De-constructing constructive dismissal in Lesotho and possible lessons from English and South African law

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Master of Laws Degree (LL.M) at the National University of Lesotho

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DECLARATION

I, the undersigned, Keketso Pakkies, do hereby declare that this dissertation is submitted to the National University of Lesotho, Faculty of Law, in partial fulfillment of the requirements for the degree of Master of Laws, and has not been previously submitted by me for a degree at this University or any other institution in its entirety or in part, that the work contained therein is my own, original work, that I am the authorship thereof.

KEKETSO PAKKIES **DATE: 30 JUNE 2022**

DEDICATION

I dedicate this work to my late mother PALESA PAKKIES.

ACKNOWLEDGEMENTS

Our competence is from God, who has made us competent to be persons we are today. I would like to thank the Almighty God for all the love and protection he has given me through all my life. Also, thank him for giving me the opportunity, strength and intellect to write this piece of paper. Without God, this would have been impossible.

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CHAPTER ONE

1. INTRODUCTION AND BACKGROUND

1.1. General Introduction

The contract of employment can be terminated in various ways and for various reasons. The contract of employment is a contract to which the ordinary principles of the law of contract are applicable in respect of termination. Some of the traditional methods by means of which contractual relationships are terminated have particular relevance to contracts of employment.[1]

It should be borne in mind though that the application of common law principles of the law of contract to employment contracts has radically changed over the past few decades because of statutory intervention, such as the *Labour Code Order* No. 24 of 1992 ("the *Labour Code*") in Lesotho, which has now implanted the principle of fairness into the employment relationship.

An important objective of the *Labour Code*, like the labour legislation in other countries, is to enhance the job security of employees. That objective is attained by defining the circumstances in which employees may be dismissed;[2] by creating forums charged with determining whether dismissals are fair; and by giving employees remedies against unfair dismissal.[3]

The first question to be established in any case involving an alleged unfair dismissal is whether a 'dismissal' actually occurred. This entails asking, first, whether the complainant was in fact an 'employee', since only employees proper can be dismissed.[4] Even if the complainant is an employee as defined in the *Labour Code*, it does not follow that a termination of the service

[1] Grogan, J. *Workplace Law* (13th Ed, Juta 2020) at page 127-128.
[2] See section 66 of the *Labour Code*.
[3] See section 73 of the *Labour Code*.
[4] Grogan, J. *Workplace Law* (13th Ed, Juta 2020) at page 127-128.

contract amounts to a dismissal. The employee may, for example, have resigned, or may have repudiated the contract by deserting, or the contract may simply have lapsed.[5]

The second step is to establish whether the termination constituted a 'dismissal'. Generally, a dismissal is easy to recognise. A dismissal takes place when the contract is terminated at the instance of the employer and entails some act which denotes that the employer has brought the contract to an end.[6]

For purposes of this study, labour law also recognizes an extraordinary type of dismissal known as constructive dismissal. This is an extraordinary type of dismissal because it is the employee that resigns but the law says that the employee is deemed to have been dismissed if the employee was forced to resign due to some improper conduct by the employer. In *Murray v Minister of Defence*,[7] Cameron JA noted that:

> In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognized as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences.[8]

In a word, without the recognition of this form of dismissal, unscrupulous employers would be able to rid themselves of an employee by making the employee's life so intolerable as to make him or her resign.[9] Examples of such conduct may, generally, include sexual and other forms of harassment, assaulting the employee *etcetera*.[10] But what exactly, in Lesotho, does the term 'constructive dismissal' mean and what does an employee need to prove in order to be successful where they allege to have been constructively dismissed? The leading authority on the answer to this question is the Court of Appeal[11] decision in *Tšeuoa v Lesotho Precious Garments P & T*

[5] Grogan, J. *Workplace Law*13th Ed, Juta 2020) at pg 127-.
[6] See section 68(a) of the *Labour Code*; *Institute of Development Management v Matete* LAC/REV/9/02 at para 29. See also *Enforce Security Group v Fikile and Others* [2017] 8 BLLR 745 (LAC) at footnote 7 where the court identifies the various ways in which a contract of employment can be terminated that do not involve or amount to 'dismissal'.
[7] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA).
[8] At para 8.
[9] Carby-Hall, J. "Unfair dismissal: what constitutes dismissal and when does termination of the contract of employment take effect?" (1988) 30 *Managerial Law* at pg. 8.
[10] See Grogan, J. *Workplace Law* (13th ed, Juta 2020) at pg 138-139 where the author provides a list of actions which have been found to give rise to valid claims of constructive dismissal.
[11] The Court of Appeal is the highest court in Lesotho.

(Pty) Ltd[12] ("*Tšeuoa 2*"). This decision has raised more questions and left some unanswered, as will be shown below. To avoid confusion, since the decision of the Labour Appeal Court will be also be discussed in this study, the decision of the Court of Appeal will be referred to as *Tšeuoa 2* whilst the decision of the Labour Appeal Court will be referred to as *Tšeuoa 1.*

1.2. Statement of the research problem

The common law recognised only two forms of dismissal: those with notice and those without notic[13]. Thus, in terms of the common law the employer could 'lawfully' terminate the employment relationship by simply giving the employee notice, say two weeks or a months' notice. The *Labour Code* has extended the concept of dismissal to include other forms. In section 66, the Act sets out the three permissible grounds for a 'fair' dismissal, namely misconduct, incapacity and operational requirements. As to what the term 'dismissal' means, section 68, titled "Definition of dismissal", provides that:

> *For purposes of section 66, dismissal shall include:*
>
> *(a) termination of employment on the initiative of the employer;*
> *(b) the ending of any contract for a period of fixed duration or for the performance of a specific task or journey without such contract being renewed, but only in cases where the contract provided for the possibility of renewal; and*
> *(c) resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract.* (Emphasis added)

Sub-section (c) (quoted above) obviously refers to constructive dismissal. But, what is this sub-section really saying: what is this 'unreasonable conduct' that it is referring to and what sort of breach of contract would entitle an employee to terminate the employment contract without notice?

[12] *Tšeuoa v Lesotho Precious Garments P &T (Pty) Ltd* LAC (2013 – 2014) 175.

[13] Supra fn 9

As was noted earlier, the leading authority in Lesotho on the interpretation of section 68(c) is the decision of the Court of Appeal in *Tšeuoa 2*. This case was an appeal against a judgment of the Labour Appeal Court.[14] The facts of this case will be discussed in detail in the subsequent chapters of this study. For now, it suffices to merely say that the employee, who was a senior manager, was made to wait outside the gates of the employer's head office. He felt humiliated by the experience and later resigned, claiming that he had been constructively dismissed.

In its judgment, the Labour Appeal Court quoted section 68(c) of the *Labour Code* and also referred to some South African case law on constructive dismissal. It then held that, in an unfair dismissal case involving alleged constructive dismissal, it is the employee that bears the onus of proving that "continued employment was rendered intolerable by the unreasonable conduct of the employer".[15] On the facts before it, the court came to the conclusion that the employee had not been constructively dismissed because he failed to discharge this onus.

It is apposite, at this juncture, to note that, in many instances the *Labour Code* does not explain the principles that it refers to. In such circumstances, the details and/or explanations can normally be found in the Codes of Good Practice[16] published under the *Labour Code*. Whilst they are not law,[17] the Codes of Good Practice have a quasi-statutory force because the courts and arbitrators are required to have regard to them when resolving disputes.[18] Relevant for purposes hereof is item 6, titled "Forced resignation or constructive dismissal". It provides that:

> *If an employer makes <u>continued employment intolerable</u> leading to the resignation of the employee, that resignation may amount to a dismissal. Resignation in these circumstances is often referred to as constructive dismissal.*

It is apparent, therefore, that the Codes of Good Practice, like the Labour Appeal Court did, define constructive dismissal by emphasising that the employer should have made continued employment intolerable. In *Tšeuoa 2,* the issue for determination was whether the Labour Appeal

[14] *Tšeuoa v DDPR and Others* LAC/REV/36/02 [2004] LSLAC 1 (10 May 2004).
[15] *Tšeuoa v DDPR and Others* LAC/REV/36/02 [2004] LSLAC 1 (10 May 2004) at para 5.
[16] The Labour Code (Codes of Good Practice) LN 4 of 2003. It should be noted that, unlike in South Africa where there are a number of codes of good practice, in Lesotho there is only one which tries to cover everything.
[17] That this is so is clear from the preamble to the Codes of Good Practice that notes that "A code of good practice is what is called 'soft law'".
[18] Grogan, J. *Workplace Law* (13th ed, Juta 2020) at pg 8.

Court had applied the correct test for constructive dismissal in light of the wording of section 68(c) of the *Labour Code*. The court held that the lower court had applied the wrong test, namely the South African test for constructive dismissal as set out in South Africa's *Labour Relations Act*.[19] The test for constructive dismissal in the two countries is different, as the court correctly acknowledged. The Court of Appeal further held that, the test in Lesotho is whether:

a) the employer has been guilty of conduct which is unreasonable having regard to the circumstances;
b) the employer has in so doing breached a term of the employee's contract of employment; and
c) as a result, the employee was entitled to terminate the contract. In other words that the breach (and/or the conduct) was of a serious nature.

On the facts of the case, the Court of Appeal, like the Labour Appeal Court, found that the employee had not been constructively dismissed. The Court of Appeal though did not elaborate on what sort of conduct by the employer would constitute 'unreasonable conduct'. Also, it did not elaborate on what would and/or should constitute a serious breach of contract that would entitle the employee to terminate the employment contract. The answers to these questions are important and this study will seek to provide answers.

Firstly, from a claimant employee's perspective, it is important to know exactly what he or she is expected to prove to be able to succeed in a constructive dismissal case. Secondly, whilst the test for constructive dismissal should not be unduly restrictive, it should not be so relaxed as to make it too easy for an employee to claim that he or she was constructively dismissed when there was a perfectly legitimate avenue open to solve his or her problem. Does the test laid down in the *Labour Code* make it too easy for employees to successfully claim that they were constructively dismissed, in other words, is there a better and alternative approach that balances the interests of employees as well as employers? As will be shown below, there are two possible approaches.

[19] In terms of section 186(1)(e) of the South African Labour Relations Act 66 of 1995 (as amended), constructive dismissal is defined as follows: "*An employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".*

The first, like section 68(c), is the 'contract test' approach. The second is the 'intolerability test' approach which appears to be more strict.

