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# EMPLOYMENT ALERT

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ISSUE

## CONSTRUCTIVE DISMISSAL AND AFFAIRS OF THE HEART

Increasingly, employees are resigning and claiming they did so because the employer made their continued employment intolerable. But what exactly is required for an employee to succeed in a claim for constructive dismissal?



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# CONSTRUCTIVE DISMISSAL AND AFFAIRS OF THE HEART

*The Labour Court was tasked with deciding whether an employee could claim constructive dismissal on the basis of an affair between his employer and his wife.*

*In April 2015, a verbal altercation took place between the employer and employee during which the employer taunted the employee with details of the affair.*



**Increasingly, employees are resigning and claiming they did so because the employer made their continued employment intolerable. But what exactly is required for an employee to succeed in a claim for constructive dismissal?**

In the case of *Niland v Ntabeni NO and others* PR33/16 (24 February 2016, unreported), the Labour Court was tasked with deciding whether an employee could claim constructive dismissal on the basis of an affair between his employer and his wife.

The test for constructive dismissal was set out in *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) as follows:

Where 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.

...

the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. I am also of the view that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed.

The conduct of the employer must be judged objectively. In accordance with the decision in *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA), it is not sufficient for an employee to establish that he or she was subjected to intolerable conditions. More is required. The employer must be culpably responsible in some way for the intolerable conditions. The employer's conduct must have lacked reasonable and proper cause.

In the *Niland* case, the employee commenced working for the employer as a professional hunter in 2003. The employer and employee established a good friendship. In 2013, the employee discovered that his wife was having an affair with his employer. Despite being made aware of this, the employee reconciled with his employer and continued with the employment relationship. However, in April 2015, a verbal altercation took place between the employer and employee during which the employer taunted the employee with details of the affair. Despite this, the employment relationship once again continued.

# CONSTRUCTIVE DISMISSAL AND AFFAIRS OF THE HEART

CONTINUED

*This case highlights that an employee will be unsuccessful in a constructive dismissal claim if the employee failed to bring the intolerable conditions to the attention of the employer.*



On 14 July 2015, the employee informed the employer that he was resigning. He made no mention of the affair. The employee took up employment with a competitor shortly after his resignation.

The employee then referred a constructive dismissal dispute to the CCMA. He was unsuccessful and applied to the Labour Court to review and set aside the award.

The Labour Court considered the unusual context and made the following observations:

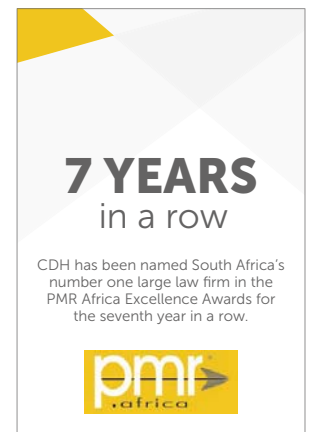
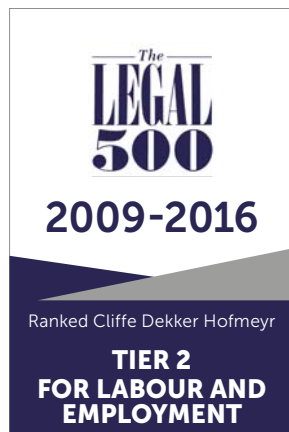
- The employee's wife was a willing participant in the affair and the employee had never confronted the employer with any specific complaints or asked him to rectify the intolerable situation.
- At no point did the employee bring his grievance to the attention of the employer.

- The employee continued his employment for another three months after the incident which, according to the employee, constituted the last straw.
- The real reason the employee resigned was to take up employment with a competitor.

This case highlights that an employee will be unsuccessful in a constructive dismissal claim if the employee failed to bring the intolerable conditions to the attention of the employer.

The employer has not been afforded the opportunity to address the employee's concerns and the employee fails to show that the intolerable situation was the sole reason for the resignation – and not a desire to pursue another more lucrative employment opportunity or avoid a performance management process or disciplinary hearing.

*Gillian Lumb, Anli Bezuidenhout and Rebecca Cameron*



# Employment STRIKE GUIDELINE

Our Employment practice's new  
EMPLOYMENT STRIKE GUIDELINE  
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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Michael Yeates named winner in the **2015** and **2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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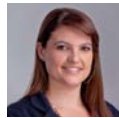
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### BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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