succeed with such a claim.

The employee must show that:[79]

(a) She /he resigned
(b) The reason for the resignation was that continued employment became intolerable.
(c) It was the employer‘s conduct that created the intolerable circumstances.[80]

It is submitted that this has been interpreted to mean that resignation was a matter of last resort.[81] The employee should not have other ulterior motive for resignation and employee would still be employed had the employer not displayed intolerable or undesirable conduct. The employee must proof on balance of probabilities that the employer made continued employment intolerable because of employer’s conduct.

In the case of *Eagleton & Others v You Asked Services (Pty) Ltd*,[82] the Court regarded the three elements that a worker must establish to petition constructive dismissal. The essentials are as follows:[83]

a) The worker terminated the contract of employment;
b) Continued employment had become intolerable for the employee; and
c) The employer must have made continued employment intolerable.[84]

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[79] McGregor et al. 2021:100.
[80] M McGregor et al. 2O21:100.
[81] M McGregor et al. 2O21:100.
[82] *Eagleton & Others v You Asked Services (Pty) Ltd* (2009) 30 ILJ 320 (LC) 8 (‘*Eagleton & Others v You Asked Services*’).
[83] *Eagleton & Others v You Asked Services.*
[84] *Eagleton & Others v You Asked Services.*

It is the sole responsibility of the employee to proof that the resignation formed a constructive dismissal. In addition, it must be proved that the worker did not act voluntarily. Lastly, it must be shown that the worker did not plan to resign.[85]

3.3 Not all constructive dismissals conducts are unfair

The Labour Relations Act[86] provides that "every employee has the right not to be unfairly dismissed; and subjected to unfair labour practice". This basically means that the employer may not just 'willy-nilly' dismiss an employee whenever she/he feels like it, the employer must have a fair and reasonable reason for making the decision to dismiss and must follow a fair procedure which is both procedural and substantive.

Most employees often assumed that a constructive dismissal is by definition unfair, which is not always correct. Not all constructive dismissals are unfair. In *Vermeulen case*,[87] an employee voluntarily resigned after the employer changed the commission structure of all employees which led to a reduction in his income. The Labour Court held that even though the change in the commission structure rendered the employment intolerable and amounted to a constructive dismissal, it was not an unfair dismissal. [88] The employer acted fairly under the circumstances where he had to apply a uniform commission structure in the workplace and he followed a fair process in implementing it.[89]

Another case that clearly indicates that not all constructive dismissal are unfair. In *Niland case,*[90] the court had to decide whether the employee's

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[85] Section 192 LRA.
[86] Section 185 of the Labour Relations Act 66 of 1995.
[87] *WL Ochse Webb & Pretorious (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC).
[88] *WL Ochse Webb & Pretorious (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC).
[89] See McGregor et al. 2O21:101.
[90] *Niland v Ntabeni NO & others* (2017) (LC).

resignation was due to his desire to work for a competitor or to his wife having an affair with his employer.[91] Briefly this were the facts, Bruce Niland was a professional hunter. He was employed by Gregg Harvey. Niland's wife had an affair with Harvey over several years. Niland became aware of this affair in 2013 and spoke to the wife, they reconciled and the relationship with the employer continued behind the scenes. From evidence adduced, it was clear that Niland had known about the romantic relationship and had written the letter wherein he stated that he had forgiven both his wife and his employer. The court held that it was not constructive dismissal, the main reason that made the employee to resign was that he secured alternative employment at a competitor. [92] Constructive dismissal in terms of section 186 of the LRA is defined as follows:

(1) Dismissal means that –
(a) "an employer has terminated a contract of employment with or without notice;
(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 favorable terms, or did not renew it;
(c) an employer refuses to allow an employee to resume work after she –
(i) took maternity leave in terms of the law, collective agreement or her contract of employment; or
(ii) … [sub par-(ii) deleted by s. 95(4) of Act No. 25 of 1997]

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.

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[91] *Niland v Ntabeni NO & others.*
[92] *Niland v Ntabeni NO & others.*

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee, or
(f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favorable to the employee than those provided by the old employer."

Basson, Christianson, Garbers, Le Roux, Mischke and Strydom,[93] provides that the intention of the LRA is to promote fairness in as far as dismissal is concerned. It also offers full protection to employees. Common law does not protect employees at all, no protection against unfair dismissal. The common law does not promote substantive and procedural fairness when dismissing employees.

3.4 Summary

In light of the above discussion, it must be understood that each constructive dismissal case has to be considered on its own merits, rather than following a blanket approach. Most employees often assume that a constructive dismissal is by definition unfair, which is not always correct. The jurisprudence of the courts discussed in this chapter has shown that not all constructive dismissal related cases are all unfair. The next chapter analysis the test for constructive dismissal.

[93] Basson *et al Essential Labour Law* (2004).

CHAPTER 4: THE TEST FOR CONSTRUCTIVE DISMISSAL

4.1 Introduction

This chapter is about the test used for constructive dismissal. In summary the objective of this chapter is to examine the test that is used in determining whether constructive dismissal is fair or unfair. The case of *Mafomane*[94] will be discussed at length in this regard.