In Lesotho, apart from the *Tšeuoa* case, it is difficult to find cases where section 68(c) of the *Labour Code* has been interpreted in detail. This study will argue that Lesotho can learn some valuable lessons from the experiences of other countries. The current test for constructive dismissal under the *Labour Code* is similar to that which is applied in English law,[20] and it is quite possible that this is where Lesotho 'borrowed' the concept of constructive dismissal. Therefore, English case law might provide much needed guidance on the interpretation of the *Labour Code*.

In terms of English law, the test focuses on whether the employer's conduct amounts to a repudiatory breach of the employment contract. This is how this came to be. The circumstances in which an employee qualifies as being "dismissed" by his or her employer were first set out in the *Redundancy Payments Act* of 1965. Section 3(c) thereof provided that an employee is dismissed if "the employee terminates that [employment] contract without notice in circumstances…such that he is entitled so to terminate it by reason of the employer's conduct".[21] A similarly worded provision also appeared in section 5(2)(c) of the *Trade Union and Labour Relations Act* of 1974.

Then in 1978, in the case of *Western Excavations v Sharp*,[22] the Court of Appeal interpreted this provision to mean that an employee is constructively dismissed 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.[23]

[20] Ackerley, N. Constructive dismissal and unfair dismissal. Veterinary Nursing Journal. Published 13 Jn 2020
[21] It should be noted the wording in section 3 of the English Act is strikingly similar to the current wording of section 68 of Lesotho's current Labour Code.
[22] *Western Excavations v Sharp* [1978] 1 ALL ER 713.
[23] For a detailed analysis of this decision, see Crump, D. and Rees, M. "Constructive Dismissal Construed: The Court of Appeal Digs for Clarity" (1978) 41 *Modern Law Review* 581-584.

More recently, in *Kaur v Leeds Hospitals NHS Trust,*[24] England's Court of Appeal affirmed that "The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment" and that "Any breach of the implied term of trust and confidence will amount to a repudiation of the contract".[25] Is this how the Lesotho courts should interpret section 68(c) of the *Labour Code*? As Vittori[26] has noted, the acceptance of the term of mutual trust and confidence as legal incident of the contract of employment in England has been described as forming the cornerstone of the contract of employment. Closer to home, the concept of constructive dismissal was imported from English law by South African labour courts into South Africa in the 1980's:

> …[South African courts] adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation.[27]

Thus, a breach of the implied term of trust and confidence was associated with the concept of constructive dismissal to such an extent that the two concepts became equated.[28] It is interesting though that in 1995, when the *Labour Relations Act* was enacted in South Africa, the contract test was abandoned by the legislature in favour of a test that focuses on whether the employer has made continued employment intolerable for the employee.[29] In *Mafomane v Rustenburg Platinum Mines Ltd,*[30] the court noted that:

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[24] *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38.

[25] Riley, J. "Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts" (2012) 36 *Melbourne University Law Review* 527, explains the development and significance of this implied duty as follows: "The duty was articulated first in a series of cases in the United Kingdom, in which employees sought to cast the blame for the termination of their employment at the feet of employers, notwithstanding that the employers did not expressly dismiss these employees. In each of these cases it was held that, if an employee was able to establish that the employer's conduct was so destructive of the mutual trust and confidence that properly binds parties to an employment relationship, the employee should be entitled to treat the employer's conduct as a constructive dismissal".

[26] Vettori, S. "Constructive dismissal and repudiation of Contract: what must be proved" (2011) 22 *Stellenbosch Law Review* at pg 180.

[27] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 8.

[28] Vettori, S. "Constructive dismissal and repudiation of Contract: what must be proved" (2011) 22 *Stellenbosch Law Review* at pg. 180. See also Cohen, T. "The Relational Contract of Employment" (2012) *Acta Juridica* at pg 94-95 where the author explains this implied duty of trust and confidence.

[29] See section 186(1)(e) of the *Labour Relations Act* (quoted above).

[30] *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC).

> …the LRA continues to use the concept of constructive dismissal as described in the earlier cases but introduced refinements and did not take over all the rules that governed constructive dismissal under the old law. The codification under the LRA has amongst other things severed the link between constructive dismissal and wrongful repudiation of a contract at common law. It is now a statutory concept in its own right which does not need to retain its link to the common law doctrine of wrongful repudiation for its justification.[31]

Under the *Labour Relations Act*, in light of the wording in section 186(1)(e), since 1995 the courts have formulated the requirements for the purpose of determining whether an employee has been constructively dismissed. These requirements have been summarized as follows:

> 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 had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established.[32]

To ensure fairness, the intolerability test is strict because an employer's interests must be protected against disgruntled employees who chose to resign and then try to use a constructive dismissal claim as a way of getting back at the employer.[33] As Maxwell puts it, "The word 'intolerable' has been included in section 186(e) to restrain employees from unduly instituting legal action for constructive dismissal".[34] There is some authority in South African case law for the proposition that, to constitute constructive dismissal, resignation should be a matter of last resort.[35] In *Albany Bakeries v Van Wlyk and Others*[36] the Court held that it would be

[31] See also *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at pg 984; *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 10. Further, see also Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 346 where the author notes that "The concept of a constructive dismissal was imported into our law from English law. Initially, the employee's resignation because of the employer's wrongdoing was compared with the common-law termination of a contract by one party because of the other's wrongful repudiation....This common-law test of the employer's repudiation by making employment intolerable fell away when s 186(1)(e) of the Labour Relations Act 66 of 1995 (LRA) firmly recognised this type of dismissal."

[32] See *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 *ILJ* 2337 (LAC) para 28.

[33] Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 346-347.

[34] Maxwell, S. "The question of constructive dismissal" (199) 7 *Juta's Business Law Review* at pg 14.

[35] See for example, *Lubbe v ABSA Bank Bpk* 11998] 12 BLLR 1224 (LAC); *Old Mutual Group Schemes v Dreyer and Another* (2009) 20 *IL]* 2030 (LAC) in par 18; *Britz v Acctech Systems (Pty) Ltd* (2009) 30 ILJ (CCMA) at pg 1166-1167 and the authorities cited thereat.

"opportunistic for an employee to leave and claim that it was a result of intolerability, when there was a perfectly legitimate avenue open to solve his problem".

As was noted earlier, one of the main objectives of this study will be to consider whether Lesotho should opt for a stricter test for constructive dismissal, a test that is similar to the one which is now applied in South Africa.

1.3. Research question

What are the requirements that must (or should) be met for a constructive dismissal claim to succeed in Lesotho?

1.4. Significance of the research problem

Any person who is employed can potentially be the victim of employer conduct that makes continued work intolerable. The (proper) interpretation of the section 68(c) of the *Labour Code* is very important for both parties to the employment contract. Employees need to know exactly what they are required to prove to be able to successfully claim constructive dismissal. In turn, employers need to know the potential defences that are available to them when faced with a constructive dismissal claim and how to avoid such claims in the first place.

As far as can be gathered, there is very little case law in Lesotho where the issue of constructive dismissal was considered in detail. The same can be said about academic journal articles. Therefore, this study is very important as it will answer the questions that have been posed above.

1.5. The aims of the study

[36] *Albany Bakeries v Van Wlyk and Others* (2005) 26 ILJ 2142 (LAC) at para 28. However, contrast this case with *Strategic Liquor Services v Mvunbi NO and Others* (2009) 30 ILJ 1526 (CC) where the Constitutional Court held that section 186(1)(e) of the *Labour Relations Act* does not link 'intolerability' with a last resort.

a) To determine the origins of constructive dismissal in Lesotho;
b) To determine the requirements that an employee has to satisfy under the Labour Code in order to be successful when claiming to have been constructively dismissed.
c) To determine the key differences between the 'contract test' as applied in Lesotho and the 'intolerability test' as applied in South Africa.
d) To identify the possible lessons that Lesotho may learn from the experiences of England and South Africa with respect to the regulation of constructive dismissal.

1.6. The scope of the study

The fundamental objective of this study is to scrutinize the legal implications of employers in Lesotho who engage in unreasonable and intolerable conduct against employees. The study will also explore precedent (South African and English) on this subject, consider and describe what forms of behaviour by employers can/should be viewed as unreasonable and/or intolerable by our courts of law in deciding whether a case of constructive dismissal has been made.

The study will also examine whether the intolerable conduct should only be that of the employer or whether it also extends to the conduct of a third party which the employer is aware of but fails to intervene. The possible remedies that are available to employees who are faced with unreasonable conduct by their employers will also be explored.

1.7. Literature review

In Lesotho, as far as can be gathered, very little has been written on constructive dismissal and in particular the proper interpretation of section 68(c) of the *Labour Code*. The leading authority on this subject is the Court of Appeal decision in the *Tšeuoa* case, as briefly discussed above. The

decision of the Labour Appeal Court deserves mention because one of the key principles relating to constructive dismissal was identified, namely that it is the employee that bears the onus of proving that he or she was constructively dismissed.[37] In its judgment the court also held that an employee must prove that he or she "had no reasonable alternative other than to resign".[38] This suggests that resignation must have been the last resort. However, it is debatable whether this is a requirement when the contract test is applied as opposed to the intolerability test.

Given the close links between Lesotho and South Africa in terms of geography and legal frameworks, the literature and the case law from the latter are probably highly persuasive. Grogan in his book *Workplace Law*[39] neatly sums up the requirements for constructive dismissal in South Africa. Relevant for this study is that the author lists some of the common actions which have been found to give rise to valid claims of constructive dismissal.[40]

On the other hand, Vittori[41] in her article focuses on the common law concept of constructive dismissal in South Africa as developed from English law, and a critical analysis of the English and South African legislation on constructive dismissal. One of the key conclusions drawn in this article is that the burden of proof for an employee basing a claim on constructive dismissal in terms of legislation (where the intolerability test applies) is more onerous than in terms of the (contract test) common law.[42] Maxwell has a similar view by noting that the word 'intolerable' has been included in section 186(e) of the *Labour Relations Act* to make it more difficult for employees who are simply not happy with their jobs to claim that they were constructively dismissed.[43]

Related to this is the somewhat controversial proposition that a claim for constructive dismissal would not be possible if the intolerable working conditions were not directly of the employer's making, say for example where a client is harassing an employee. After a careful analysis of the

[37] *Tšeuoa v DDPR and Others* LAC/REV/36/02 [2004] LSLAC 1 (10 May 2004) at para 5.
[38] Ibid, at para 5.
[39] Grogan, J. *Workplace Law* (13th ed, Juta 2020) at pg 137-138.
[40] At pg 137-138.
[41] Vettori, S. "Constructive dismissal and repudiation of Contract: what must be proved" (2011) 22 *Stellenbosch Law Review* at pg. 180
[42] At pg 185.
[43] Maxwell, S. "The question of constructive dismissal" (199) 7 *Juta's Business Law Review* at pg 14.

case law, Dekker[44] in his article argues that fairness requires that a claim for constructive dismissal should be possible if a third party made continued employment impossible, provided the employer was made aware of this and failed to act.

