CONSTRUCTIVE DISMISSAL: A TRICKY HORSE TO RIDE

Jordaan v CCMA 2010 31 ILJ 2331 (LAC)

1 Introduction

The concept of constructive dismissal is flexible because the circumstances that may give rise to it are "so infinitely various" (*Minister of Home Affairs v Hambidge* 1999 20 ILJ 2632 (LC) par 12). As such, there are no clear rules defining precisely when a constructive dismissal has taken place. The facts of each case must be established, interpreted and measured against general principles to determine whether the requirements for constructive dismissal have been met. The Labour Appeal Court (LAC), in the case of *Jordaan v CCMA* (2010 31 ILJ 2331 (LAC) 2335), made the point that the law has attained more certainty since *Hambidge's case* (*supra*). This is partially true. However, this case note shows that it remains difficult to set down hard and fast rules to determine the existence of a constructive dismissal.

The Supreme Court of Appeal (SCA) has held that very strict proof of constructive dismissal is required, and it has not readily found that circumstances complained of by employees constitute such a dismissal (*Murray v Minister of Defence* 2006 27 ILJ 1607 (SCA) par 29). In the case of *Old Mutual Group Schemes v Dreyer* (1999 20 ILJ 2030 (LAC)) Conradie JA cautioned that constructive dismissal is not for the asking. He held that generally it will be difficult for an employee who resigns to show that he has actually been constructively dismissed, because the *onus* of proof on the employee in this regard is a heavy one (see also *Foschini Group v Commission for Conciliation, Mediation and Arbitration* 2008 29 ILJ 1515 (LC); *Copeland and New Dawn Prophesy Business Solutions (Pty) (Ltd)* 2010 31 ILJ 204 (CCMA); *Eagleton v You Asked Services (Pty) (Ltd)* 2009 30 ILJ 320 (LC); *Vorster and BMC Management Trust* 2009 30 ILJ 1421 (CCMA); and *Chabeli v CCMA* 2010 31 ILJ 1343 (LC))

Jordaan's case (*supra*) highlights just how hard it is to establish a viable claim of constructive dismissal. It shows that even where an employee experiences a loss of job security as a result of attempts by the employer to protect his business, and this leads to the employee's resignation, it will not rise to the standard of constructive dismissal. The LAC saw *Jordaan's case (supra)* as an attempt to "stretch the law relating to constructive dismissal" and held that this was not only inappropriate but that such an attempt "should not be contemplated" by future courts (*Jordaan's case* (*supra*) 2338).

2 Progress of the dispute

The appellant resigned from her employment and claimed that she had been constructively dismissed in terms of section 186(1)(e) of the Labour Relations Act 66 of 1995 (LRA). She referred the matter for arbitration at the Commission for Conciliation, Mediation and Arbitration (CCMA), where she was unable to prove her case of an unfair constructive dismissal.

The appellant then applied to the Labour Court, in terms of section 145 of the LRA, to review and set aside the arbitration award dismissing her case. The Labour Court refused to do this on the grounds that the appellant's application was lodged outside of the prescribed time limits and that she had failed to apply for condonation for the late application. It appears that the Labour Court did not consider the merits of the case at all (*Jordaan's case* (*supra*) 2333).

The Labour Court's decision was appealed at the LAC, in which the appellant contended that the Labour Court had erred in its application of section 145 of the LRA to the facts in question. In fact, the Labour Court had not applied section 145 to her case at all, because her application for condonation had been declined.

The Labour Appeal Court proceeded to deal with the case on its merits and not on the issue of condonation (*Jordaan's case* (*supra*) 2333). The appeal was dismissed.

3 Facts

The appellant began working for the 6th respondent in July 2002 as an estate agent. She initially worked under the direct supervision of Mr Lance Gouws, who was the manager and major shareholder of the respondent. In July 2004, the appellant moved to a different branch of the respondent where her husband, Mr Jacques Jordaan, was the manager. He also held shares in the business.