4.2 The test for constructive dismissal

The test for constructive dismissal was restated by the Labour Court in the case of *Mafomane*.[95] The test for determining whether the termination of an employment by an employee amounts to a constructive dismissal is articulated eloquently in *Pretoria Society for the Care of the Aged v Loots*.[96]

According to the above stated case,[97] the test for constructive dismissal is an objective one. Whenever the employee resigns or terminates the contract as a result of constructive dismissal the employee is basically showing that the situation has become so unbearable and toxic that the

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[94] *Mafomane* v *Rustenburg Platinum Mines Ltd* [2003] (LC) *('Mafomane v Rustenburg Platinum Mines Ltd').*
[95] *Mafomane v Rustenburg Platinum Mines Ltd*.
[96] *Pretoria Society for the Care of the Retarded v Loots [*1997] 6 BLLR 721 (LAC) ('*Pretoria Society for the Care of the Retarded*').
[97] *Pretoria Society for the Care of the Retarded.*

employee cannot fulfil what is the employee's most important function, namely to discharge his/her duties. The employee is demonstrating that he/she would have carried on working indefinitely had the unbearable or toxic situation had not been created by the employer. The employee abandons his/her employment as he/she does not believe that the employer will ever change or abandon the pattern of creating an unbearable work environment. If he/she is wrong in this assumption and the employer proves that his/her fears were unfounded then he/she has not been constructively dismissed and her conduct proves that he/she has in fact resigned.[98] Critical issues to determine the constructive dismissals are as follows:

(a) Whether the employee brought the contract to an end;

(b) Whether the reason for the employee's action was that the employer had rendered the prospect of continued employment intolerable; and

(c) Whether the employee had no reasonable alternative other than terminating the contract.

The onus of proving these requirements rests on the employee.The test for determining whether a person have been constructively dismissed should partly be subjective and partly objective, and regard must had to the perceptions of the employee at the time of the termination of the contract, as well as to the context in which the termination took place.[99] The court held that in order to succeed on a claim that he or she has been constructively dismissed the employee must be able to prove the following:

(a) The employee terminated the contract;

(b) Continued employment was intolerable;

(c) The intolerability was of the employer's making;

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[98] *Pretoria Society for the Care of the Retarded.*
[99] Grogan J, Dismissal, Discrimination and Unfair Labour Practices (2010) 199.

(d) The employee resigned as a result as a result of the intolerable behavior of the employer.[100]

The test for determining whether or not an employee was constructively dismissed was set out in *Pretoria Society for the Care of the Retarded case*.[101] According to the court "the enquiry [is] whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court's function is 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".[102]

The Constitutional Court set out a test for dealing with a claim of constructive dismissal in the case of *Strategic Liquor SeNices v Mvumbi.*[103] In this case, the CC held as follows; "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".[104]

The test for intolerability is an objective test not subjective. Any reasonable employee in the circumstances would have found the circumstances to be intolerable.[105] The resignation should be the last resort, and there must have not been other means except to tender resignation. The must be the causal link between resignation and intolerable conduct by the employer which must be proofed on balance of probabilities by the employee. If the employee's subjective concerns have not been well-founded or there are other possible avenues that the employee could pursue, then the onus on

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[100] *Mafomane v Rustenburg Platinum Mines Ltd*.
[101] *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC).
[102] *Pretoria Society for the Care of the Retarded v Loots.*
[103] *Strategic Liquor Services v Mvumbi NO* ((2009) 9 BLLR 847 (CC) ('*Strategic Liquor Services*').
[104] *Strategic Liquor Services.*
[105] A C Basson et al. 2009:94.

the employee will not have been discharged.[106] Any employee who resign from employment takes personal risk as it will be his/her duty to discharge proof on balance of probabilities, which might be a mammoth task. In terms of section 192(1) of the LRA the onus rests on the employee to prove, on a balance of probabilities, that he was dismissed from his employment.

Grogan[107] argues that "the employees concerned must have terminated the contract because they genuinely believed that their employers had rendered the continuation of the employment relationship 'intolerable'. However, the subjective feelings of the employee are not enough; their believe must also have been reasonable". Employee will not convince courts on mere claim that he/she believed that employment relationship was toxic or intolerable.'

Grogan[108] further provides that 'intolerable' is a strong word. The choice of that term by the legislature indicates that a mere inconvenience is not sufficient to sustain a claim of constructive dismissal. Whether employee exhausted all internal processes before abandoning his/her contract. The mere subjective belief of the employee is not good enough, the belief also has to be reasonable and rational. The employee is duty bound to prove that the employer was in fact responsible for creating the conditions that induced the belief. Grogan asserts that employees who claim constructive dismissal must generally show that they were subjected to coercion, duress or undue influence. Mere unhappiness at work is not enough.[109]

Once an employee has established that he/she was indeed constructively dismissed, the onus then shifts to the employer to prove that the employee was dismissed for a fair reason and in accordance with a fair procedure.[110] In order for an employee to be successful with constructive dismissal claim,

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[106] A C Basson et al. 2009:94.
[107] Grogan J, Dismissal, 2nd edition 2014:68.
[108] Grogan J, Dismissal, 2nd edition, 2014:70.
[109] Grogan, Workplace Law, 2nd edition, 2016:176.
[110] Bouwer 2009 http://www.retrenchmentassist.co.za.

it must be understood that each case differ on its own merits. Courts do not use blanket approach in such cases. When an employee terminates his/her employment contract he/she must know consequences of his/her or conduct.

