When does the constructive dismissal occur?

Section 186(1) (e)-(f) of the Labour Relations Act, 66 of 1995 as amended defines **"dismissal"** as meaning that;

- An employee terminated employment with or without notice because the employer made continued employment intolerable for the employee, or
- An employee terminated 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 favourable to the employee than those provided by the old employer.

The principles and tests that the Labour Court had applied in determining whether a constructive dismissal has taken place were adequately summed up by Senior Commissioner John Grogan in CWU obo Marele v Glas Centre (1999) 8 CCMA 6.13.15, who suggested the following:

a. Did the employee intend to bring an end to the employment relationship (Jooste v Transnet Ltd t/a/ SA Airways (1995) 16 ILJ (LAC) at 638B) – if he or she had, constructive dismissal would not have taken place.

b. Had the working relationship become so unbearable, objectively speaking, that the employee could not fulfil his

obligations to work? (Pretoria Society for the Care of the Retarded v Loots (1997) BLLR 721 LAC)

c. Did the Employer create the intolerable situation?

d. Was the unbearable situation likely to endure for a period that justified termination of the relationship by the employee? (Pretoria Society for the Care of the Retarded v Loots (1997) BLLR 721 LAC)

e. Was the termination of the employment contract the only reasonable option open to the employee? The onus in proving these requirements rests with the employee.

The above approach was re-emphasised by Commissioner BJ Van Niekerk in the arbitration matter of Rahlagane, John Madile v Mactransco (Pty) Ltd (MPRFBC 3711) 12 May 2009.

The Labour Appeal court has confirmed in Lubbe v Absa Bank Bpk (1998) 12 BLLR 1224 (LAC) that, when the employee has realistic alternatives, a decision to resign will not easily be seen as a constructive dismissal.

If the employer has a grievance procedure in place, an employee who claims constructive dismissal must have exhausted with such procedure before taking a decision to resign.

The purpose of grievance procedures is to allow an employee or employees to bring to the attention of the management of the Company any dissatisfaction or feeling of injustice that may exist in respect of the workplace. Grievance procedures may not be used as appeal mechanisms in response to the employers' disciplinary actions against employees.

In Old Mutual Group Schemes v Dreyer and Another, (1999) 20 ILJ 2030 (LAC), the Court held that the mere holding of a disciplinary enquiry does not amount to duress entitling the employees to bypass the internal appeal processes. The Court found that the employees' contention that the internal processes would have been futile to appeal was without foundation.

In L.M. Wulfsohn Motors (Pty) Limited T/A Lionel Motors v Dispute Resolution Centre and Others, (2008) 29 ILJ 356 (LC), the Court found that there had been no constructive dismissal on the basis that a grievance procedure had not been exhausted. The Court further made the following useful comment in that regard:

„[12] ... Where an employee could reasonably be expected to invoke a grievance procedure,

the resignation will not be regarded as a constructive dismissal.

In order to determine whether a constructive dismissal has been established, the Labour Appeal Court in Solid Doors (Pty) Limited v Commissioner Veron and Others, (2004) 25 ILJ 2337 (LAC) at para 28. [„Solid Doors"] held as follows:

„[28] ... there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee"s employer who made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established."

The Supreme Court of Appeal in Murray v Minister of Defence [2008] 6 BLLR 513 (SCA) …at para13 , held that even if the employer is responsible for the intolerable conditions, this will not be sufficient to constitute a constructive dismissal. Something more is required. In that regard the SCA held that:

„[13] …there are many things an employer may fairly and reasonably do that may make an employee‟s position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the Courts have adopted) have lacked „reasonable and proper cause‟. Culpability does not mean that the employer must have wanted to or intended to get rid of the employee though in many instances of constructive dismissal that is the case.‟

The burden of proof in Constructive Dismissals lies with the employee. In other words, the employee must prove on "balance of probabilities" that he has been constructively dismissed.

In Jordaan v Commissioner for Conciliation, Mediation and Arbitration and Others (2010) 31 ILJ 2331 (LAC) at 2335, the Court set out a two-stage approach for the purposes of determining constructive dismissal disputes:

"In the first place, an employee who leaves a place of employment bears the onus of showing that the employer effectively dismissed the employee by making her continued employment intolerable. Once this is established, a second stage must be applied and this concerns an evaluation of whether the dismissal was unfair"

In Regent Insurance Co Ltd v Commission for Conciliation, Mediation & Arbitration & others (2013) 34 ILJ 410 (LC) (15 June 2012), The Court followed the two-stage approach adopted by the

LAC in Jordaan v Commission for Conciliation, Mediation & Arbitration & others (2010) 31 ILJ 2331 (LAC), that required an employee first to show on an objective standard that the employer had made employment so intolerable that resignation was the employee's only reasonable option. Only thereafter was an evaluation made to show whether the constructive dismissal was unfair. The court found that the employee could have invoked the employer's grievance procedures or referred a dispute to the CCMA if she felt the warning was unfair, and her resignation was premature and unreasonable.

An employee who has been constructively dismissed may in terms of section 191(1) (a)- (b) of the Act refer unfair dismissal dispute to the CCMA or applicable Bargaining Council, if his employer falls within the registered scope of such council. The time frame for referral of unfair dismissal disputes is 30 days from "the last date on which the employee left the service of the employer". If the employee fails to refer his dispute within the period of 30 days, the CCMA or Council may on good cause shown condone a late filling of such referral.

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