

26 January 2024

## CONSTRUCTIVE DISMISSAL



*Westbank, a Division of FirstRand Bank Limited v Commission for Conciliation, Mediation & Arbitration* (C293/2021) [2024] ZALCCT 1 (18 January 2024)

In this article, we delve into the labour court's perspective after assessing the essential components linked to constructive dismissal.

The latest Judgement handed down on 18 January 2024, in the case of *Westbank, a Division of FirstRand Bank Limited v Commission for Conciliation, Mediation & Arbitration*, clarifies the South African position when dealing with Constructive dismissal.

Constructive dismissal refers to a situation where an employee resigns from their job due to the employer's actions or behaviour, whereby the Employer makes the working conditions intolerable. In such cases, the employee may claim constructive dismissal and seek remedies. It's important to note that constructive dismissal is a complex legal concept, and the specific circumstances surrounding each case can vary.

Key elements and considerations related to constructive dismissal as clarified in the latest judgement are set out below:

### 1. What Constitutes Constructive dismissal:

- The case underscored that for the applicant to effectively invoke S186(1)(e) of the Labour Relations Act, the burden of proof lies in establishing the following:

It must be ascertained whether the situation indeed constitutes constructive dismissal. All three elements must align to proceed with the case on this basis:

- 1) The Employee terminated their contract of employment; and
- 2) The reason for terminating the contract must be the intolerability of continued employment at the company; and

- 3) The Employer is responsible for making the ongoing employment conditions intolerable for the Employee.

## **2. Objective Test:**

- The test for constructive dismissal in South Africa is an objective one.
- The responsibility falls on the applicant to substantiate the presence of all three of the aforementioned factors. The case of *Murray v Minister of Defence* illuminated various facets of the law, emphasising the constitutional stance that enforces the right to fair treatment in the workplace.
- The obligation on the Employer towards the Employee has both a formal procedural and substantive aspect to it.

## **3. Intolerability:**

- The assessment of intolerability holds significant weight. It necessitates the Employee to present compelling reasons, demonstrating that no reasonable person could reasonably be expected to persist in the working relationship.
- Intolerability encompasses circumstances that are unendurable or agonizing, pushing an Employee's tolerance to its breaking point.
- This evaluation is grounded in the reasonable person test, an objective standard. The reasonable person, in this context, is someone placed in the shoes of the Employee, considering the same background, life experience, and position.

## **4. Employers need to safeguard against the following:**

- Employers must promptly address grievances raised by employees, adhering to the specified time-frames outlined in the company's grievance procedure.
- It is essential for employers to maintain consistent standards across all employees to prevent instances of bullying or victimization.
- Procedural fairness is paramount in actions leading to constructive dismissal. Unfair or arbitrary actions may bolster the employee's case.
- Employers are obligated to consult with employees before implementing changes that could impact their terms and conditions of employment. Unilateral changes to the employment contract are not permissible.

## **5. Remedies:**

- If a constructive dismissal claim is successful, the employee may be entitled to remedies such as compensation for unfair dismissal or reinstatement.

We eagerly anticipate the opportunity to support you with any of your labour law requirements. Please feel free to reach out to us if you need any assistance.

**Written by:**  
**Ms. Justinne Lemkus**  
**Altitude Employment Solutions**  
**Business Partner**