The employee takes a risk when resigning from employment and claim constructive dismissal. In the case of *Watt,*[111] the arbitrator held that "it is that an employee bears a considerable risk in the case of constructive dismissal for a number of reasons. In the first place one of the requirements …is that the employee must resign. This is turn means that if such employee is unable to show the requisite conditions that render continued employment intolerable then the resignation remains valid. Secondly, it is necessary for the employee to establish this. In other words, the applicant bears the onus which in itself constitutes a risk. In the third place, the test is objective and therefore the subjective perceptions of the employee are not relevant in this regard. Finally, the circumstances surrounding constructive dismissal are so varied that it is very difficult to lay down any concise guidelines. This means that cases of constructive dismissal can only be decided on a case by case basis, taking account of all conditions which means that an element of uncertainty are always inherent in such situations". [112]

In the case of *Pretoria Society for the Care of the Retarded v Loots*,[113] the Labour Appeal Court under the 1956 LRA laid down a test that must be used to determine whether the termination of an employment contract by the employee amounts to constructive dismissal. The court held that "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

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[111] *Pretoria Society for the Care of the Retarded v Loots* 1997 18 ILJ 981 (LAC), par 72 ('*Pretoria Society for the Care of the Retarded'*).
[112] *Pretoria Society for the Care of the Retarded.*
[113] *Pretoria Society for the Care of the Retarded.*

important function, namely to work. The employee is in effect saying that he/she would have carried on working indefinitely had the unbearable situation not been created".[114]

In determining whether constructive dismissal has occurred involves a two-fold enquiry. The first question is whether, but for the employer's conduct, the employee intended to resign. If the answer is in the affirmative, then there is no constructive dismissal. However, if the answer is negative, the question that follows is whether the employer's conduct amounted to constructive dismissal.[115] It is important to remember that the objective assessment of the employer's conduct that may have made the continued employment intolerable has to be assessed in its totality and not 'in piece meal fashion'.

4.3 Summary

This chapter has shown that the test of constructive dismissal ought to be objective one. This was evident in the case of *Strategic Liquor Services v Mvumbi*.[116] Be that as it may, it is the duty of the employee to prove on balance of probability that he/she was constructively dismissed. The employee has to show that the employer has made the continued employment intolerable.

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[114] *Pretoria Society for the Care of the Retarded.*
[115] Du Toit et al Labour Relations Law 430.
[116] *Strategic Liquor Services*.

CHAPTER 5: COMPARATIVE STUDY

5.1 Introduction

This chapter is about comparative study analyses done with Canada and United Kingdom in the context of constructive dismissal. The objective of this chapter is to analyse case laws and policies of the above mentioned countries so as to make a comparative analysis with South Africa's jurisprudence on constructive dismissal.

5.2 The basis and rationale for a comparative analysis

The rationale for embarking on this comparative analysis is to make informed recommendations for South Africa labour laws in as far as constructive dismissal is concerned. Furthermore, this chapter makes a comparative analysis with other countries chosen because of the need to compare foreign jurisprudence with our own so that one can suggest amendments to current Labour Relations laws.

5.3 Comparative analysis between Canada and United Kingdom jurisprudence on constructive dismissal

5.3.1 Canadian jurisprudence

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[117]

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[117] Constitution Act, 1982,part 1.

The Canadian Human Rights Act [118] prohibits discrimination in employment and services within federal jurisdiction. Under the Act, Canadians are protected from discrimination when they are employed or receive services from:

> the Federal Government
>
> First Nations Governments; or
>
> Private companies that are regulated by the federal government, including banks, trucking companies, broadcasters and telecommunications companies.

This means that employers and service providers must ensure that all employees are treated equally in Canada at all material times. The unjust dismissal provisions in section 240 of the Canada Labour Code (the Code')[119] cover unjust constructive dismissals as well as those unjust dismissals made by the open unambiguous action of the employer.

Constructive dismissals are always considered unjust according to Labour Code.The issue of unjust dismissal was resolved conclusively in the Federal Court of Appeal decision in the case of *Srougi*. [120]As stated in the case of *Srougi*, the court held that once it has been established that a constructive dismissal has taken place, there is no question that the unjust dismissal provisions apply. The individual terminations of employment provisions in sections 230 to 234 of the Code, and the severance pay provisions in sections 235 to 237,[121] may also apply in cases of constructive dismissal. Unfortunately, the characterisation of a constructive dismissal is not always straightforward.

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[118] *Canadian Human Rights Act, 1985, R.S.C.*
[119] *Canada Labour Code (R.S.C., 1985, c. L-2),* sections 230,234,235 and 237.
[120] *Srougi v. Lufthansa German Airlines, [*1988] F.C.J. Nº 539.
[121] *Canada Labour Code (R.S.C., 1985, c. L-2),* section 230.