The relationship between Mr Gouws and Mr Jordaan had deteriorated over time. Matters came to a head on the 22 July 2004, when Mr Gouws called a meeting and invoked his majority shareholder powers to remove Mr Jordaan from his position as manager of the Beacon Bay office. Mr Jordaan remained an employee of the business, but both parties envisaged that his resignation and the sale of his shares would be negotiated in the near future (*Jordaan's case* (*supra*) 2333).The situation was tense, and Mr Gouws had the added concern of the possibility of Mr Jordaan setting up shop in competition with him (*Jordaan's case* (*supra*) 2337). In his testimony, Mr Gouws referred to Mr Jordaan as "cajoling and having private meetings with all and sundry in an effort to get them to go with him." (*Jordaan's case* (*supra*) 2337). He eventually left the respondent and set up his own business.

A week later, on 27 July 2004, Gouws called a meeting with all his staff, in which he explained to them that they were required to sign a restraint of trade agreement for the operational requirements of the business. Although the agreement had already been prepared, Gouws told his staff they had 30 days within which to sign it. He made them aware that a failure to sign the agreement within the 30 days held the "conceivable risk" of retrenchment, but that this would only be a matter of last resort to protect the business. The appellant, who was present at the meeting, testified that when she asked what would happen should she decline to sign, Gouws replied that he would retrench her (*Jordaan's case* (*supra*) 2334). Gouws's evidence was that he simply said that he would consider the *possibility* of her retrenchment. It is important to note that Gouws did not single the appellant out to sign the Restraint of Trade Agreement, as the requirement applied to all his staff.

On 27 August 2004, the appellant met with Gouws and indicated that she would not sign the restraint of trade agreement. She then asked for a letter "dismissing or retrenching her." Gouws declined, saying that he first needed to consult his attorney before taking any such action (*Jordaan's case* (supra) 2333). He testified, however, that he did not intend to enforce the requirement to sign the restraint of trade agreement against the appellant at that stage, "as a number of staff members had already left by that time" (*Jordaan's case* (*supra*) 2334). Gouws testified that he believed the appellant to be an honest person and would therefore have been prepared to keep her on even had she not signed the agreement (*Jordaan's case* (supra) 2337). This was the reason he would not confirm that she would be retrenched, and explains why he was not prepared to provide a letter confirming her retrenchment. Gouws testified that he told the appellant he had to consult with his attorney to "fob her off" (*Jordaan's case* (*supra*) 2334).

On the 31 August 2004, the appellant enquired whether she was going to receive a letter of retrenchment. Again, Gouws "fobbed her off", replying that he had not had an opportunity to consult with his attorney.

It is not clear why Gouws felt it necessary to "fob her off" instead of telling the appellant that he did not intend to force her to sign the restraint of trade agreement, especially given that he considered her an honest person. In his testimony, he explained that he was playing a "game of bluff" to ensure that the appellant signed the agreement (*Jordaan's case* (*supra*) 2338). An alternative motive may have been to push her into a situation in which she would resign, but this aspect was not canvassed in evidence.

Following these events, the appellant testified that she felt compelled to resign, which she did. She then commenced employment with her husband's newly established competitive business (*Jordaan's case* (*supra*) 2335).

Gouws testified that he believed that this had been her intention all along (*Jordaan's case* (*supra*) 2338-2339).

4 Issue

The crisp issue before the court was whether the appellant's resignation amounted to a constructive dismissal in terms of section 186(1)(e) of the LRA. This defines dismissal to include the situation in which "an employee terminated a contract of employment, with or without notice, because the employer made continued employment intolerable for the employee."

