

Navigating the High Threshold for Constructive Dismissal Claims

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Proving Intolerability in the Workplace

INTRODUCTION

Constructive dismissal is described in s186(1)(e) of the Labour Relations Act No. 66 of 1995 (“**LRA**”) as when “an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee”.

Accordingly, constructive dismissal occurs when an employee is coerced and/or left with no other reasonable option than to terminate the employment contract due to intolerable working conditions. The threshold for proving this intolerability is onerous and often leaves aggrieved employees facing a daunting challenge. This article addresses the requirement of intolerability when proving a claim of constructive dismissal.

ESSENTIALS ELEMENTS TO PROVE CONSTRUCTIVE DISMISSAL

For an employee to prove constructive dismissal the following three elements must be present:

1. the employee terminated the employment contract (“Termination”) due to the employer’s conduct;
2. the reason for the Termination was that the employee found continued employment intolerable; and
3. the cause of the intolerability was the employer.¹

THE STANDARD FOR INTOLERABILITY

The case of *Gold One Limited v Madalani and Others* [2020] ZALCJHB 180; (2020) 41 ILJ 2832 (LC); [2021] 2 BLLR 198 (“**Gold One Judgement**”) held that “intolerability is a high threshold, far more than just a difficult, unpleasant or stressful working environment or employment conditions, or for that matter an obnoxious, rude and uncompromising superior who may treat employees badly.”

The *Gold One Judgement* has accordingly established that proving intolerability requires an employee to show a significant degree of difficulty beyond typical workplace issues caused by the employer, and that

Termination was the only reasonable option available to the employee. What makes this onus more stringent is that the test to prove constructive dismissal is objective, which means that, legally, the reasonable person in the position of the employee would have been required to reach the same conclusion as the employee regarding the intolerability of the employment relationship which resulted in the Termination.

Additionally, since the claim of constructive dismissal exists because of a resignation occasioned by the employee, the onus of proof lies with the employee to establish that the resignation amounted to a dismissal in terms of section 186(1)(e) of the LRA. This is done by establishing that if not for the intolerable working condition/s, the employee would not have resorted to Termination.²

Once the abovementioned onus is discharged by the employee, a counter onus then rests on the employer to prove that the dismissal was not unfair, for instance, by demonstrating that the employer’s actions were not wrongful. This counter onus is proven on a balance of probabilities based on reasonableness.³

CONCLUSION

Succeeding with a claim of constructive dismissal is difficult due to the high threshold placed on an employee to prove it. Success hinges on understanding legal standards, gathering evidence and presenting persuasive arguments due to the objective test for constructive dismissal.

Kindly contact the authors of this article on 011 568 8500 for more information.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice.

Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated here.

¹CCMA Info Sheet: Constructive Dismissal 2018

²Pretoria Society for the Care of the Retarded v Loots
[1997] 6 BLLR 721 (LAC)

³Eagleton v You Asked Services (Pty) Ltd (2009) 30 ILJ
320 (LC)



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