When it comes to constructive dismissal in English law, there are a number of Court of Appeal[45] judgments that have explained and expanded the requirements over the years.[46] As was noted above, in the relatively recent decision in *Kaur v Leeds Hospitals NHS Trust*[47] the court summarises the requirements and/or applicable principles in a constructive dismissal, and in particular, that "Any breach of the implied term of trust and confidence will amount to a repudiation of the contract". English literature[48] also focuses on meaning and significance of this implied term. This term will be discussed in detail in this study for purposes of identifying the sort of breach of contract that would/should constitute constructive dismissal in terms of section 68(c) of the *Labour Code*.

1.8. HYPOTHESIS

a) In all employment contracts, there exists an implied term of mutual trust and confidence.

b) For purposes of section 68(c) of the *Labour Code*, a serious breach of contract by an employer means 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

[44] Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 353.
[45] The Court of Appeal of England and Wales.
[46] See for example*Western Excavations v Sharp* [1978] 1 ALL ER 713; *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 413 (CA) 374-350; *Malik v Bank of Credit and Commerce International* [1998] AC 20; *London Borough of Waltham Forest v Omilaju* [2005] ICR 481; *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA.
[47] *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA.
[48] Brodie, D. "Mutual Trust Confidence: Catalysts, Constraints and Commonality" (2008) 37 *Industrial Law Journal* (UK) 329; Cabrelli, D. "Buckland v Bournemouth University Higher Education Corp: Statutory Constructive Dismissal and the Implied Term of Mutual Trust and Confidence" (2011) 74 *Modern Law Review* 122; Cabrelli, D. "The Implied Duty of Mutual Trust and Confidence: An Emerging Overarching Principle" (2005) 34 *Industrial Law Journal* (UK) 284-307; Carby-Hall, J. "Unfair Dismissal: What Constitutes Dismissal and When Does Termination of the Contract of Employment Take Effect?" (1988) *Managerial Law Review* 1-18; Crump, D. and Rees, M. "Constructive Dismissal Construed: The Court of Appeal Digs for Clarity" (1978) 41 *Modern Law Review* 581-584.

more of the essential terms of the contract. The employee is entitled to consider himself or herself as having been constructively dismissed in such circumstances and can resign accordingly.

c) Instead of the contract test, Lesotho should adopt a stricter test; namely the intolerability test as applied in South Africa.

1.9. Research methodology

This study will be based on literature of primary and secondary sources such as textbooks, law journal articles, statutes, case law and internet sources from reliable websites. These sources will be subjected to a critical analysis with the aim of determining what an employee needs to prove in order to be successful where they allege to have been constructively dismissed. A comparative study will also be undertaken to determine the lessons (if any) that Lesotho can learn from the experiences of South Africa and England, where there is much more literature and case law on the subject of constructive dismissal.

1.10. Chapter breakdown

The study will be dived into four chapters:

Chapter 1 – The introduction

This chapter will introduce the research problem, including the aims and objectives of the study and the research methodology to be used**.**

Chapter 2 – The 'contract test' in Lesotho and an English law perspective

To be able to understand why section 68(c) has been drafted the way it is and how it should be interpreted, this chapter will attempt to determine where Lesotho 'borrowed' the concept of constructive dismissal from. Thereafter, a critical analysis of section 68(c) will be undertaken to determine what an employee needs to prove in order to be successful where they allege to have been constructively dismissed. This will involve consideration of the terms 'unreasonable conduct' and 'serious breach' of the terms of the employment contract. Both the decisions of the Labour Appeal Court and the Court of Appeal in *Tšeuoa* will form a critical part of this discussion. The possible pros and cons of the contract test will also be identified. When interpreting section 68(c), reference will be made to English case law given the similar approach to constructive dismissal

Chapter 3 – A different approach: the intolerability test as applied in South Africa

This chapter will consist of a critical analysis of the intolerability test as applied in South Africa. The pros and cons of the tests applied in South Africa and Lesotho will also be identified and discussed.

Chapter 4 – Conclusions and recommendations

Finally, in chapter four, conclusions will be drawn and recommendations will be made on the way forward for Lesotho.

CHAPTER TWO

2. THE 'CONTRACT TEST' IN LESOTHO AND AN ENGLISH LAW PERSPECTIVE

2.1. Introduction

In the previous chapter it was intimated that the decision of the Court of Appeal in *Tšeuoa 2* has raised some interesting questions regarding the test for constructive dismissal in Lesotho, and consequently, the requirements that an employee that is alleging to have been the victim of constructive dismissal has to prove. Thus, this chapter will consist of a critical analysis of section 68(c) of the *Labour Code*. It begins with some brief comments on the relationship between employer and employee; its common law origins and the reasons for statutory intervention with respect to termination of the employment contract; and the source of labour law. Thereafter, an analysis of the aforementioned section will be undertaken. It will also be shown that Lesotho 'borrowed' the concept of constructive dismissal from England, and as such, English case law will also be referred to in the discussion on what the 'contract test' entails.

2.2. An overview of the Labour Code and the employment relationship

When compared with other legal disciplines such as the law of delict, labour law is dynamic in the sense that it is always changing. In order to fully appreciate why we have the current labour law system in Lesotho, it is important to have a basic understanding of where we came from and the developments that have taken place over time.

In Roman law the letting and hiring of the labour or services of free men could be regulated by two species of *locatio conductio* (i.e. an agreement for letting or hiring of things), namely the *locatio conductio operarum* and *locatio conductio operis.* The *Locatio conductio operarum* (i.e. the letting and hiring of personal services) was a consensual contract whereby a labourer or servant as employee undertook to place his personal services for a certain period of time at the disposal of an employer who in turn undertook to pay him the wages or salary agreed upon in consideration of his services.[49] The *locatio conductio operarum* is the equivalent of the modern-day contract of employment.

The general principles underlying *locatio conductio operarum*, as set out above, were adopted and further developed in Roman-Dutch Law.[50] In the 1600s when the Dutch formed the first permanent settlements in what is now Cape Town, South Africa, they brought along with them their Roman-Dutch common law as developed in Holland[51]. Basutoland (now called Lesotho) became a British protectorate in 1868. From 1871 it was ruled from the Cape Colony. Then in 1884 the British issued the *General Law Proclamation 2B* of 1884. The proclamation basically says that the law that will apply in Basutoland shall be the law in force at the colony of the Cape

[49] *Smit v Workmen's Compensation Commissioner* [1979] 1 ALL SA 152 (A) at 154-155.
[50] *Smit v Workmen's Compensation Commissioner* [1979] 1 ALL SA 152 (A) at 154-155.
[51] Ibid

of Good Hope. Thus, Roman-Dutch common law became our common law, and is still the common law of Lesotho even today.[52]

The common law embraces the principle of 'freedom of contract'. The well-established principle, which is at the heart of the law of contract, is expressed in the Latin maxim "*pacta sunt servanda*" meaning that contracts properly entered into should be enforced.[53] In terms of the common law, freedom of contract means that 'free will' completely governs labour relations between employers and workers. The parties decide freely whether or not to conclude the employment contract, the contract terms, and also the time or how to terminate the employment relationship.

As Cohen[54] notes, "provided that notice was given, the termination of such contracts was lawful and reasons for termination of no relevance". This was one of the major shortcomings of the common law: employees did not have job security. Thus, statutory intrusion into the common law of employment was inspired *inter alia* by a general realisation that the common law did not provide employees with job security.[55]

An important objective of the *Labour Code*, like the labour legislation in other countries, is to enhance job security of employees. That objective is attained by defining the circumstances in which employees may be dismissed, by creating forums charged with determining whether dismissals are fair, and by giving employees remedies against unfair dismissal.[56] Section 66 of

[52] Hoolo Nyane, "Abolition of criminal defamation and retention of *scandalum magnatum in* Lesotho" (2019) 19 *African Human Rights Law Journal* at 744.
[53] A famous case that is often cited in this regard is the decision of South Africa's Appellate Division in *Wells v South African Aluminite Company* 1927 AD 60, where the court held that: "If there is one thing which more than policy requires is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held to be sacred and enforced by Courts of justice."
[54] Tamara Cohen, "When common law and labour law collide: some problems arising out of the termination of fixed-term contracts" (2007) *South African Mercantile Law Journal* at pg 27.
[55] John Grogan, *Workplace Law* (13th ed, Juta 2020) at pg 8.
[56] See section 73 of the *Labour Code*. The primary remedy is reinstatement. However, monetary compensation may also be awarded where reinstatement is found to be impracticable.

the *Labour Code* provides that employee shall not be dismissed, whether adequate notice is given or not, unless there is valid reason for termination of employment, which reason is connected with the conduct of the employee at the workplace; capacity; or the employer's operational requirements.

Put differently, the *Labour Code* has imported considerations of fairness and equity into the employment relationship by requiring dismissals to be for a fair reason (substantive fairness) and in compliance with a fair procedure (procedural fairness).[57] In an unfair dismissal case, the *Labour Code* places the burden on the employer to prove that a valid reason existed to dismiss the employee.[58] In the context of a dismissal on the ground of misconduct, substantive fairness would mean that the employer must prove that the employee contravened a workplace rule or standard regulating conduct in the workplace.[59] If the employer is unable to discharge this onus, because the employee did not engage in any misconduct, the dismissal will be held to be unfair,[60] and the employee will be entitled to either reinstatement or monetary compensation.[61]

It is apposite to note that, unlike in other countries such as South Africa, in Lesotho the *Labour Code* does not place a limit on the amount of monetary compensation that an employee can be awarded.[62] It is apparent, therefore, that it is difficult for employers to simply get rid of employees unless there is a valid reason for dismissing an employee. In simple terms, an

[57] See *Standard Lesotho Bank v Morahanye* LAC/CIV/A/06/08 at para 6 where these principles are explained.
[58] Section 66(2) provides that a dismissal will be unfair unless, having regard to all circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment.
[59] Nicola Smit, "How do you determine a fair sanction - dismissal as appropriate sanction in cases of dismissal for (mis)conduct" (2011) *De Jure* at pg 50 notes that "an employer must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This would require evidence, for example, that the trust relationship between the employer and employee had broken down. Put differently, an employer can dismiss fairly if it can prove that there was a transgression, the *nature* as well as the effect or *impact* of which was such as to make the sanction of dismissal appropriate".
[60] Item 7 of the *Codes of Good Practice*: "A reason is valid if it can be proved. In other words a dismissal will be unfair if the employer is not able to prove the reason for dismissal".
[61] See section 73 of the *Labour Code.*
[62] Section 73 of the Labour Code simply says that the compensation that a court may award shall be an amount that the court considers "just and equitable" in all the circumstances of a case.

employer cannot lawfully dismiss an employee unless the employee has, for example, engaged in some act of misconduct that warrants dismissal such as theft.