5 Law

5 1 Statute or common law

A claim for an unfair constructive dismissal may be founded in statute or in the common law (*Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA)). The requirements for establishing a viable case of constructive dismissal are virtually the same in terms of the LRA and the common law. The general requirements were summarized by the SCA in the *Murray case* (*supra*) as follows:

> "The employee must be able to prove that the he or she has terminated the employment contract; that the conduct of the employer rendered the continued employment intolerable; that the intolerability was of the employer's making; the employee resigned as a result of the intolerable behaviour of the employer, and that the resignation or the termination of the employment was a matter of last resort. Finally, the employee bears the onus to prove that there has been a constructive dismissal and that he or she has not in fact resigned voluntarily. And ... the employee should not delay too long in terminating the contract in response to the employer's conduct (par 31)."

The reason the employee should not "endure" the intolerable workplace for "too long" is simply that the longer one puts up with alleged intolerable working conditions, the harder it is to prove that the situation was really intolerable (*Wright and TNT Express* 2007 28 ILJ 1648 (BCA)).

5 2 Two-stage enquiry

It is well established that a two-stage enquiry is necessary to determine whether an unfair constructive dismissal has occurred (*Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake* 1998 19 ILJ 1240). A failure to appreciate this has been held to be a reviewable irregularity in the proceedings by the arbitrating commissioner (*Foschini Group v Commission for Conciliation, Mediation and Arbitration (supra)*; and *Doornpoort Kwik Spar cc v Odendaal* 2008 29 ILJ 1019 (LC)). The first stage of the enquiry places an *onus* on the employee to show that she resigned only because her employer made her continued employment intolerable; and thus that she was effectively dismissed by the employer (s 192 of the LRA).

The second stage of the enquiry requires that the dismissal be proved to be unfair. A fair constructive dismissal would be a case in which the employee found her continued employment to be intolerable but in which the

employer was not at fault for the situation. (For examples of fair constructive dismissals, see *Daymon Worldwide SA Inc v CCMA* 2009 30 ILJ 575 (LC); and *Eagleton v You asked Services (Pty) Ltd* (*supra*)).

Should the facts reveal that the reason behind the constructive dismissal was one contemplated in section 187 of the LRA, the constructive dismissal may be found to be automatically unfair (*Maharaj v CP De Leeuw (Pty) Ltd* 2005 26 ILJ 1088 (LC)).

While the two stages are distinct enquiries, they should not be treated as completely independent of each other. Evidence relevant to the first stage of the enquiry may well prove to be relevant to the second stage of the enquiry (*Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake* (*supra*)).

In assessing whether a constructive dismissal has taken place, the court must assess the employer's conduct holistically (*Marsland v New Way Motor and Diesel Engineering* 2009 30 ILJ 169 (LC); and *Murray v Minister of Defence* (*supra*)). The reason for this is to ascertain whether, objectively speaking, the work situation was so intolerable for the employee that she could not be expected to put up with it and so was forced to resign (*Jooste v Transnet Ltd t/a SA Airways* 1995 16 ILJ 629 (LAC)). The test for constructive dismissal is thus objective (*Foschini Group v CCMA* (*supra*)). An employee's subjective perception that she is being forced to resign is not decisive. The employee's perception must also be objectively reasonable in all the circumstances (*Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2000 21 ILJ 988 (LC)).

5 3 No option but resignation

There is a body of case law which shows that an employee is required not only to show that her continued employment with the employer was intolerable, but that she had also exhausted all possible alternatives to resignation before doing so.

The court in *Jordaan's case* (*supra*) summarized this requirement as follows:

> "In short … [the] appellant bears an initial onus of showing on an objective standard that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to [her] save the termination of the relationship" (2336).

In deciding whether the employee was forced to resign as a result of the employer's conduct, relevant factors include "the timing of the resignation, the education and literacy of the employee and the availability of professional or other assistance (*Dallyn v Woolworths (Pty) Ltd* 1995 16 ILJ 696 (IC)).

5 3 1 Further consultations

Generally, in instances in which an employee has an option of continuing discussions with the employer, she should exhaust all such opportunities before resigning (*S and ABC (Pty) Ltd* 2007 28 ILJ 703 (CCMA)). However, in the case of *Riverview Manor (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2003 24 ILJ 2196 (LC)), the court held that as the employer's decision to reduce the employee's salary was obviously immutable, the employee was justified in immediately rejecting it, and resigning in protest. The court found that the employee's resignation was not premature, and the claim for constructive dismissal was successful.