The term "constructive dismissal" in Canada denotes situations where the employer has not directly fired the employee. Rather the employer has failed to comply with the contract of employment in a major respect, unilaterally changed the terms of employment or expressed a settled intention to do either thus forcing the employee to quit.[122] Constructive dismissal is sometimes called "disguised dismissal" or "quitting with cause" because it often occurs in situations where the employee is offered the alternative of leaving or of submitting to a unilateral and substantial alteration of a fundamental term or condition of his/her employment.[123] Whether or not there has been a constructive dismissal is based on an objective view of the employer's conduct and not merely on the employee's perception of the situation.

The difference between constructive dismissal and ordinary resignation it is that the former is when employee is forced to resigned due to the unbearable conditions caused by the employer, while the latter it is done by the employee voluntarily. The seriousness of the employer's failure as well as the amount of deliberation apparent in its actions are also important factors. The employer's action must be single-handedly, which means that it must have been done without the consent of the employee.[124]

The employer's action must be unilateral, which means that it must have been done without the permission of the employee. If it is not unilateral, the variation is not a constructive dismissal but merely an agreed change to the contract of employment.[125] Generally, if the employee clearly indicates non-acceptance of the new conditions of employment to the employer, there has been a constructive dismissal only if the employee leaves within a

[122] *Srougi v. Lufthansa German Airlines*, [1988] F.C.J. Nº 539.
[123] *Srougi v. Lufthansa German Airlines, [1988] F.C.J. Nº 539.*
[124] *Srougi v. Lufthansa German Airlines*, [1988] F.C.J. Nº 539.
[125] *Srougi v. Lufthansa German Airlines*, [1988] F.C.J. Nº 539.

reasonable (usually short) period of time. By not resigning, the employee indicates his/her acceptance of the new conditions of employment.[126]

Demotion may also lead to constructive dismissal. It is clear that demotion creates hostility and intolerable conditions at the workplace. In the case of *Ciszkowski,*[127] the Canadian court held that a constructive dismissal took place after the employee was instructed that instead of reporting to the Director of Finance, he would instead be reporting to the junior manager. After he has been reshuffled, the employee lost access to his office and the budget. He, was no longer invited to attend some managerial meetings, and he no longer had subordinates or allowed to processed new contracts. Constructive dismissal usually occurs where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable or unbearable.

In the case of Co*rker*,[128] The plaintiff, Ms. Evelyn Corker, claimed damages for constructive dismissal from her position as a counsellor with the Defendant University. She alleges that the University changed the terms of her employment by assigning her to clerical duties. The University's position was that the transfer from counselling duties to other duties was temporary and, in any event, was part of her job description.[129] The main issue the court,[130] had to decide was "whether the transfer from counselling duties to other duties was a fundamental breach of the contract of employment and thereby constituted constructive dismissal". Irrespective of fact that her position and salary remained unchanged, the court[131] concluded that she had been constructively dismissed. The employer was not entitled to alter her duties unilaterally in the manner in which it had done because she was

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[126] *www.canada.ca (accessed on 2022.11.25.).*
[127] Ciszkowski v. Canac Kitchens, 2015 ONSC 73 (CanLII).
[128] *Corker v. University of British Columbia, 1990, Carswell B.C. 726 (BCSC).*
[129] *Corker v. University of British Columbia, 1990, Carswell B.C. 726 (BCSC).*
[130] *Corker v. University of British Columbia, 1990, Carswell B.C. 726 (BCSC).*
[131] *Corker v. University of British Columbia, 1990, Carswell B.C. 726 (BCSC).*

hired to provide counselling services and not clerical services. The court rejected the University's arguments in favour of the applicant.

In the decided case of *Holm*. [132] The court did not waste time in finding that the employee was constructively dismissed. The essential terms of his employment were substantially changed in that:[133]

1. Subordinates would no longer report to him and he would no longer be referred to as a "Manager".
2. His annual salary would be reduced by 20%.
3. The loss of his ability to use a luxury car at no cost to him for his personal use outside business hours.
4. His new office was much smaller.
5. He would be reporting to someone junior to him in terms of position and salary. The employee felt that this would be demeaning, and degrading for him.

In the case of *McLean,* [134] the court discovered that there was constructive dismissal case after the employer has terminated the employee's role as a sales and service technician and without consent of the employee reassigned him to the job of project technician. Before the change of duties and responsibilities, the employee spent about five percent of his time on the plant floor consulting on how to fix problems with the machines. In contrast, the project technician job involved reconstructing machines and maintenance work with hundred percent of the plaintiff's time being spent in the physically challenging environment of the plant floor[135].