For the unscrupulous employer that does not have a reason to dismiss an otherwise innocent employee who is not suspected of anything, making the employer's life so miserable until he or she decides to resign might do the trick. In such circumstances, under the current labour law dispensation, the employee could resign and sue the employer for constructive dismissal.

2.3. The main sources of labour law

Until the emergence of labour legislation such as the *Labour Code* in Lesotho, the sole source of the rights of employers and employees was the contract of employment that they entered into.[63] The employer-employee relationship is now regulated to a large extent by the *Labour Code*, for example, on matters such as the employer's obligation to pay the employee's wages at a certain time and in a certain manner.[64]

This being said, the common law contract of employment remains the basis of the employment relationship in the sense that the legal relationship between the employer and the employee is created and regulated by it.[65] The point here, as will become apparent later, is that the principles of the law of contract are relevant and significant when it comes to termination of the employment contract.

[63] John Grogan *Workplace Law* (13th ed, Juta 2020) at pg 8. Although the author refers to South Africa, the same position applied in Lesotho.
[64] The employer's obligations will be discussed in more detail below.
[65] "…a contract of employment affords parties the opportunity of identifying their respective employment rights and duties, thereby providing certainty as to the ambit of the nature of the relationship going forward". See Radley Henrico and Nicola Smit "The contract of employment in labour law: obstacle or panacea?" 2010 *Obiter* 252. It is important to note that the authors though argue that the existence of a contract of contract is relevant but not indispensable to establish an employment relationship.

Lesotho is a member of the ILO and section 4 of the *Labour Code* provides that "in case of ambiguity, provisions of the Code…shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and Recommendations". Thus, ILO conventions are also a source of labour law. In addition to all this, many principles have been developed and established by the courts. These pronouncements, particularly those of higher courts, bind lower courts and are therefore also a source of labour law.

2.4. Where did Lesotho 'borrow' the concept of constructive dismissal?

For anyone that has gone through Lesotho's Labour Code, it quickly becomes apparent that the drafters of the Act were not very creative because it seems as if they simply 'copied and pasted' certain text from various ILO Conventions. When it comes to dismissals, the ILO' *Termination of Employment Convention,* 1982 (No. 158) is the most relevant to such issues. For example, section 66 of the *Labour Code* – which sets out the permissible reasons or grounds for dismissal – replicates Article3 of the aforementioned Convection.

Article 3 of the Convention defines dismissal in the following terms: "For the purpose of this Convention the terms *termination* and *termination of employment* mean termination of employment at the initiative of the employer". It is interesting though that, as far as can be gathered, there is no ILO Convention that specifically says that constructive dismissal should be or is recognised as a form of dismissal: Convention No. 158 is also silent on this issue. As Napier[66] explains, when this Convention was being drafted, a deliberate decision was taken to exclude the issue of forced resignations from the Convention:

> No attempt is made, however, to deal with the similar problem of constructive dismissal. 'Termination' is defined as 'termination at the instance of the employer' (Art. 3; Para 4). According to the preparatory

[66] Brian Napier "Dismissals - The New I.L.O. Standards" 1983 Industrial Law Journal at pg 27. See also the 'preparatory document' that the author refers to

documents the view which prevailed was that the problem of forced resignation was best left to regulation by individual member countries.

In a word, it can be said that it is up to each country to decide whether or not 'forced resignation' should be recognised as a form of dismissal, and if so, to determine the requirements that have to be satisfied before it can be said that an employee has been constructively dismissed. As indicated in the previous chapter, it is submitted that Lesotho must have borrowed the concept of constructive dismissal from England because the test in both countries focuses on whether the employer is guilty of a breach of contract which entitles the employee to resign.

2.5. The test for constructive dismissal in Lesotho: an analysis of section 68(c)

2.5.2. Tseuoa v The Precious Garments[67]: the facts and decisions of the LAC and C of A

In discussing the requirements for constructive dismissal under the Labour Code, throughout, reference will be made to the facts in *Tšeuoa* and how the law was applied to them by both the Labour Appeal Court and the Court of Appeal. The facts in this case may be summarised as follows. Tšeuoa was employed as a personnel manager by his employer, a textile factory. He was based in the district of Mafeteng. On or about the 13th day of May 2002, he was summoned to the employer's head office, situated in the capital city, Maseru. Upon arrival he had expected to speak with the general manger but he was referred to another person, one Mr Mokhseng. Tšeuoa waited for some time, however, Mr Mokheseng did not attend to him. At some point he decided to leave with the intention of coming back the next day. On the following day, Tšeuoa went back to the head office and requested to see Mr. Mokheseng. The response he got was that Mr Mokheseng will only be able to see him after attending to some other matters. Tšeuoa was made to wait where job-seekers line up, and this annoyed him. After waiting for some time, he left and wrote a resignation letter the following day. He claimed to have been 'compelled to resign' due to the employer's conduct.

Tšeuoa then proceeded to lodge an unfair dismissal claim in the Directorate for Dispute Prevention and Resolution (DDPR).[68] His claim was dismissed by the DDPR. He challenged the

[67] (Cof A (CIV) NO. 36/2013)

arbitration award by way of review proceedings in the Labour Appeal Court[69] (*Tšeuoa* 1). In its judgment, the court also found his claim of constructive dismissal to have no merit:

> The Court *a quo* held that in constructive dismissal cases the *onus* of proving that continued employment has been "rendered intolerable" by the unreasonable conduct of the employer rests on the employee, and that it must be discharged on a balance of probabilities. It must also be shown (by the employee) said the Court *a quo*, that the unreasonable conduct concerned was wilful, and that the employee had no reasonable alternative other than to resign.
>
> The Court *a quo* found that the conduct of the employer must be objectively unacceptable to a reasonable man; that constructive dismissal is an extraordinary and special form of dismissal, and that the employee must satisfy the Court of the existence of special circumstances.
>
> The Court *a quo* went on to find, on the facts, that the appellant had failed to prove that the first respondent had made continued employment intolerable for the appellant and that no reasonable alternative, other that resigning, existed for him.[70]

Not satisfied with the decision of the Labour Appeal Court, Tšeuoa appealed to the Court of Appeal (*Tšeuoa 2*). Whilst it agreed that the claim had no merit, it held that the lower court had applied the wrong test for constructive dismissal in Lesotho. The correct test, as the highest court held, is whether:

a) the employer has been guilty of conduct which is unreasonable having regard to the circumstances;
b) the employer has in so doing breached a term of the employee's contract of employment; and
c) as a result, the employee was entitled to terminate the contract. In other words that the breach (and/or the conduct) was of a serious nature.[71]

The above requirements are considered next.

2.5.3. Unreasonable conduct by the employer

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[68] The DDPR is the equivalent of the CCMA in South Africa.
[69] At the time when Tšeuoa instituted the review proceedings, the Labour Appeal Court had jurisdiction to entertain such matters. Currently, it is the Labour Court that has such review jurisdiction.
[70] See *Tšeuoa 2 at para 7-8 where the findings of the Labour Appeal Court have been neatly summarised.*
[71] Here it should be borne in mind that section 68(c) of the Labour Code defines constructive dismissal as : *"resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract".*

As to how the standard of unreasonable conduct must be measured, the Court in *Ts'euoa 2* gave some guidance in this regard. The Court said a Court will ask if: the employer has, without reasonable and probable cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between him and employee; the employer's conduct is of such a nature that the employee cannot reasonably be expected to put up with it.

In simple terms, the question here appears to be whether there is a reasonable explanation or justification for the employer's conduct. In *Ts'euoa 2,* the Court of Appeal noted that there was a good explanation as to why the employee had to wait for a long time at the gate. On the 13th, Mr Mokheseng was not there. Whilst he was there on the 14th, he could not see the employee immediately because of his other commitments. Also, everyone was required to wait at the gate, not just jobseekers, as the Court of Appeal found. The court also emphasised the fact that the employee did not suffer any real prejudice by being made to wait at the gate.

2.5.4. The employer's conduct amounts to a breach of the employment contract

The employer and employee must agree, whether expressly, tacitly or impliedly, on the contractual consequences they wish to invoke, meaning that consensus should be established with regard to the nature of the services the employee will render under the authority of the employer as well as the remuneration the latter will pay as counter-performance to the employee.[72]

Like any other contract, when the employer and employee conclude an employment contract, the idea is that the obligations imposed by the contract will be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay is said to have committed a breach of the contract.[73] The concept of

[72] LAWSA at para 109.
[73] RH Christie The Law of Contract in South Africa (5th ed, LexisNexis) at 495.

breach of contract can also be described in this manner: if either party, by act or omission and without lawful excuse, fails in any way to honour his or her contractual obligations, he or she commits a breach of contract.[74]

Breach of contract can take place in various ways, and the specific forms of breach that are recognised by law include: the debtor culpably fails to make timeous performance of his or her obligations (*mora debitoris*); the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or obligations (*mora creditoris);* the debtor does perform, but in a defective or incomplete manner (positive malperformance); either party indicates an unequivocal intention not to honour the agreement (repudiation).[75]

It is important to bear in mind that the terms of an employment contract may be express, tacit or implied. A tacit term of a contract is an "unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances".[76] Tacit terms are read into the contract because it is assumed that, although the parties did not include them expressly, they would have done so had they thought about them at the time.

The test used for the existence of tacit terms is "whether it can confidently be said that if at the time the contract was being negotiated someone had said to both parties, what will happen in such a case?, they would both have replied, 'Of course so and so will happen; we did not trouble to say that; it is too clear'".[77] Such terms will normally be read into the contract if they are necessary to give the contract business efficacy i.e. to render it effective and workable.