5 3 2 Grievance procedures

Usually, in cases in which formal grievance procedures are in place, the employee is required to exhaust such procedures before resigning, in order to claim constructive dismissal successfully *(Khonjelwayo and Nura Powering Opportunity* 2009 30 ILJ 2186 (CCMA)); *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre* 2008 29 ILJ 356 (LC); *S and ABC (Pty) Ltd (supra)*; and *Laires and Power Flo* 2011 32 ILJ 1451 (CCMA)). However, there have been cases in which constructive dismissal has been successfully proved despite a failure to follow formal procedures because they were found to be ineffective and not a reasonable option to the employee in the circumstances (see *Copeland and New Dawn Prophecy Business Solutions (Pty) Ltd supra*; and *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre* (*supra*)).

5 3 3 Disciplinary procedures

Generally, an employee may not resign to avoid disciplinary proceedings, and then claim to have been constructively dismissed (*Dallyn v Woolworths (Pty) Ltd* (*supra*); and *Khonjelwayo and Nura Powering Opportunity* (*supra*)). She may not bypass internal procedures, including an appeal, to gain access to the court to vent the dispute (*Old Mutual Group Schemes v Dreyer* 1999 20 ILJ 2030 (LAC)). However, this is not a hard and fast rule. If the employee can show that the disciplinary proceedings were a sham, and the result a foregone conclusion, then she may resign prior to the enquiry and claim constructive dismissal (*SALSTAFF on behalf of Bezuidenhout v Metrorail* 2 2001 22 ILJ 2531 (BCA)).

5 3 4 Performance evaluations

Similar principles apply in those instances in which an employee resigns in the face of a performance review or evaluation. In the case of *Dark and Ex Hex Boerdery (Pty) Ltd* (2008 29 ILJ 3092 (CCMA)), the employer offered an employee the option of resigning with five weeks' pay, to avoid possible dismissal for poor performance. The court held that because the employee

still had the option to defend himself at the performance and/or disciplinary proceedings, resignation was not his last option. Therefore, his resignation was not a constructive dismissal.

In the Constitutional Court case of *Strategic Liquor Services v Mvumbi* (2009 30 ILJ 1526 (CC)), the court was satisfied on the evidence that the employee was not given a real "choice" between resigning or being subjected to poor-performance procedures. Rather, the evidence showed that the supposed alternative to resignation was a sham, and that the employer would have found a reason to dismiss him anyhow. Thus, his resignation was classified as a constructive dismissal.

5 3 5 Criminal proceedings

In the case of *Daniels and Cape Promotional Manufacturing (Pty) Ltd* (2006 27 ILJ 196 (CCMA)), the employer had offered the employee the option to resign or to face criminal charges of theft. The employee resigned and then claimed constructive dismissal. The CCMA held that the resignation was not voluntary and that it was therefore a constructive dismissal. The CCMA found it to be substantively fair, but procedurally unfair. In other words, the situation in which the employee found himself was not the employer's fault, but the employer had not followed fair procedures in dealing with him.

5 3 6 Legal proceedings to protect the employee's interests

It has also been suggested that in those instances in which a legal remedy is available to the employee, the employee will be unsuccessful in claiming to have been constructively dismissed. An example of this can be found in the case of *Foschini Group v Commission for Conciliation, Mediation and Arbitration* (*supra*)). The court held that although the employee had felt that the company had acted unilaterally by advertising and filling her post during her absence, there was no reason why she could not have declared a grievance or referred an alleged unfair labour-practice dispute relating to demotion to the CCMA for determination, rather than resigning.