Ordinarily, terms and conditions regarding a downsizing of employees should be addressed by the employer to the employee within an

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[132] *Holm v Agat Laboratories Ltd, 2018 ABQB 415 (CanLII).*
[133] *Holm v Agat Laboratories Ltd, 2018 ABQB 415 (CanLII).*
[134] *McLean v Dynacast Ltd*., *2019 ONSC 7146 (CanLII).*
[135] *McLean v Dynacast Ltd., 2019 ONSC 7146 (CanLII).*

employment contract and must meet the standards outlined in the Employment Standards Act[136] ("ESA"). In the case of *Michalski*, [137] the employee persuaded the court that as he had been temporarily laid off, the court ruled that it was a constructive dismissal because employee's contract of employment did not have express terms stating that temporary layoffs could happen during the course of his employment. The plaintiff who had been temporarily laid off, sought damages for constructive dismissal as the contract did not have express terms indicating that temporary layoffs might occur during the course of his employment. The court found that if there is no term, either expressly or implied, that temporary layoffs are permitted then the fundamental terms of the contract have been altered, resulting in constructive dismissal.[138]

Not all constructive dismissals are unfair.[139] The facts of every case should be analysed in order to determine whether the conduct by the employer was merely irritation or insult, or whether it really made continued employment intolerable.[140] In the case of *Hlewka*,[141] the applicant failed to persuade Court of Canada on her constructive dismissal case. The defendants hired Hlewka[142] as a primary schoolteacher. She was told that she would be provided with a written contract of employment and that she would be eligible for benefits including contributions to the employee pension plan. Neither the written contract nor the contributions were provided. Hlewka resigned and brought an action, alleging constructive dismissal. The Saskatchewan Provincial Court found that there was no constructive dismissal.

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[136] Employment Standards Act, section 56(2).
[137] *Michalski v Cima Canada Inc.*, 2016 ONSC 1925 (CanLII).
[138] *Michalski v Cima Canada* Inc., 2016 ONSC 1925.
[139] *See M McGregor et al Labour Law Rules (2021) 101.*
[140] *See M McGregor et al Labour Law Rules (2021) 101.*
[141] *Hlewka v. Moosomin Education, 2007 SKPC 144 (CanLII).*
[142] *Hlewka v. Moosomin Education, 2007 SKPC 144 (CanLII).*

Another case that confirmed that not all constructive dismissals are unfair, is the case of *Bayouk*.[143] In this case the court confirmed that an employer is vested with powers to alter an employee's duties and responsibilities at any given time, but only insofar as their working conditions are not substantially changed. In this case,[144] the employer amended the employee's duties after the company was sold. However, the court held that change was not fatal enough to amount to a constructive dismissal because the employee had not been downgraded to a lower status and his job description and responsibilities didn't change much. The Tribunal Administratif du Travail further held that this change was not tantamount to a constructive dismissal, because the employee had not been downgraded to a lower status nor had there been any major alteration of his responsibilities.

The case of constructive dismissal was thrown out by Supreme Court of Canada. It was the case of *Johnson.*[145] In this case a Black employee alleged that he was treated unfairly and discriminated because of his skin colour and he felt that work environment was poisonous for him to continuing working there. He further alleged that the employment as result of discrimination became intolerable. The court held that allegations of harassment and discriminatory behavior were not credible, nor were they severe enough to amount to a contravention of contract. [146] The employee had, essentially, a dispute with another employee, which did not support a finding that the assembly plant body shop was poisoned by racism, warranting a finding of constructive dismissal. As a matter of law, the offending conduct must be persistent and repeated.[147]

5.3.2 United Kingdom Jurisprudence

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[143] *Bayouk et ADT Canada inc., 2017 QCTAT 1301 (CanLII).*
[144] *Bayouk et ADT Canada inc., 2017 QCTAT 1301 (CanLII).*
[145] *General Motors of Canada Limited v. Johnson, 2013 ONCA 502 (CanLII*).
[146] *General Motors of Canada Limited v. Johnson, 2013 ONCA 502 (CanLII.*
[147] *General Motors of Canada Limited v. Johnson, 2013 ONCA 502 (CanLII.*

According to section 95(1)(c) of the UK's Employment Rights Act, 1996,[148] ('ERA') "the employee ends the contract under which he is employed (with or without notice) in circumstances in which he is permitted to terminate it without notice by reason of the employer's conduct".[149] An employee who resigns in such circumstances is deemed to have been constructively dismissed. In other words, similar to the South African position, it is the employee who terminates the contract owing to circumstances caused by the employer's unbearable conduct.[150]

In terms of the ERA constructive dismissal is regarded as a form of unfair dismissal provided that the employer committed a fundamental breach of contract and there was a "*causal connection*" linking the employee's resignation and said breach. In other words, the employee should not have had a more pressing motive for resigning other than the fact that mutual trust was severed by the employer's conduct.[151] Where an employee resigns because the employer made continued employment intolerable for the employee, it will constitute a dismissal, better known as constructive dismissal.[152] There should have been no other motive for the resignation and the employee would have continued with the employment relationship if it had not been for the employer's unacceptable conduct.[153]

In the United Kingdom, similar to South Africa, an employee can only establish a claim of constructive dismissal if the employee is able to prove on balance of probabilities that a particular important term in the contract of employment which the employer has by conduct broken showing that he/ she no longer intends to be bound by the contract or the employer is guilty of conduct which is a serious breach of the contract as a whole.[154] If the

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[148] *Employment Rights Act 1996*, *section 95 (1)(c*).
[149] *Employment Right Act 1996, section 95(1)(c).*
[150] Kubyana KL and Manamela E "To order or not to order reinstatement as a remedy for constructive dismissal" (2019) *Obiter Journal* 325-339.
[151] *iasservices.org.uk.*
[152] *M McGregor et al Labour Law Rules (2021) 101.*
[153] *M McGregor et al Labour Law Rules (2021) 100.*
[154] *app.croneri.co.uk.*

employee fails to persuade the tribunal or court on balance of probabilities that his/her claim of constructive dismissal will be unsuccessful. In the case of *Sharp*,[155] the employee failed to convince the court that employer breached his contract of employment.