Although the essential requirement for a valid contract of employment is simply agreement on the nature of the employee's duties and the remuneration to be paid and employment contracts also bear a heavy load of implied terms.[78] These are imported into the contract by operation of law, even if the parties are unaware of their existence at the time of contracting or later. Implied

[74] Dale Hutchison (ed) et al *The Law of Contract in South Africa* (3rd ed, Oxford University Press, 2017) at 290.
[75] Dale Hutchison (ed) et al *The Law of Contract in South Africa* (3rd ed, Oxford University Press, 2017) at 290.
[76] RH Christie The Law of Contract in South Africa (5th ed, LexisNexis) at 158.
[77] John Grogan *Workplace Law* (13th ed, Juta 2020) at pg 28.
[78] John Grogan *Workplace Law* (13th ed, Juta 2020) at pg 28.

terms are significant when determining the true extent of the parties' rights and obligations.[79] For example, the parties would probably not expressly agree at the time of concluding the contract that the employee may not steal from the employer or unfairly compete with the latter's business. Indeed, they might not even have thought about raising such matters.

But the courts will read into an employment contract an implied duty that employees will not steal from their employers or unfairly compete with their businesses. This follows from the general principle that every employment contract contains an implied term that employee will act in good faith and protect their employer's interests – in particular, that they will not make secret profits at their employer's expense or put themselves in a situation where their interests conflict with those of their employer.

The point here is that, in the context of the employment contract, a breach may occur with respect to an express, tacit or implied term of the contract.

In *Ts'euoa 2,* it will be recalled that the employee felt compelled to resign because he had been made to wait at the gate for a long time and felt humiliated by the whole incident. Having already found that the employer's conduct was not unreasonable, the Court of Appeal considered whether the second requirement for constructive dismissal, namely that the employer's conduct amounted to a breach of the employment contract, had been proven by the employee. The court noted that the employee had failed to prove the terms of his employment contract, meaning that he was not relying on any express term of his employment contract.[80]

Interestingly, it was argued on behalf of the appellant that there exists an implied term that the employer will not, without reasonable and probable cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties. Whilst the court held no breach of such implied term had taken place on the facts,[81] it is important to determine what this implied term entails.

[79] RH Christie The Law of Contract in South Africa (5th ed, LexisNexis) at 158.
[80] *Ts'euoa 2* at para 12.
[81] Ibid.

The relationship between the employer and employee is based on mutual trust which forms the basis of this implied duty:

> The subsistence of mutual trust and confidence is essential to an employment relationship. Central among the indicia that distinguish an employment relationship from other commercial relationships under which work is performed is the expectation that the employer may exercise the prerogative of control (and should also bear the corresponding responsibilities of command), and the employee must render loyal and obedient service. These reciprocal obligations are at the heart of the employment relationship, and they depend upon a degree of trust and confidence between the parties. Just as an employer cannot be expected to continue to accept the service of a disloyal employee who has acted to undermine the employer's business interests, so the employee should not be required to remain in employment with an employer who has engaged in conduct that has destroyed the employee's trust and confidence in the working relationship.[82]

In English case law and South African case law (in the pre-*Labour Relations Act* era) it is and/or was generally accepted that a breach of the implied duty of trust and confidence amounts to constructive dismissal.[83] Riley[84] describes the development of this duty in the United Kingdom and its relationship with the concept of constructive dismissal as follows:

> The duty was articulated first in a series of cases in the United Kingdom, in which employees sought to cast the blame for the termination of their employment at the feet of employers, notwithstanding that the employers did not expressly dismiss these employees. In each of these cases it was held that, if an employee was able to establish that the employer's conduct was so destructive of the mutual trust and confidence that properly binds parties to an employment relationship, the employee should be entitled to treat the employer's conduct as a constructive dismissal.

Under current English jurisprudence, a breach of the implied duty amounts to repudiation of the employment contract which, in turn, entitles the employee to resign and to claim constructive dismissal.[85] Destruction of the employee's trust may be evidenced by various kinds of conduct, depending on the circumstances of the employment. Conduct which may be found to destroy trust and confidence includes: unilateral changes to terms and conditions of employment by the employer.[86] To demonstrate how broad the implied duty can be, in the English case of *Malik v*

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[82] Jolene Riley "Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts" (2012) 36 *Melbourne University Law Review* 525-526.
[83] Vettori, S. "Constructive dismissal and repudiation of Contract: what must be proved" (2011) 22 *Stellenbosch Law Review* 179.
[84] Jolene Riley "Siblings but Not Twins: Making Sense of 'Mutual Trust' and 'Good Faith' in Employment Contracts" (2012) 36 *Melbourne University Law Review* 525-526.
[85] See *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38 where the court summarises the law on constructive dismissal in England.
[86] *Jooste v Transnet Ltd t/a SA Airways*1995 ILJ 629 (LAC);

Bank of Credit and Commerce International SA,[87] the employer was engaging in corrupt business practices. The House of Lords held that the employer's conduct amounted to a breach of the implied term, and that this entitled the employee to treat such conduct as a repudiatory breach and resign.

It is submitted that the implied term of trust and confidence forms part of Lesotho's law. This is so because in *Ts'euoa 2,* the Court of Appeal did not say that there is no term; it simply held that the employee had failed to prove that it had been breached. This being said, in appropriate circumstances, it could be argued that humiliating an employee could amount to a breach of the implied term of trust and confidence.

2.5.5. The breach of contract was of a serious nature

In *Ts'euoa 2* the Court of Appeal held that no breach of contract had taken place, and as such, did not feel that it was necessary to consider the last element of the test for constructive dismissal in Lesotho. This being said, this is a question worth asking: what sort of breach of contract would be so serious as to entitle an employee to terminate the employment contract without notice?

The answer to this question is important because an employer may breach the employment contract in a 'minor' way or in a more 'serious' manner. For example, the parties may have agreed that the employer will pay the employee's salary on the 25th day of each month. It could happen that in a certain month and for some reason the employer decides to make payment on the 26th day of the month. It could also happen that the employer decides not to make any payment at all. In both scenarios, technically speaking, the employer is in breach of the employment contract. The question would then be whether the employee is entitled to terminate the contract without notice in these scenarios?

[87] Malik v Bank of Credit and Commerce International SA [1998] AC 20 (HL).

The courts have held that, to entitle the employee to terminate the contract, the breach must be sufficiently important or serious to justify the employee resigning. In the leading English case of *Western Excavating (ECC) Ltd v Sharp*,[88] Lord Denning stated that:

> 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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

So, the type of breach that entitles an employer to terminate the contract is one that goes to the root of the employment contract. This seems to refer to a breach of one of the essential terms of the employment contract. The 'employment contract' can and has been defined in various ways.[89] The following definition has been proposed for the purpose of identifying the essentials of such contract:

> A contract of employment is an agreement between two legal personae (parties) in terms of which one of the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them.[90]

It follows that, for example, since service is a prerequisite for remuneration, an employer's refusal to accept an employee's tender of service, constitutes a repudiation of the employment contract. In *Kinemas Ltd v Berman*,[91] the applicant had agreed to appoint the respondent and one M as managers of its company. When M changed his mind about taking up the offer of employment, the applicant refused to receive the respondent into service. The Appellate Division held that the applicant's conduct amounted to repudiation of the employment contract and that the respondent was entitled to damages. See also *Stewart Wrightson* (*Pty*) *Ltd v Thorpe*[92] where the employer forbade the employee from returning to work; on the facts of the case, it was held that the employer's conduct amounted to a summary dismissal of the employee.

[88] [1978] ICR 221.
[89] See LAWSA at para 101 where the various definitions that have been put forward are identified.
[90] John Grogan *Workplace Law* (13th ed, Juta 2020) at pg 24.
[91] *Kinemas Ltd v Berman* 1932 AD 246.
[92] *Stewart Wrightson* (*Pty*) *Ltd v Thorpe* 1977 (2) SA 943 (A)

The offer of an alternative position at greatly reduced salary may also constitute a breach of a material term of an employment contract, as illustrated in the Canadian case of *Farber v. Royal Trust*,[93] In this case, the employee was employed as a regional manager. The employer decided to re-structure its business with the result that the positions of regional manager were going to be abolished. This being the case, the employee was offered an alternative position at a lower pay grade. The employee refused to accept this new position and resigned. The issue for determination was whether the employee had been constructively dismissed. On the facts, the Supreme Court of Canada held that the employee had been constructively dismissed.[94]

The decision of the House of Lords in *Western Excavating (ECC) Ltd v Sharp* (quoted above) also states that a breach by an employer which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract entitles the employee to resign and claim constructive dismissal. This obviously refers to what is known as 'repudiation'. A party to a contract commits the breach of repudiation when, by words or conduct, and without lawful excuse, he or she manifests an unequivocal intention no longer to be bound by the contract or by obligations forming part of the contract. In *Street v Dublin*[95] it was said that the test for repudiations is "…whether the conduct amounts to such a repudiation [as justifies cancellation] if whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound".

In terms of English law, the test for constructive dismissal focuses on whether the employer has repudiated the employment contract. An employer is taken to have done so if it has breached the implied duty of trust and confidence.[96] In *London Borough of Waltham Forest v Omilaju*[97] it was said that "The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship". The test of whether there has been a breach of the

[93] 1997 CanLII 387 (SCC), [1997] 1 SCR
[94] Ibid, at 871.
[95] 1961 (2) SA 4 (W) at 10.
[96] *Western Excavations v Sharp* [1978] 1 ALL ER 713; *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38 (see also the many cases cited thereat).
[97] [2005] IRLR 35 at para 14.3.

implied term of trust and confidence is objective.[98] The English courts have also developed what is referred to as the last straw doctrine which, in simple terms, means that a relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents.[99] In *London Borough of Waltham Forest v Omilaju,*[100] the court summarised the principles that apply to the last straw doctrines as follows:

> 15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:
>
> "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."
>
> 16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex"*) is of general application.

It is also important to note that when it comes to repudiation, it is generally accepted that a party's repudiatory act or omission does not automatically terminate the contract. The innocent party has an election to make: he or she can stand by the contract or terminate it.[101] English courts have always emphasised the point that, in the employment context, where an employer has breached a material term of the employment contract, the employee must make up his or her mind as soon as possible regarding whether to stand by the contract or to terminate it by resigning: "he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".[102] The requirements for constructive dismissal in terms of English have been neatly summarized as follows:

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[98] *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38(4).
[99] *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38(5).
[100] [100] [2005] IRLR 35 at para 15 –16.
[101] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 952.
[102] Per Lord Denning in *Western Excavations v Sharp* [1978] 1 ALL ER 713.

a) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
b) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
c) He must leave in response to the breach and not for some other, unconnected reason.
d) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.[103]

2.5.6. The question of onus of proof in constructive dismissal cases under the Labour Code

Ordinarily, in conventional dismissal cases where the employment contract has been terminated at the instance of the employer, it is trite that the onus is on an employee to prove that he or she was in fact dismissed, and on the employer to show that the dismissal was fair. This is so because section 66(2) of the *Labour Code* clearly says that "a dismissal will be unfair unless, having regard to all the circumstances, the employer can sustain the burden of proof to show that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment".