In the case of the *Albany Bakeries Ltd v Van Wyk* (2005 26 ILJ 2142 (LAC)), the LAC found that although the employee had believed that the company had unilaterally, and unfairly, demoted her, this did not make her continued employment intolerable, as she could have referred the matter as an unfair-labour practice to achieve justice. At the same time, the court found that the employer's conduct was sufficient for her to repudiate the contract.

6 Intolerability

While it may be rational, and generally sensible, to exhaust all avenues prior to resigning, there will be cases in which the employee cannot be reasonably

expected to do so. Such cases will probably be rare, and the employee will bear the *onus* of proving that there were cogent and compelling reasons for failing to exhaust alternatives before terminating the employment relationship (*Foschini Group v CCMA* (*supra*)). In such cases, it will be important to refer to the Constitutional Court case of *Strategic Liquor Services v Mvumbi* (*supra*)). Here, the court found that the test for constructive dismissal is not that the employee should have no alternative but to resign but simply that the employer should have made continued employment intolerable for the employee.

7 Application of law to facts

The crisp question to be decided by the court was whether the respondent had made continued employment intolerable for the appellant, by seeking to impose a restraint-of-trade agreement on her.

The court rejected the appellant's argument that Gouws's behaviour in compelling the appellant and other employees to sign the restraint of trade agreement rendered a continued employment relationship intolerable (*Jordaan's case* (*supra*) 2336). The court found that Gouws' action in requiring his staff to sign a restraint-of-trade agreement was a "plausible and justifiable" response to the situation in which he found himself, as it was tailored to "ensuring loyalty to the business and to obviate the possibility that it would have been denuded dramatically of intellectual assets ..." (*Jordaan's case* (*supra*) 2337). As it turns out, this strategy was unsuccessful as it seems most of his staff left within the 30-day period he gave them to sign the agreement (*Jordaan's case* (*supra*) 2334).

However, the appellant's argument went further than this. She argued that the requirement to sign a restraint-of-trade Agreement on threat of termination of employment created *a loss of security of employment*, which made continued employment intolerable for the appellant.

The respondent argued that even if the appellant had a subjective fear of losing her job, that fear was not objectively sustainable as he had not yet indicated to the appellant that he was going to enforce the restraint-of-trade against her. In what was probably fatal testimony, the appellant conceded under cross-examination that "while she might have had subject-tive apprehensions as to the consequences of a refusal to sign, there was no objective justification for the conclusion that she would have lost her job" had she not signed it (*Jordaan's case* (*supra*) 2338). The court therefore found that "there was no evidential basis by which to justify, on the probabilities, that there was a clear, objective and immediate threat of dismissal." (*Jordaan's case* (*supra*) 2337).

The court, quoting Grogan (*Workplace Law* 4ed (2002) 105), held that therefore, "the evidence in this case falls significantly short of that where it could be concluded that the 'employer behaved in a deliberately oppressive manner and left the employer with no option but to resign'". It is worth noting here that the LAC, in the case of *Pretoria Society for the Care of the*

Retarded v Loots (1997 18 ILJ 981 (LAC)), held that it is not necessary to show that the employer *intended* repudiation of the employee's contract of employment (but compare *Britz v Acctech Systems (Pty) Ltd* 2009 30 ILJ 1150 (CCMA)). However, the question of intention is not relevant to this case, in view of the court's ultimate finding.

Thus, the appellant did not discharge the *onus* to prove that her employment had become intolerable. It was therefore not necessary for the court to consider whether there were alternatives to resignation open to the appellant, and her case was finally dismissed.

8 Conclusion

The appellant's concession that there was no "objective justification" for her fear of losing her job made the judge's decision easy. However, it is submitted that even had the appellant insisted that her apprehension and insecurity were objectively reasonable in the circumstances, she would still not have won her case. The mere fact that one's job is precarious is clearly not sufficient to establish constructive dismissal. Likewise, the existence of "tension in the office" should "never satisfy the requirements for a constructive dismissal [because] the courts would [then] be inundated" with alleged constructive dismissals which were really just "controversial engagements" between employer and employee (*Jordaan's case* (*supra*) 2338).

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