Mr Sharp was broke and in need of money. His financial woes worsened when the employer suspended him without pay on disciplinary grounds. He pleaded with his employer for advance payment pay for his holiday trip, or alternatively for a loan that will bide him. The employer refused. In order to get his accrued holiday pay Mr. Sharp resigned. He then claimed constructive dismissal on the ground of his employer's unreasonable conduct in refusing him financial aid. The Court of Appeal,[156] held that Mr Sharp had not been constructively dismissed at all. The Appeal court,[157] further remarked that the test for constructive dismissal was not "had the employer behaved unreasonably?" but "had the employer been in serious breach of contract against the employee?" it is clear that the employer behaved reasonable and did not make the work environment intolerable. The employer did not commit fundamental breach of contract, Mr Sharp left of his own accord. The contract of employment does not have clause of giving employee advance or loan, employer's refusal was not a breach of contract.

In its judgment, the Court of Appeal,[158] set out four points which are now regarded as the classic formulation of the constructive dismissal test.

1. There must be a breach of contract by the employer; this can be an actual or an anticipatory breach.[159]

[155] *western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[156] *western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[157] *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[158] *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[159] *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*

2. The breach must be sufficiently serious, namely a repudiatory or a fundamental breach, or the last of a series of breaches, which taken together form sufficiently serious conduct by the employer.[160]

3. There must be no waiver of the breach, example through the employee's delay in leaving.[161]

In the Court of Appeal Judge Lord Denning remarked that[162] "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct". The Judge basically alluded that for a claim of constructive dismissal to be upheld, the employer's conduct must be such that it amounts to breach of contract prompting the employee to resign.[163]

One of an individual's fundamental employment rights is to be paid for the work that they do by their employer.[164] It is against the law for an employer to issue a contract without pay, or pay below the statutory minimum wage. Unable to pay an employee correctly is a breach of contract and therefore grounds for constructive dismissal.[165] Failing to settle for sick leave pay correctly amounts to breach of contract by the employer.[166] The case of *Craig,*[167] is relevant to this issue. Mr Singh was summoned to appear at the disciplinary inquiry by the employer Metroline West Ltd and the following day, he was duly booked off sick by his medical doctor. During his period of absence from work he was examined by occupational health; there was no suggestion that his sickness was not genuine. The employer alleged that Mr

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[160] *Lewis v Motorworld Garages Ltd [1985] IRLR 465, CA).*
[161] *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[162] *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, CA.*
[163] *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA.
[164] croner.co.uk (accessed 2023.01.05).
[165] croner.co.uk (accessed 2023.01.05).
[166] croner.co.uk (accessed 2023.01.05).
[167] *Mr Parbhjot Singh v Metroline West* Limited: [2022] EAT 80

Singh was trying to avoid the disciplinary hearing and only paid him statutory sick pay instead of company sick pay. Mr Singh brought a claim for constructive dismissal contending that the failure to pay him company sick pay was a fundamental violation of employment contract. The Employment Tribunal held that the Respondent had the contractual right to suspend without pay if it thought his absence was not genuine; however, this power had not been exercised.[168] Furthermore, Mr Singh's contract of employment permitted the Respondent (employer) to withhold company sick pay if, following an investigation, it was discovered that the absence was not genuine. There was no such investigation and no other reason for withholding company sick pay. In the case of *Singh*,[169] the court held that unfair constructive dismissal could be established even where the employer's actions were such that it did not indicate an intention to end the employment relationship.[170]

5.4 Tentative lessons that can be learned by South Africa from Canadian and UK experiences

When comparing law of the Canada and United Kingdom, South Africa's unfair dismissal's law does differ tremendously from the approach of the above countries. It is also found that South Africa's unfair employment law does adopt and adhere to the labour practices established by the International Labour Organization (ILO), which is in uniformity with the employment legislature in Canada and UK. It is therefore submitted that South African employment law have adhered to international core values and standards.[171]

5.5 Summary

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[168] *Mr Parbhjot Singh v Metroline West Limited*: [2022] EAT 80.
[169]*Mr Parbhjot Singh v Metroline West Limited*: [2022] EAT 80.
[170] *Mr Parbhjot Singh v Metroline West Limited*: [2022] EAT 80.
[171] Riaz Kader, A comparative analysis of constructive dismissal in South Africa and within other international jurisdictions, (2018).