Clauses 7(13) and (14) of the Codes of Good Practice also address the question of onus of proof in unfair dismissal disputes:

> (13) A reason is valid if it can be proved. In other words a dismissal will be unfair if the employer is not able to prove the reason for the dismissal. For example, if an employee is dismissed for theft but the employer cannot prove that the employee committed the theft, the dismissal may be unfair.
>
> (14) The burden of proof lies with the employer. It is sufficient for the employer to prove the reason on the balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. Determining which of the contending versions is the more probable depends on the facts led and the inferences drawn from those facts.

In *Ts'euoa 1*, the Labour Appeal court touched on the issue of onus of proof in constructive dismissal cases, and held that:

[103] See *Jooste v Transnet Ltd t/a SA Airways*1995 ILJ 629 (LAC) at 637.

> It is important to note that unlike in cases of unfair dismissal where the *onus* is upon the employer to show that dismissal was fair, in constructive dismissal cases, the *onus* of proving that continued employment was rendered intolerable by the unreasonable conduct of the employer rests upon the employee and must be discharged on a balance of probabilities as shown by the facts of the case.

Whilst the Labour Appeal Court identified the incorrect test for constructive dismissal under Lesotho Labour Code, it was correct though on the question of onus of proof in a constructive dismissal case: it is the employee that bears the onus of proving that he or she was constructively dismissed. In *Jooste v Transnet Ltd t/a SA Airways,* the following appears at page 638:

> It follows from what I have said that in a matter in the Industrial Court in which the applicant resigned, but avers that he was constructively dismissed, the first factual enquiry is whether, in resigning, the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. Similarly, where the resignation forms part of an agreement between the applicant and his former employer to terminate their relationship, once the agreement is proved (by the employer) or admitted, the enquiry is at an end, unless the applicant contends and proves that that agreement is not binding.

In the context of constructive dismissals under the *Labour Code* in Lesotho, discharging the onus of proof will entail proving that the three elements as set out by the Court of Appeal in *Ts'euoa 2* are present, namely that the employer has been guilty of conduct which is unreasonable having regard to the circumstances; the employer has in so doing breached a term of the employee's contract of employment; and as a result, the employee was entitled to terminate the contract. In other words that the breach (and/or the conduct) was of a serious nature.

2.6. Conclusions

From the discussion in this chapter, it is apparent that the test for constructive dismissal in Lesotho and England focuses on whether the employer has breached a term of the employment contract. To satisfy this requirement, it must be shown that 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.[104]

CHAPTER THREE

3. A DIFFERENT APPROACH: THE INTOLERABILITY TEST AS APPLIED IN SOUTH AFRICA

3.1. Introduction

As was alluded to earlier, South Africa has taken a different approach when it comes to defining constructive dismissal and the requirements that an employee has to satisfy to be successful when claiming to have been constructively dismissed. Thus, the purpose of this chapter is to critically discuss such requirements, and in doing so, the 'intolerability test' will be compared with the 'contract test'.

3.2. The reception of the concept of constructive dismissal in South Africa

[104] See *Western Excavations v Sharp* [1978] 1 ALL ER 713.

The old Industrial Court had jurisdiction to hear and determine unfair labour practice claims. The *Labour Relations Act* of 1956 (as amended) did not mention constructive dismissal by name. This meant that, if an employee resigned, that was the end of the matter and as the employee voluntarily relinquished his or her employment he or she could not complain of an unfair labour practice.[105] This being said, the approach of the Industrial Court was that if the resignation was caused by the employer, it was tantamount to dismissal. In this regard, Myburgh J held as follows in *Jooste v Transnet Ltd t/a SA Airways:*[106]

> It follows from what I have said that in a matter in the Industrial Court in which the applicant resigned, but avers that he was constructively dismissed, the first factual enquiry is whether, in resigning, the applicant did not intend to terminate the employment relationship. The onus is on the applicant. If the court finds that the applicant did have that intention, the enquiry is at an end. Similarly, where the resignation forms part of an agreement between the applicant and his former employer to terminate their relationship, once the agreement is proved (by the employer) or admitted, the enquiry is at an end, unless the applicant contends and proves that that agreement is not binding. If the applicant is unable to discharge the onus on the balance of probabilities, the Industrial Court has no jurisdiction to determine the dispute concerning the unfair labour practice. If the applicant does discharge the onus, the next inquiry, in a case in which the applicant contends that he was constructively dismissed, is whether the employer did constructively dismiss him. The onus is on the employee to establish that there was a constructive dismissal…In considering what conduct on the part of the employer constitutes constructive dismissal, it needs to be emphasized that 'constructive dismissal' is merely one form of dismissal. In a conventional dismissal, it is the employer who puts an end to the contract of employment by dismissing the employee. In a constructive dismissal it is the employee who terminates the employment relationship by resigning due to the conduct of the employer.

This approach was followed in *Pretoria Society for the Care of the Retarded v Loots*[107] by the newly established Labour Appeal Court, in hearing an appeal from the Industrial Court. Thus, it has been said that the concept of constructive dismissal was imported from English law by South African labour courts in the 1980's.[108] Influenced by English case law such as *Western Excavations v Sharp* and *Woods v WM Car Services (Peterborough)*, South African courts placed an emphasis on repudiation of the employment contract by the employer.

> 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. *Where she proves the creation of the unbearable work environment she*

[105] *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 *ILJ* 1240 (LC) at para 26.
[106] *Jooste v Transnet Ltd t/a SA Airways*1995 ILJ 629 (LAC) at 638.
[107] *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC).
[108] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 8.

is entitled to say that by doing so the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end…[109] (Emphasis added)

Constructive dismissal is now regulated in South Africa under section 186(e) of the current *Labour Relations Act of 1995 (LRA),* and is therefore firmly recognised as a form of dismissal. The definition and/or the requirements that have to be satisfied will be considered below.

3.3. The definition of constructive dismissal under the LRA

With the promulgation of the LRA in 1995, the concept of constructive dismissal was codified into the LRA by making it part of the definition of dismissal in section 186 of the LRA. In section 186(e), which changed to section 186(1)(e) in 2002,[110] a dismissal was defined as including the instance where:

… an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

In 2015, the reference to '*contract*' was removed[111], and section 186(1)(e) now reads:

Dismissal means that an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

As Landman J pointed out in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others,*[112] the LRA continues to use the concept of constructive dismissal as described in the earlier cases but introduced refinements and did not take over all the rules that governed constructive dismissal under the old law. The important thing that bears emphasis is that the LRA has moved away from the 'contract test' approach to constructive dismissal. As the court noted in *Mafomane v Rustenburg Platinum Mines,*[113] "the LRA has…severed the link between constructive dismissal and wrongful repudiation of a contract at common law. It is now a statutory concept in its own

[109] *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at pg 984.
[110] *FedifeLtd v Wolfaard (450/99)[ZASCA 91;[2002]2 ALL SA 295 (A)*
[111] Ibid
[112] *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998) 19 *ILJ* 1240 (LC) at para 28.
[113] *Mafomane v Rustenburg Platinum Mines Ltd* [2003] 10 BLLR 999 (LC) at para 47.

right which does not need to retain its link to the common law doctrine of wrongful repudiation for its justification". That this is so was confirmed by the Supreme Court of Appeal in *Murray v Minister of Defence*[114] where it was stated by Camron JA that, under the LRA, it is no longer necessary to invoke concepts such as repudiation as was previously necessary in the pre-LRA era.

Thus, in South Africa, taking into consideration the wording of section 186(1)(e) of the LRA, a constructive dismissal occurs when an employee is the one who terminates the contract of employment and he does so owing to the continued employment having been intolerable for him due to the conduct of the employer.[115]

3.4. The requirements for constructive dismissal under the LRA

Given the specific wording of section 186(1)(e) of the LRA, three specific issues emerge for determination in a constructive dismissal case, as set out in *Solid Doors (Pty) Ltd v Commissioner Theron and Others.*[116] The Labour Appeal Court held that there are three requirements for constructive dismissal to be established. Firstly, the employee must have terminated the contract of employment. Secondly, the reason for termination of the contract must be that continued employment has become intolerable for the employee. Thirdly, it must have been the employee's employer who had made continued employment intolerable. The court also held that 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,[117] and it would follow that the claim should fail if one of the three is absent. These three requirements will be critically discussed below.

[114] *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) at para 10.
[115] *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 *ILJ* 2337 (LAC) para 26. See also *CEPPA & another v Glass & Aluminium 2000 CC* (2002) 23 *ILJ* 695 (LAC) at para 30 where the Labour Appeal Court interpreted section 186(1)(e) to mean that "Constructive dismissal involves a resignation because the work environment has become intolerable for the employee as a result of conduct on the part of the employer".

[116] *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 *ILJ* 2337 (LAC) para
[117] Ibid, at para 28.

3.4.1. The employee terminated the contract of employment

Out of the three requirements, this first one is probably the easiest to prove. In simple terms, all that the employee here is required to show is that it was him who terminated the employment contract and not the employer. This is what is referred to as 'resignation'.

An employee can terminate the employment contract in this manner either by way of submitting an actual resignation or by way of other form of clear and unequivocal conduct showing an intention on the part of the employee to unilaterally bring the employment relationship to an end[118]. In the Lesotho case of *Mahamo v Nedbank Lesotho Limited,*[119] relying on South African case law, the Lesotho Labour Appeal Court neatly summaries the principles that are applicable to resignation in the following manner:

> The juridical nature of resignation
>
> As was said in *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926: '[a] resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract…The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequences of the resignation.' To be legally effective, a notice of intention to resign from employment and therefore to terminate the contract must be clear and unequivocal. (See *Kragga Kamma Estates CC and another v Flanagan_1995 (2) SA 367 (A) at 375 C).* The employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention (see *Council for Scientific & Industrial Research (CSIR) v Fijen* (1996) 17 *ILJ* 18 (AD), and *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LAC)). Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent (see *Rustenburg Town Council v Minister of Labour & others* 1942 TPD 220; *Potgietersrus Hospital Board v Simons* 1943 TPD 269, *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC) and *African National Congress v Municipal Manager, George & others* (550/08) [2009] ZASCA 139 (17 November 2009) at para [11]). In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See *Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T)).

