

Employment Law

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SOUTH AFRICA

Constructive dismissal: The end result of complaints, grievances and toxicity in the workplace



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Constructive dismissal: The end result of complaints, grievances and toxicity in the workplace

It has become quite routine for employers to simply dismiss a possible claim of constructive dismissal. This is because it is one of the more peculiar forms of dismissal claims and, statistically, a form of claim that does not easily find success at arbitration. In short, for an employee to succeed they must show that the resignation was because their continued employment had become intolerable at the instance of the employer. While the bar is high, the risk of a successful constructive dismissal claim can be serious for an employer. Also, an employee is not limited to compensation and may seek reinstatement (despite the resignation). So, our law is well advanced in the protection of employees who are subjected to a constructive dismissal.

The case of *Makombe v Cape Conference of the Seventh Day Adventist and Others* (C04/2023) [02025] ZALCCT 19 (28 March 2025) is a recent judgment worthy of noting, in that the Labour Court had to consider whether a female pastor (Makombe) of the Seventh Day Adventist Church (Church) had been constructively dismissed.

Background

The facts before the Labour Court were extensive, given that the issues leading up to Makombe's resignation on 8 November 2020 spanned a period of six years. We will only deal with a high-level overview of the facts.

Makombe commenced employment with the Church on 9 January 2014 as a ministerial intern and later became a pastor. Upon her appointment, Makombe was deployed as a chaplain at three separate learning institutions in the Eastern Cape and she was to render chaplaincy services to students of these institutions, who were members of the Cape Conference of the Church. While Makombe and three other female colleagues were assigned as chaplains to learning institutions, their male counterparts were assigned to districts with churches to serve as pastors.

Makombe's first grievance related to her withdrawal in November 2015 from one of the institutions to which she was assigned due to a conflict with the college staff regarding the duties of a chaplain. Makombe's withdrawal was after she requested the Church to provide her with the job description for a chaplain, which it failed to do.

In July 2016, Makombe was informed that she was being transferred to Queenstown, which transfer she appealed. One of the bases of her appeal was the fact that there was known hostility towards women in ministry in Queenstown.



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However, Makombe eventually moved to Queenstown in November 2016 after she was threatened with a charge of insubordination should she not transfer. Upon her arrival in Queenstown, the congregants made it clear that they did not want a female pastor and Makombe reported this to the Church.

Ultimately, the Queenstown congregants' treatment of Makombe resulted in her litigating against the Church in both the Magistrates' Court and the Commission for Conciliation, Mediation and Arbitration (CCMA). A further consequence was that Makombe began to consult with mental health practitioners where she reported stressors related to her work.

After what had happened in Queenstown, Makombe experienced various challenges in her employment with the Church relating to, among other things:

- a group grievance by seven pastors, including Makombe, regarding their working conditions and treatment by the Church's erstwhile Cape Conference President (this grievance was publicised on social media and Makombe led the grievance);

- Makombe being transferred to other regions without the Church having consulted her or having regard to her personal circumstances;
- Makombe referring an unfair labour practice claim against the Church due to its decision not to give her a salary increase (the claim included an element of alleged gender discrimination but was ultimately not pursued in the Labour Court due to Makombe's financial constraints); and
- Makombe referring an unfair dismissal claim against the Church after she was dismissed for refusing to transfer to Beaufort West (she was reinstated by agreement on 1 January 2019).

While all of the above was taking place, Makombe continued to consult her medical practitioners and in January 2018, she was diagnosed with major depressive disorder. Her diagnosis was said to have come about due to the work stressors she was experiencing.



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Makombe's work situation deteriorated after she was transferred to George in January 2020. This is where at a district event hosted in the first quarter of 2020, congregants made it clear to the Church that they were unhappy with a female pastor, which they believed was in conflict with their religious and biblical convictions. However, the Church instructed Makombe to remain in George and advised that she would be supported. The congregants and church elders in George were hostile towards Makombe and demeaned and humiliated her on WhatsApp groups. She was also barred from performing certain pastoral duties, which they regarded as reserved for male pastors. Makombe wrote to the Church about her plight in April 2020, to no avail. She also followed up with the Church in May, June, July, August, and October 2020. Again, while all of this was taking place, and in June 2020, Makombe continued to seek treatment for her mental health condition.

In October 2020, Makombe was informed that she would be transferred to Gqeberha from 1 January 2021. On 6 November 2020, Makombe received a letter from the President of the Cape Conference of the Church, regarding a poster on social media promoting a Methodist church event at which Makombe had been invited to preach. Issues were raised regarding Makombe's participation in the event. In her response to the letter, Makombe challenged the reasonableness of the concerns raised by the Church but still indicated that she would withdraw from the event.

