

Let's get constructive about constructive dismissal - you can still be fired



By [Johan Botes](#)

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Very few workplace issues elicit as firmly held views or fears as the topic of constructive dismissal. Whether it is a manager, fearful of doing something wrong and at risk of an employee lodging the dreadful claim of constructive dismissal, or Harvey Spectre wannabes cascading their views on the legal impact of such a claim: say "constructive dismissal" and you have everyone's attention.



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The Labour Appeal Court (LAC) recently came to our collective assistance by finally clarifying whether an employer may take termination steps against an employee where the employee resigned. In *Standard Bank of South Africa Limited v Nombulelo Cynthia Chiloane* (5 November 2020), the LAC considered the termination of an employee who resigned in breach of the employment contract by not serving contractual notice.

Following prior judgments from the lower court, there existed uncertainty on whether an employee could still face disciplinary action if a resignation (with immediate effect) was deemed to have terminated the employee relationship.

In *Mtati v KPMG Services (Pty) Ltd*, the court held that a disciplinary proceeding was null and void if the employee resigned with immediate effect, as the employment relationship had ended. However, in *Naidoo and Another v Standard Bank SA Ltd*, the judgment ruled that a court order should be obtained by an employer to compel an employee to serve out their notice period, so that disciplinary proceedings could be instituted against an employee who had resigned with immediate effect. A further judgment - *Coetzee v Zeitz MOCCA Foundation Trust and Others* - concluded that an employer could still implement disciplinary proceedings provided it did not accept the defective notice. In *Mthimkhulu v Standard Bank of South Africa*, the position was that employees who did not serve out their notice period were in breach of contract, therefore the employer still had the right to institute disciplinary proceedings as the employment relationship still existed.

In *Standard Bank*, the LAC clarified the matter by finding that an employer did have a right to institute disciplinary proceedings for misconduct during an employee's notice period, even if such employee resigned with immediate effect in

breach of the contractual obligations. The court's reasoning was the employment relationship is governed either by contract or by the Basic Condition of Employment Act (BCEA), or both. Where a notice period is not agreed upon contractually, the BCEA outlines provisions for such and this cannot be disregarded unless it is waived by the innocent party. Resignations that do not comply with contractual or statutory requirements cannot validly terminate the employment relationship, and therefore disciplinary proceedings may proceed during the notice period, regardless of whether the employee had resigned with immediate effect.

Constructive dismissal

However, what was not clarified by the LAC decision is the legal position where an employee resigns and then claims constructive dismissal (as opposed to merely resigning with immediate effect). Various judgments reference the suggestion that a claim of constructive dismissal ends the employment relationship. With respect, it cannot be correct that an employee can escape the reach of an employer by merely claiming constructive dismissal when resigning with immediate effect. In the light of the LAC judgment in *Standard Bank*, there can be no doubt remaining that an employer need not accept an employee's resignation with immediate effect - it can hold the employee to the notice period and proceed with disciplinary action during that notice period. By extension of this same argument, an employee could avoid such steps by claiming that the resignation with immediate effect is due to circumstances that suggest constructive dismissal.

If an employee could avoid a disciplinary hearing [(and its outcome)] by merely claiming constructive dismissal when resigning with immediate effect, it would allow an untenable situation to arise. Employers would never be able to hold a termination enquiry after the employee resigned with immediate effect - which the LAC confirmed an employer may do - as the employee would be able to falsely claim constructive dismissal without even pursuing such a claim.

The appropriate balance in protecting the rights of an employee, who is indeed the victim of intolerable working situations, versus the rights of an employer seeking to hold a wrongdoer liable, should be as follows:

- the employee could indeed resign and claim constructive dismissal
- the employer would remain at liberty to take action against the employee during the latter's contractual notice period, which steps could include dismissing the employee
- the employee would be at liberty to refer a dispute regarding the alleged constructive dismissal to the employment tribunal
- were the tribunal to determine that the employee was indeed constructively dismissed, the constructive dismissal would precede the dismissal for misconduct, and the former would then be the reason for termination of employment in fact and law
- should the tribunal determine that the employee was not constructively dismissed, the dismissal for misconduct would stand as the reason for termination.

Notwithstanding some of the findings in prior judgments, claiming constructive dismissal, on its own, ought not to terminate the relationship as a matter of fact or law. A subsequent determination of the dispute would settle the dispute between the parties as to the reason for termination and the date of such termination. The employer could therefore still hold the

employee to the notice period, and may then terminate the employee's service for cause during the notice period, even where the employee had resigned and claimed that the relationship has ended immediately due to constructive dismissal.

Holding otherwise would allow wrongdoers to escape workplace justice and pave the way for them to repeat their misconduct at the next workplace. Employers culpably making continued employment intolerable would similarly be held liable, should a tribunal find that the employee was indeed constructively dismissed. This seems to be the more constructive way of handling this thorny issue.

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