This chapter has made comparative analysis between Canada and United Kingdom jurisprudence on constructive dismissal. Basically the labour laws on constructive dismissal on the above mentioned countries with South Africa are similar in all aspects. The next chapter will be on conclusion and recommendations.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

This chapter provides conclusion and recommendations on constructive dismissal in South African employment law. The aim and objective is to recommend how South Africa can amend labour laws to deal with constructive dismissal in a consistent and uniform approach.

6.2 Conclusion

Canada, United Kingdom and South Africa‘s constructive laws are similar. The position in the United Kingdom, Canada and South Africa in the context of constructive dismissal laws appears to be similar. Dismissal laws of the above mentioned countries don’t differ from each other.

In summary, the test used by our courts to resolve whether a constructive dismissal had occurred is slightly biased and partly unbiased.[172] The test for constructive dismissal is an objective one. In the case of *Smithkline Beecham*,[173] the court held that the test as to whether the prospect of continued employment would remain intolerable is an objective one and therefore constructive dismissal cannot be determined from the state of mind of the employee alone. The circumstances leading to the employee's resignation must also be considered.[174] The examples of the employer's unbearable and unacceptable conduct which are generally accepted to render the continued employment relationship intolerable are not exhaustive. Examples accepted by Arbitrators and Courts are unreasonable demotion, sexual harassment, unlawful deductions from an employee's salary, unjustified disciplinary action etc.

The Constitutional Court set out a test for dealing with a claim of constructive dismissal in the case of *Strategic Liquor SeNices.*[175] In this case the Constitutional Court held as follows ... "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".[176]

There is no provision in the Basic Conditions of Employment Act, [177] which entitles an employee to terminate a contract of employment by resignation, without notice. The only exception to this rule is whereby the employer has created an intolerable working condition, and situation has become so unbearable to the employee to leave the premises immediately, and later register a dispute of constructive dismissal. The real challenge in as far as constructive dismissal is concerned is to determine which conduct of the employer force employee to resign. The other challenges might be the

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[172] *J Grogan Dismissal, Discrimination & Unfair Labour Practices 2ed (2008) 199.*
[173] *Smithkline Beecham (Pty) Ltd v CCMA & Others (2000) 21 ILJ 988 (C).*
[174] *Smithkline Beecham (Pty) Ltd v CCMA & Others* (2000) 21 ILJ 988 (C).
[175] *Strategic Liquor Services v Mvumbi* NO ((2009) 9 BLLR 847 (CC).
[176] *Strategic Liquor Services v Mvumbi* NO ((2009) 9 BLLR 847 (CC).
[177] Basic Conditions of Employment Act 75 0f 1997.

understanding of the concept intolerable. This term might be interpreted differently by different employees. There are various conduct from the employer that makes relationship sower and render the prospect of continued employment intolerable.

The onus would always rest on the employee to prove that he/she did not resign voluntarily. A mere claim that the employer acted in an unreasonable manner is not enough for employee to resign. The employee may decide to resign over a single serious incident or over a number of incidents. If there is unfair labour practice on the part of employee, the employee can file a grievance. It remains the duty of the employee to prove that the termination of employment resulted from the conduct of the employee. It is the duty of the employee to prove that to remain in service would have been unbearable and intolerable. There are many genuine cases of constructive dismissal in which an employee has no alternative but to resign, particularly those cases involving the sexual harassment of the employee. For example, in *Pretorius,*[178] case employee alleged that, she was subjected to sexually harassment over a period of 18 months. The harassment including foul language, touching, unsolicited (and sometimes intimate) gifts and sexual advances. She finally resigned and claimed constructive dismissal. She had complained to the employer about his behaviour, but he continued. Commissioner held[179] that this was constructive dismissal brought about by sexual harassment, and awarded the employee nine months' salary as compensation. It was further held that where an employee has been subjected to continual harassment, she will be deemed to have been constructively dismissed if she resign in desperation. The big question is, can one conclude that resignation is last resort in cases involving sexual harassment?

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[178] *Pretorious v Britz* (1997) 5 BLLR 649 (CCMA).
[179] *Pretorious v Britz* (1997) 5 BLLR 649 (CCMA).

In the case of *Coetzer*,[180] which also relates to sexual harassment, the employer was allegedly making sexual advances, which were rejected by employee. The employee was then instructed to work odd and long hours as form of 'punishment'. Employer would touch the employee on thighs and buttocks. He would also come into her bedroom and sleep on top of her. After being rejected the employer then began finding fault with her work and began to harass and victimised her in front of other employees. The employee resigned. The court held that the employer had rendered the prospect of continued employment intolerable and declared that the employee was constructively dismissed. She was awarded eight months' salary as compensation. [181]

It is challenging to determine constructive dismissal on a face value. The difficulty with the concept of constructive dismissal is ascertaining when continued employment has actually become intolerable. Our courts failed to develop general principle thus far. Each case is treated on its own merit. There is no yardstick to determine constructive dismissal. It is extremely difficult to predict if constructive dismissal has occurred. Various Courts and Arbitration proceedings have delivered different judgments. It is safe to say each case is treated according to its own merits. In the case of *Albany Bakeries Ltd*,[182] the court reiterated the importance of an employee exhausting reasonable alternatives to resignation. It stated that "how will an employee ever prove that [the employment had been made intolerable] if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct.