Makombe resigned on 8 November 2020 and said this in her letter of resignation:

"I hereby tender my letter of resignation as a Pastor of the Cape Conference of the Seventh-day Adventist Church. Since the commencement of my employment in January 2014, my employment relationship with the Conference has caused me much emotional and psychological anguish and as such, I strongly feel that continuing under the employment of the Conference will severely jeopardise my well-being.

I will serve the required 1 month's notice, as per policy stipulation. I thank the Executive Committee for the opportunity to serve within the Cape Conference."

On the same day Makombe resigned she visited a hospital where she was diagnosed with having panic and anxiety attacks.

The parties agreed that Makombe's resignation would take effect from 30 November 2020.

Makombe then referred a dispute to the CCMA alleging that she had been constructively dismissed and sought compensation. The CCMA dismissed the claim, which resulted in the case being determined by the Labour Court.



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The Labour Court's decision

Makombe's medical condition and the Church's lack of compassion

Makombe claimed that the commissioner failed to conduct a proper analysis of the expert evidence presented before her and reached an incorrect decision. This is where both parties had presented expert evidence on Makombe's mental health condition. On the one hand, Makombe's experts stated that her medical condition was directly related to her work stressors; while the Church's expert stated that her mental health condition could have been caused by other life stressors (without any direct reference to what those stressors were).

While the commissioner accepted that Makombe suffered from a mental health condition based on the medical reports placed before her, she found that there was insufficient evidence to support the conclusion that Makombe's work situation was the sole cause of her condition.

The Labour Court found that when the commissioner accepted the report by Makombe's medical expert, she implicitly accepted the findings made therein, namely that Makombe's medical condition was due to stressors related to her work. The court also noted that there was no evidence before the commissioner of any other stressors other than hypothetical postulations put forth by the Church's experts. Finally, the Labour Court found that the Church failed to show any compassion for the mental health issues, it was well aware she was struggling with these issues, and it failed to intervene by assisting Makombe.

As result, the court found that there was sufficient evidence before the commissioner that Makombe's medical condition was due to her work stressors and that the commissioner's finding to the contrary was unreasonable.

The Church's failure to assist Makombe and intervene in relation to congregants' rejection of a female pastor

The Labour Court found that central to several of the issues faced by Makombe was her role as a female pastor.

One of these instances was in relation to a grievance raised by Makombe that the Church failed to facilitate her election and later ordination as an elder. Makombe argued that she was eligible to be an elder; however, when she resigned she was yet to be elected and ordained as an elder due to technical issues raised by the Church. While the commissioner found that Makombe was not ordained as an elder because she refused to transfer her membership to the Queenstown district and refused instructions, which negatively affected the process of becoming an elder, the Labour Court disagreed with this. Instead, it found that it was unsurprising that the same congregants who were hostile towards a female pastor decided not to support Makombe's election and ordination as an elder. The Church's response that it had no say in the process was also found to have fallen far short of what was required of an employer that had given an undertaking to assist Makombe. The Labour Court also found that assigning Makombe to a district where female pastors were accepted might have resolved the situation, but that the Church failed to do so. This situation, the court held, led to an intolerable working environment for Makombe.



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In relation to Makombe's persistent transfers, the Labour Court found that Makombe's request that the Church ought to have consulted with her before any transfers was not an unreasonable one. This is particularly as consultation with Makombe could have avoided the situation where she was transferred to areas known to be hostile towards female pastors. The court went on to state that Makombe's request to be consulted before an assignment would have allowed her to conduct her due diligence regarding whether the congregants would receive her well and that consulting Makombe did not impose an onerous burden on the Church. Ultimately, the court found that the Church's failure to consult Makombe in relation to her transfers was unfair.

The straw that broke the camel's back was found to be the toxic work environment that Makombe had experienced during her time in George. Makombe was insulted and ridiculed in a WhatsApp group she was part of and a male colleague even felt compelled to intervene and pleaded her case to the Church's Cape Conference. However, the colleague's intervention and Makombe's grievances were not attended to by the Church.

The court also found the Church's conduct to be lacking when the congregants make it unequivocally clear that a female pastor was against their religious convictions and, therefore, not welcome. While the Church assured Makombe that the congregants could not dictate matters to it and that she would be supported, no actual support was offered to Makombe other than the vague assurance that she would be supported.

The court went on to find that the Church's only defence to having not intervened was that it could not discipline church members and that this was an admission that it was either unable or unwilling to address the hostile work environment created by congregants. The Labour Court also rejected the Church's contention that it did not create a hostile work environment for Makombe. This is where it was held that individuals under an employer's control (such as the congregants) are capable of creating a hostile work environment and that an employer could be found to have created intolerable working conditions, where it failed to remedy the situation by omission.