[118] Ibid

[119] *Mahamo v Nedbank Lesotho Limited* (LAC/CIV/04/11) [2011] LSLAC 9 (04 July 2011) at para 18-19.

> If a resignation to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour. This is not to say that a resignation need not be communicated to the employer party to be effective – indeed, it must, at least in the absence of a contrary stipulation (*African National Congress v Municipal Manager, George & others* (*supra*)). A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention. (See Sihlali v South African Broadcasting Corporation Ltd (2010) 31 ILJ 1477 (LC)). The Courts generally look for unambiguous, unequivocal words that amount to a resignation- see, for example, *Fijen v Council for Scientific & Industrial Research* (*supra*) where the South African Labour Appeal Court stated that to resign, the employee had to 'act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.' (See also *Southern v Franks Charlsely and Co* [1981] IRLR 278).

It should be noted also that, because is constructive dismissal is dependent upon the employee terminating the employment relationship, the respective claims of constructive dismissal and a 'conventional' dismissal are mutually exclusive and cannot be both pursued. This illustrated in the case of *Eagleton and Others v You Asked Services (Pty) Ltd,*[120] where the applicant employees claimed that they had been dismissed in an attempt to compel their accession to a demand made by their employer. In the alternative, if the court were to find that their dismissals were not automatically unfair, then they claimed to have been constructively dismissed. Further alternatively, they claimed that, if the court were to find that they were not constructively dismissed, they were retrenched. The court held that:

> In light of the aforegoing I am further of the view that a claim of constructive dismissal and in the alternative a claim of a conventional dismissal is mutually destructive: A contract of employment is either terminated by the employer or by the employee (by resigning) and the employee will have to make an election. I am thus in agreement with the Respondent's submissions that once the Applicants claim a constructive dismissal, which is brought about by the fact that the Applicants had resigned, this fact automatically disentitles them from claiming that they have been dismissed by the employer in the conventional sense of the word. If the Respondent is required to plead to the statement of claim as it currently stands, it will be prejudiced in that it does not know what case it has to meet. Furthermore, I am of the view that a plea to the factual allegations will of necessity destroy at least one of the Applicants' claims: If the Respondent admits that the Applicants terminated their employment by resigning, it will destroy a claim that the Respondent had dismissed the Applicants (in the conventional sense of the word). Conversely if the Respondent pleads that it had terminated the Applicants' employment the claim for constructive dismissal must of necessity fall away.

[120] *Eagleton and Others v You Asked Services (Pty) Ltd*[120] (2009) 30 ILJ 320 (LC)

It should also be noted that as the first requirement for constructive dismissal under South African law is concerned, namely that the employee must have resigned, the same principle also applies in Lesotho because section 68(c) defines constructive dismissal by starting with the words 'resignation by an employee'.

3.4.2. The reason for termination of the contract must be that continued employment has become intolerable for the employee

When it has been established that the employee resigned, then the next step in the enquiry is to determine whether the reason for that termination is because the employer made continued employment intolerable for the employee. In other words, there must be "a proper nexus (link) between the intolerability, and the termination".[121]

The case of *Agriculture Research Council v Ramashowana NO*[122] should serve as a reminder for employees claiming to have been constructively dismissed that the link may be difficult to establish if some time has lapsed between the conduct complained of and the date of resignation. In this case, the conduct complained of occurred in December 2013 but the employee only resigned in March 2015; some 15 months later. The court held that in order to succeed in a claim that the working conditions were intolerable, the employee has to resign within a reasonable time of the trigger, "which may be a once-off outrage or the last straw following the earlier string of events".

[121] Grogan, J. *Workplace Law* (13th ed, Juta 2020) at pg 137-138 (see also the cases cited thereat). See also *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 49, where the court held: "The implication of the requirement of section 186(1)(f) that the employee must have resigned 'because' the employer made continued employment intolerable, is that there must be a causal relationship between the intolerable working environment on the one hand and the resignation on the other. It is only if the employee resigns because continued employment has become intolerable, that the resignation may constitute a constructive dismissal. If the employee resigns for another reason, the resignation does not constitute a constructive dismissal, even if the employee's continued employment has been made intolerable".

[122] 2018 39 ILJ 2509 (LC).

At the heart of this part of the enquiry is establishing what is '*intolerable*'. This is not a term that has been defined in the LRA, but is a high threshold to meet.[123] Grogan says that what the employee must prove is that "the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign".

In *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others*[124] the court defined '*intolerability*' as follows: "The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance …" Expressing a similar view, Snyman AJ in *HC Heat Exchangers (Pty) Ltd v Araujo*[125] observed that:

> In my view, intolerability is 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. Even a breach of the employment contract, deductions from salary, or unfair disciplinary action would not *per se* establish intolerability.

The judge also emphasised the point that the onus to prove the existence of intolerability rests "squarely upon the shoulders of the employee party".[126] As Grogan correctly points out, it is not possible to draw up a closed list of employer conduct that renders continued employment intolerable for employees. This being said, the author has identified the following example of conduct that has been found to give rise to constructive dismissal: unlawful deductions from an employee's salary, sexual and other forms of harassment, ordering the employee to perform unlawful acts, slapping the employee on the face in front of colleagues, excreting undo pressure on an employee to resign *etcetera.*[127] From a review of the case law, the following key principle, as summarised by Snyman AJ in *HC Heat Exchangers (Pty) Ltd v Araujo,*[128] can be extracted:

> Whether the employer's conduct, considered as a whole together with its cumulative impact, is such that when reasonably and sensibly judged, an employee could not be expected to put up with it. In other words, no reasonable employee could be expected to tolerate or put up with the conduct.

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[123] See, for example, *Bakker v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 1568 (LC) at paras 12-13, where it is said "Intolerable' is not defined in the LRA, but it is a strong word which suggests a high threshold…"
[124] (2019) 40 ILJ 1539 (LAC) at para 39.
[125] *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 49.
[126] Ibid, at para 50.
[127] Grogan, J. *Workplace Law* (13th ed, Juta 2020) at pg 137-138
[128] *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 50.

Whilst on the discussion of what circumstances that would be considered intolerable under South African law, it is interesting to also note that there is some authority for the proposition that, to constitute constructive dismissal, resignation should be a matter of 'last resort'.[129] The last resort doctrine means that a claim for constructive dismissal will be permissible where all internal dispute resolution mechanisms have been exhausted, before the employee decides to resign. This requires that an employee must bring the grievance to the attention of the employer and give the employer the opportunity to rectify cause of the complaint.

In *Aldendorf v Outspan International Ltd,*[130] there are internal processes that the employee could have utilised before resigning. Based on these facts, the employee could not persuade the court that he had no option but to resign. In *Albany Bakeries v Van Wyk and Others*[131] the Court held that "it would be opportunistic for an employee to leave and claim that it was a result of intolerability, when there was a perfectly legitimate avenue open to solve his problem".

The above cases should be contrasted with the decision of the Labour Court in *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others.*[132] In this case the employee did not follow an internal processes before she resigned because she knew it would be a pointless exercise. The Court held that the failure to institute a grievance did not influence her claim for constructive dismissal; there would have been no sense in following a procedure the outcome of which was pre-determined.

On whether resignation should be a matter of last resort, the Constitutional Court *in Strategic Liquor Services v Mvumbi NO and Others*[133] has authoritatively held that section 186(1)(e) of the LRA does not link 'intolerability' with a 'last resort'. Thus, "it is not necessary to show that the

[129] See for example, *Lubbe v ABSA Bank Bpk* 11998] 12 BLLR 1224 (LAC); *Old Mutual Group Schemes v Dreyer and Another* (2009) 20 *ILJ* 2030 (LAC) in par 18; *Britz v Acctech Systems (Pty) Ltd* (2009) 30 ILJ (CCMA) at pg 1166-1167 and the authorities cited thereat.
[130] (1997) 18 *ILJ* 810 (CCMA).
[131] *Albany Bakeries v Van Wlyk and Others* (2005) 26 ILJ 2142 (LAC) at para 28.
[132] (2008) 29 *ILJ* 356 (LC).
[133] *Strategic Liquor Services v Mvumbi NO and Others* (2009) 30 ILJ 1526 (CC) at para 4.

employee had no other choice but to resign. All that must be shown is that it was the actual existence of the intolerable conduct of the employer that caused the resignation".[134]

From all the above, a preliminary conclusion that can be drawn is that, when compared with the requirements in Lesotho and/or England that an employee has to satisfy, under South African law, it is more difficult for an employee to prove that he or she was constructively dismissed. As to why South Africa has opted for the more strict approach, Dekker[135] opines that a test for constructive dismissal should be strict so as to protect employers against disgruntled employees:

> Cameron JA calls constructive dismissal a 'victory for substance over form' *(Murray* supra in par 8). It protects employees against the employer who makes their lives so intolerable that they resign and, as a result, forfeit their right of recourse against the employer. At the same time, the employer's interests should be protected against disgruntled employees who resign and use constructive dismissal as a way of getting back at the employer. To ensure fairness, the test for determining whether the employer made continued employment intolerable' is therefore strict…

Maxwell has also noted that the word 'intolerable' has been included in section 186(e) of the LRA to make it more difficult for employees who are simply not happy with their jobs to claim that they were constructively dismissed.[136]

3.4.3. The employer must have caused the intolerability

This third requirement has been a bit challenging regarding its exact meaning, particularly in cases where the intolerability is not caused by the employer directly, but by a third party. The example that comes to mind is a situation where a client sexually harasses an employee at the workplace. Can it be said that the employer caused the intolerability? Dekker argues that fairness requires that the employer be held liable if a third party made continued employment intolerable,

[134] *HC Heat Exchangers (Pty) Ltd v Araujo and Others* [2020] 3 BLLR 280 (LC) at para 50.
[135] Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 353.
[136] Maxwell, S. "The question of constructive dismissal" (199) 7 *Juta's Business Law Review* at pg 14.

provided that the employer was made aware and failed to act.[137] In *Mafomane v Rustenburg Platinum Mines Ltd*, the court, according to Dekker,[138] correctly interpreted this last requirement to mean that the employer will be taken to have caused the intolerability for circumstances under the employer's control.