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[180] *Pretorious v Britz* (1997) 5 BLLR 649 (CCMA).
[181] *Pretorious v Britz (*1997) 5 BLLR 649 (CCMA).
[182] *Albany Bakeries Ltd v Van Wyk & others (*2005) (LAC).

Finally, it might well smack of opportunism for an employee to leave when she/he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem".[183] The court held that he would have been dismissed either way.[184] The employee's contention in this regard must have a proper foundation.[185] In the case of *Western Cape Department of Transport*,[186] the court ruled that the employee had not been constructively dismissed and held that the employee had many options except tendering resignation. The court held that "the employee could have followed the formal grievance procedures which were known to her and that she could also have referred an unfair labour practice dispute to the relevant Bargaining Council and as a consequence her resignation was premature". There is no consistency in handing judgments by courts and Arbitrators. Some says judgments requires that internal procedures must be followed while others says it is unnecessary as long as the employee can prove on balance of probabilities that he would have been dismissed either way.

The aim of this study was to investigate causes of constructive dismissal, forms of constructive dismissal and better way of dealing with stressed employees due to constructive dismissal. The purpose of this research was also to examine what is intolerable conduct and test for determining constructive dismissal. This research aims to better understand the meaning and origin of the concept of a constructive dismissal.

6.3 Recommendations

There is a dire need for the Labour Relations Act to be revisited and amended. [187] As things stands more people are unfairly dismissed on daily basis. In a breakdown of the 1 777 Employment Equity Act-linked referrals

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[183] *Albany Bakeries Ltd v Van Wyk & others* (2005) (LAC).
[184] Old Mutual Group section 4(8 Scheme v Dreyer 1999 (20) ILJ 2030 (LAC).
[185] Old Mutual Group Scheme v Dreyer 1999 (20) ILJ 2030 (LAC).
[186] (C846/08) [2011] ZALCCT 23 (26 August 2011) at para 49.
[187] LRA1995.

received by the CCMA from 01 April 2021 until 31 January 2022, the report found that 1 087 were for unfair dismissal on arbitrary grounds, while 359 were over "equal work for equal pay",[188] said Deputy Minister of Employment and Labour, Boitumelo Moloi recently.

Another reason for amending Labour Laws in South Africa including United Kingdom and Canada is that the burden of proof in the context of constructive dismissal rests on the plaintiff or the person filing the suit. The Applicant (employee) should prove that the allegations are true and that the defendant, or employer, caused damages. It is the duty of the dismissed employee to discharge the onus of proof that the employer's behavior was intolerable hence resigned. The resignation was involuntary. According to of the LRA,[189] constructive dismissal takes place where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable.

In my view is unfair to expect employee with limited resources to proof that he is dismissed, the onus of proof should be shifted to the employer, just like in criminal cases where the state is *dominis litis* and has to proof the case beyond reasonable doubt. The employer has to proof that his conduct was lawful and tolerable. Currently is almost impossible to win a case of constructive dismissal against the employer as the employee has to persuade Judge or Arbitrator. In the case of *Watt*,[190] the Commissioner reiterated the challenges confronted by any employee who intends bringing an allegations of constructive dismissal, it is submitted that an employee bears a considerable risk in the case of constructive dismissal. Firstly one of the Prerequisite of a constructive dismissal is that the employee must first resign from employment. Unfortunately if the employee fails to proof requisite conditions that render continued employment intolerable, then that

[188] www.news24.com (accessed 2023.01.10).
[189] Section 186(1)(e) of the LRA 1995.
[190] *Watt v Honeydew Dairies* (Pty) Ltd.

the resignation remains valid (as a resignation and not as a constructive dismissal).[191]

Lastly the test for constructive dismissal should be totally subjective not objective. Currently the test for establishing whether the termination of an employment by an employee amounts to a constructive dismissal is expressed eloquently in *Pretoria Society for the Care of the Aged v Loots*.[192] "When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned".[193]

The test for establishing whether a person have been constructively dismissed should be totally subjective and not objective. In *Smithkline* case,[194] the court held that the test as to whether the prospect of continued employment would remain intolerable is an objective one and therefore constructive dismissal cannot be determined from the state of mind of the employee alone. The circumstances leading to the employee's resignation must also be considered.

Claasen and Du Toit,[195] acknowledge that "[t]o succeed in the claim that the employee was constructively dismissed, the employee has to show that

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[191] *Watt v Honeydew Dairies* (Pty) Ltd.
[192] *Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 (LAC).*
[193] *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC).
[194] *Smithkline Beecham (Pty) Ltd v CCMA & Others* (2000) 21 ILJ 988 (C).
[195] *labourguide.co.za (accessed ,2023.01.10).*

objectively assessed, the conditions at the workplace were so intolerable that he or she had no other option but to terminate the employment relationship". If this explanation by the above authors is anything to go by, it means entire (and objective) onus of proof lies with the employee, and not employer. This shouldn't be taken to mean that a referral for constructive dismissal is a laughing matter or can't be proved.[196] It is submitted that constructive dismissal test should be subjective so that we can have successful constructive dismissal cases and it will also discourage employers to abuse the system.

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