

# Constructive Dismissal and the Threshold of Intolerability

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## INTRODUCTION

Constructive dismissal remains one of the more contested – and often misunderstood – concepts in South African labour law. It arises where an employee resigns because the employer, through conduct or omission, has made continued employment objectively intolerable. Constructive dismissal is defined in section 186(1)(e) of the Labour Relations Act 66 of 1995 (the “**LRA**”) and may constitute an unfair dismissal under the LRA, if all the criteria are met.

The threshold, however, is high as reaffirmed by the Constitutional Court in *Maleka v Boyce NO and Others*.<sup>1</sup>

## THE FACTS

Mr Maleka, the appellant, was employed as an IT Director within the ADT Group. Following a corporate acquisition and restructuring, his reporting line was altered such that he no longer reported directly to the managing director, but instead to a newly appointed executive, who in turn reported to the managing director.

Mr Maleka viewed this change as a demotion, contending that it diminished his authority and standing within the company. He subsequently resigned and referred a constructive dismissal dispute to the CCMA. His claim was unsuccessful at arbitration and on review before the Labour Court, as well as on appeal to the Labour Appeal Court. Ultimately, the Constitutional Court refused to grant relief.

## THE RULING

Although the Constitutional Court ultimately refused leave to appeal on procedural grounds, it still chose to reaffirm the legal criteria for constructive dismissal. It held that three elements must be established:

1. The employee must have terminated the employment relationship;
2. The reason for the termination must have been that continued employment had become intolerable; and
3. The intolerable conditions must have been caused by the employer.

The Court held that intolerability is assessed objectively, and not through the lens of the employee’s subjective perceptions, such as dissatisfaction with restructuring, or anxiety as to whether continued employment *might* become intolerable. The enquiry is whether the employer’s conduct had, at the time of resignation, rendered continued employment genuinely unbearable to a reasonable person in the employee’s position.

The requirement of objectivity proved fatal to Mr Maleka’s claim. The evidence demonstrated that his resignation was primarily driven by concerns about anticipated future changes, rather than by conditions that had already rendered his continued employment intolerable.

The Court further had regard to Mr Maleka’s failure to invoke the company’s internal grievance procedures prior to his resignation. While there is no absolute obligation on an employee to exhaust such remedies, particularly where doing so would be futile, a failure to do so may weigh against a finding of constructive dismissal, especially where it undermines the contention that resignation was a measure of last resort.

## PRACTICAL IMPLICATIONS

From an employer’s perspective, restructuring is an inevitable feature of modern business. This judgement confirms that organisational changes, including adjustments to reporting lines or management structures, do not automatically amount to constructive dismissal. This remains the case provided such changes are implemented fairly, communicated transparently, and do not materially diminish an employee’s dignity. Furthermore, the existence of effective internal grievance procedures is not merely sound human resources practice, but carries tangible legal significance, as illustrated in this case.

From an employee’s perspective, one should bear in mind that constructive dismissal claims are generally difficult to prove. Mere dissatisfaction, a sense of marginalisation, or anxiety about future developments will not suffice. The intolerability must already exist at the time of the resignation, not merely be anticipated,

and resignation must be a measure of last resort, after reasonable attempts to resolve the issue internally have either failed or would clearly be futile.

## CONCLUSION

The *Maleka v Boyce NO* case reaffirms that constructive dismissal claims must meet a high threshold to succeed, and that, whether one is an employer implementing restructuring or an employee contemplating resignation, a clear understanding of where the threshold lies is essential before taking any drastic steps.

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<sup>1</sup>*Maleka v Boyce NO and Others* (2026) ZACC 7.



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