3.5. Conclusions

The test for constructive dismissal in South Africa has evolved over the past few decades; moving away from asking whether there has been a material breach or repudiation of the employment contract to whether the employer has made continued employment for the employee intolerable. The test that is applied in Lesotho and England on one hand and South Africa on the other share some similarities but there are also some distinct differences. On the face of it, the South African approach appears to be stricter in terms of the requirements that an employee must prove to establish constructive dismissal. This is so because of the second requirement, is 'intolerability'. In the next and final chapter, overall conclusions will be drawn and recommendations made for the way forward.

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATIONS

This study explored the regulation of what is truly an extraordinary form of dismissal; the situation where an employee terminates the employment relationship by resigning but the law deems such act to have been a dismissal. It is apparent, therefore, why constructive dismissal has

[137] Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 353.
[138] Ibid, at 353.

been described as a victory for substance over form. There are two basic approaches to constructive dismissal that were identified and discussed, namely what has been referred to as the contract test and the intolerability test, as applied in Lesotho and England on one hand and South Africa on the other.

In Chapter 1 it was shown that there appears to be some confusion in Lesotho regarding the correct test that should be applied when an employee alleges to have been the victim of constructive dismissal. That this is so is apparent from the decision of the Labour Appeal Court in *Tšeuoa 1*. It will be recalled that in this case an employee who was a manager was made to wait at the gate of the employer's head office for a long time, on two occasions; he felt humiliated by the whole experience and he resigned, claiming that he had been constructively dismissed. Thus, the main question that this study sought to answer can be framed as follows: what are the requirements that must (or should) be met for a constructive dismissal claim to succeed in Lesotho?

In order to answer the above question, the starting point should be the definition of constructive dismissal in the Lesotho's *Labour Code*. Whilst the Code does not specifically refer to the words 'constructive dismissal', section 68(c) says that "resignation by an employee in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract" constitutes dismissal. This sub-section refers to constructive dismissal.

The highest court in Lesotho, namely the Court of Appeal, held in *Tšeuoa 2* that the requirements that must be satisfied in order to establish constructive dismissal are that (a) the employer has been guilty of conduct which is unreasonable having regard to the circumstances; (b) the employer has in so doing breached a term of the employee's contract of employment; and (c) as a result, the employee was entitled to terminate the contract. In other words that the breach (and/or the conduct) was of a serious nature. Thus, the main question is whether an employer has breached a 'serious' or material term of the employee's contract of employment. This is more or

less the same question that is asked under English law as set out in the leading case of *Western Excavations v Sharp*.

Chapter two of this study consisted of a critical analysis of the requirements that were set out in *Tšeuoa 2.* In so doing, reference was made to English case law given the similar approaches to the concept of constructive dismissal. With respect to the first requirement, namely that the employer has been guilty of conduct which is unreasonable having regard to the circumstances, the question here seems to be whether there is a reasonable explanation or justification for the employer's conduct.

Regarding the second requirement that says the employer's conduct must have breached a term of the employee's contract of employment, a breach would occur if the employer, by act or omission and without lawful excuse, fails in any way to honour its contractual obligations.[139] This appears simple enough, but things can get complicated when an employee does not allege that the employer has breached an express term of the employment contract, as was shown in the *Tšeuoa* case where the employer alleged that, by making him wait at the gate and/or humiliating him, the employer had breached the implied term of trust and confidence. Thus, the nature of this implied duty was discussed in chapter two, and it was shown that the courts have often held that a breach of this implied term amounts to constructive dismissal.[140] Under English jurisprudence, a breach of the implied duty amounts to repudiation of the employment contract which, in turn, entitles the employee to resign and to claim constructive dismissal.[141]

The point that should be emphasised here is this. In *Tšeuoa 2* the Court of Appeal did not say that there is no implied term of trust and confidence. This being the case, it is submitted that this implied term forms part of the law in Lesotho. All this means that, where an employee in Lesotho cannot rely on the breach of an express material term of the employment contract, arguing (in appropriate circumstances) that the employer has breached the implied term of trust

[139] Dale Hutchison (ed) et al *The Law of Contract in South Africa* (3rd ed, Oxford University Press, 2017) at 290.
[140] See Vettori, S. "Constructive dismissal and repudiation of Contract: what must be proved" (2011) 22 *Stellenbosch Law Review* 179, where the author identifies some of the leading case law on this issue.
[141] See *Kaur v Leeds Hospitals NHS Trust* [2018] EWCA 978 CA at para 38 where the court summarises the law on constructive dismissal in England.

and confidence may increase the employee's chances of convincing a tribunal or Labour Court that constructive dismissal has taken place.

With respect to last requirement that was set out in *Tšeuoa 2,* namely that the breach of contract was of a serious nature, it is submitted that, to satisfy this requirement, the employer it must be shown that 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.[142] In other words, the employer must have breached a material term of the employment contract or repudiated the contract in some way. So, not every breach of contract will entitle an employee to resign and claim constructive dismissal. The breach must be a serious or repudiatory.

With respect to the latter scenario, the point that was emphasised in chapter two is that it is generally accepted that a party's repudiatory act or omission does not automatically terminate the contract. The innocent party has an election to make: he or she can stand by the contract or terminate it.[143] English courts have held that, where an employer has breached a material term of the employment contract, the employee must make up his or her mind as soon as possible regarding whether to stand by the contract or to terminate it by resigning. The same principle is applicable in Lesotho. Employees should be permitted a reasonable time to consider their position. However, if they wait too long, they are regarded as having waived the breach and therefore would be unable to resign and claim constructive dismissal.[144]

[142] See *Western Excavations v Sharp* [1978] 1 ALL ER 713.

[143] *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) at 952.

[144] Constructive Dismissal and Repudiation of Contract: What Must Be Proved? STELL, L. R. 2011 , P180, see also for example *Pretoria Society for the Care of the Retarded v Loots 1997 6 BLLR 721 (LAC) 725*, where Nicholson JA, stated that in determining whether there has been a constructive dismissal: "The enquiry then becomes 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 employer and employee …" Also in *Murray v Minister of Defence 2009 3 SA 130 (SCA)* para 12 Cameron JA, states that with constructive dismissal, once the employee has proved that resignation was not voluntary "the enquiry is whether the employer … had without reasonable or proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee" Regarding England, see the comments of Lord Justice *Sedley in Paul Buckland v Bournemouth University Higher Education Corporation [2010] WL 605762* paras 27-28.

Having discussed the contract test as applied in Lesotho and England, chapter three of this study focused on the South African approach where the test for constructive dismissal is basically whether the employer has made continued employment for the employee intolerable. The leading case in South Africa on the requirements for constructive dismissal is the decision of the Labour Appeal Court in *Solid Doors (Pty) Ltd v Commissioner Theron and Others,* where the court held that there are three requirements for constructive dismissal to be established. Firstly, the employee must have terminated the contract of employment. Secondly, the reason for termination of the contract must be that continued employment has become intolerable for the employee. Thirdly, it must have been the employee's employer who had made continued employment intolerable. The court also held that 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,[145]

It was shown that in both countries, for constructive dismissal to have taken place, the employee must have terminated the employment contract. In other words, the employee has to resign in order to claim constructive dismissal. In terms of South African jurisprudence, the respective claims of constructive dismissal and a 'conventional' dismissal are mutually exclusive and cannot be both pursued, as was held in the case of *Eagleton and Others v You Asked Services (Pty) Ltd.* In principle, there is no reason why Lesotho courts would not follow the same approach.

In terms of South African law, the main question in a constructive dismissal case is whether the employer has made continued employment for the employee intolerable. It was shown that proving the 'intolerability' requirement can be quite difficult because South African court have expressed the view that "The word 'intolerable' implies a situation that is more than can be tolerated or endured; or insufferable. It is something which is simply too great to bear, not to be put up with or beyond the limits of tolerance …"[146] Obviously, under the contract test that is

[145] Ibid, at para 28.
[146] *Solidarity on behalf of Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2019) 40 ILJ 1539 (LAC) at para 39.

applied in Lesotho, it is not necessary to prove that continued employment was intolerable as the Court of Appeal held in *Tšeuoa 2*.

As to why the LRA has set this high threshold, Dekker[147] has argued that a test for constructive dismissal should be strict so as to protect employer's against disgruntled employees. This argument seems sound: the requirements for constructive dismissal should not be so relaxed so as to open the 'floodgates' of litigation by employees who are simply not happy at work. Employee should utilise internal dispute resolution mechanisms (if any) before resigning.

Whilst there is some authority in South Africa for the proposition that resigning should be a matter of last resort, the Constitutional Court remarked in *Strategic Liquor Services v Mvumbi NO & others*[148] that the test for constructive dismissal does not require that the employee has no choice but to resign, but only that the employer should have made continued employment intolerable. One should bear in mind that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period.

In light of all the above discussion, the following recommendations can be made:

Firstly, it is recommended that Lesotho should consider following the South African approach to constructive dismissal by making the test whether or not the employer has engaged in conduct that has made continued employment intolerable for an employee. This approach is strict enough to ensure that employers are protected against disgruntled employees who simply want to resign because they are unhappy. In other words, the South African approach attempts to balance the interests of both employers as well as employees. Secondly, it is recommended that if Lesotho decides not to change, clause 6 of the Codes of Good Practice ought to be revised in order to make it consistent with the test for constructive dismissal as identified by Lesotho's Court of

[147] Dekker A. "Did he jump or was he pushed revisiting constructive dismissal" 2012 *South African Mercantile Law Journal* at pg 353.
[148] (2009) 30 ILJ 1526.

Appeal in *Tšeuoa 2:* in its current form, the aforesaid clause 6 creates the impression that intolerability is a requirement for constructive dismissal in Lesotho. Thirdly, the idea that constructive dismissal should be a matter of last resort seems sound, and should be incorporated into Lesotho's law. A requirement of this nature would ensure that employees use internal dispute resolution mechanisms to resolve any issues that they may have with their employers before resigning and claiming to have been constructively dismissed. An exception to this rule could be where an employee can show that internal mechanisms are not there or that following such procedure would be futile. Fourthly, it is apparent that some of the problems between employers and employees can be resolved if the parties were able to resolve their disputes. Therefore, it is recommended that employers and employees should be educated on the various dispute resolution mechanisms such as mediation. Such training could be conducted by the Department of Labour. Lastly, it is recommended that, when it comes to constructive dismissal, the law should provide for more punitive (monetary) penalties against employers that engage in conduct that forces an employee to resign. In constructive dismissal cases, it is usually the case that reinstatement is simply not practicable.

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