In summary, the court found that the Church had created an intolerable working environment by failing to address the issue of the George congregants who opposed Makombe as a female pastor. It also drew a connection between Makombe's resignation and her mental health struggles, noting that she had had a panic attack and was hospitalised on the day she resigned. In that regard, the court found that Makombe acted reasonably by resigning and removing herself from conditions that made her susceptible to a relapse into the major depression for which she had been successfully treated in June 2020.



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Finally, the court accepted the commissioner's findings that certain church congregants were dissatisfied with Makombe, expressing hostility towards her and that they did not accept her as their pastor, nor did they want her to administer to their religious traditions. The court stated that the effect of this was that the congregants did not want Makombe to do what she was employed to do. The commissioner also correctly found, the court noted, that the Church was slow in addressing Makombe's concerns or, at times, failed to address her grievances. Instead, the Church transferred Makombe from one location to another, where congregants were hostile to Makombe for being a female pastor, which was not a sensible way to address the matter.

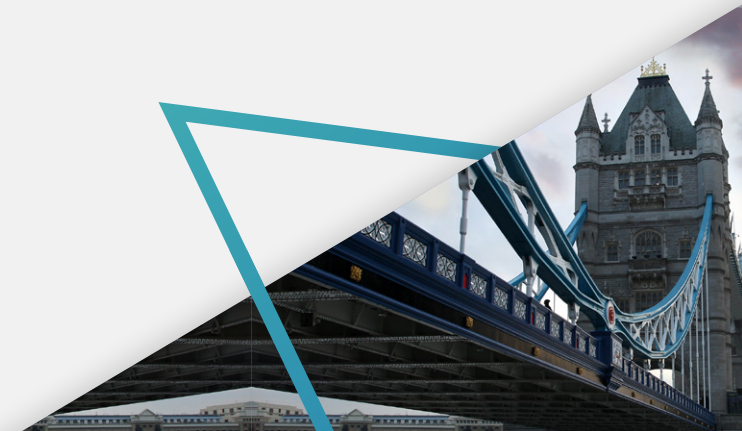
Conclusion

The Labour Court ultimately found that Makombe was constructively dismissed based on the above issues and on account of the Church's failure to address the issue of the congregants' hostility towards Makombe. It emphasised that constructive dismissal cases are not limited to situations where an employer behaves in a "*deliberately oppressive manner*" but that an employer can create circumstances that render continued employment intolerable by omission.

Where the congregants were under the Church's control, the court found that as an employer, it had an obligation towards Makombe as its employee, to "*do something*" about the hostile work environment she experienced. Rather, the Church chose to "*fold its hands*" because it could not discipline congregants and left Makombe

to fend for herself. The Church was also found to only have paid lip service to its offer of assistance to Makombe, without doing anything to practically assist her. What the court found to be evident from the facts was that the Church did not want to ruffle the feathers of the congregants by acting against them and instead, accommodated them at Makombe's expense.

Finally, the court found that while it had disregarded some of the grievances raised by Makombe as not having been the proximate cause of her resignation, the cumulative effect of the grievances raised over time was such that intolerability was established, with Makombe's experiences in George being the last straw. The Church had demonstrated, over a period of time, that it was either unwilling or unable to address the challenge of congregants opposed to a female pastor. It was held that Makombe could not have been expected to endure her intolerable working conditions indefinitely, especially at the expense of her health. Where a connection had been established between Makombe's intolerable working conditions and her resignation, the Labour Court found that Makombe had proved that she had been constructively dismissed.



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Costs were also ordered against the Church. This, the court held, was because the treatment that Makombe received at the hands of the Church was unfathomable considering that it was an employer involved in the ministry and yet failed to display the ethos of care and compassion to which it was meant to have subscribed. The court also took into account that the compensation award of 12 months' salary would have only been *"a drop in the bucket"* considering the legal costs that Makombe had incurred in pursuing her claim.

Key takeaways

This is cautionary tale for employers. Employers should not be dismissive when it comes to their duties to resolve an employee's allegation of intolerable working conditions, grievances and the like. Added to this is the obligation to ensure employees mental health well-being and the duty of an employer, as the Labour Court found, which arises when the intolerable working conditions arise from external factors or third parties to intervene in such issues. Where an employer omits to do so and sits idly by, it can be found to be culpable in creating an intolerable work environment and opens itself up to a constructive dismissal claim.

Constructive dismissal claims also need now to be considered against the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, which imposes an obligation on employers to protect employees in any situation in which the employee is working or which is related to their work or also face a claim of unfair discrimination.

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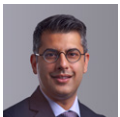
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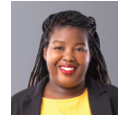
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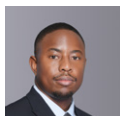
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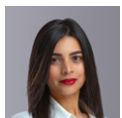
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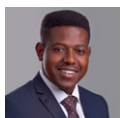
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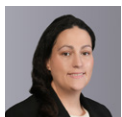
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