

***The President of RSA v Reinecke* 2014 3 SA 205 (SCA)**

*Constructive dismissal, common law remedies and the changing identity of the employer: A Critique of some of the findings made by the Supreme Court of Appeal*¹

1 Introduction

The recent appeal case of *The President of RSA v Reinecke* (the *Reinecke* judgment) dealt with many issues about the employment of magistrates under the Magistrates Court Act (90 of 1993) but the most important issue for purposes of this note is how the judgment grappled with, on the one hand, the relationship between the common law rights and those rights conferred by statute in the labour sphere and; on the other hand, the notion of constructive dismissal in a complex working environment. The case calls for comment purely on the possible precedent it sets for the relationship between the common law and statutory rights in matters concerning employment as well as the impact it makes into the doctrine of constructive dismissal. The findings made by the court could potentially escalate and begin to constitute new defences to common law remedies where these intersect with other statutes that regulate employment and to claims of constructive dismissals.

It should however be said at the outset that *Reinecke's* case, properly considered was for contractual damages arising from a repudiation of his contract of employment which repudiation he had accepted by resigning. But, because the remedy he invoked is so closely related to constructive dismissal under the Labour Relations Act (66 of 1995) (the LRA) the court discussed his remedy in relation to constructive dismissal as generally understood under the LRA. This is evidenced by the fact that the court actually did make reference to constructive dismissal and the LRA. It therefore follows that the pronouncements the court made are equally applicable to constructive dismissals and it is in that light that this note approaches the discussion. As would be seen elsewhere in this note *Reinecke* would in any event have been entitled to invoke the remedies afforded by constructive dismissal under the LRA had he not been excluded from the ambit of the LRA by virtue of his judicial office as a magistrate.

Constructive dismissal as a form of dismissal serves a very important purpose in our labour relations. It allows an employee who has been a victim of intolerable conduct in the workplace to resign and still have recourse against an employer. Absent the remedy afforded by constructive dismissal this employee will have no recourse against the

1 I wish to thank my colleague Prof Peter Jordi, for the useful exchange of views we had during the writing of this note

employer as the employment relationship would have been terminated at his instance and not at the instance of the employer. Constructive dismissal affords this employee a remedy he otherwise would not have. It does this by recognizing that although the employee resigned the cause of the resignation is the employer's intolerable conduct. In this way it can be said that constructive dismissal serves a purpose of protecting employees against an employer who makes their working conditions so intolerable that they resign and in the process forfeit their rights of recourse against such an employer (Dekker 'Did He Jump or was he Pushed? Revisiting Constructive Dismissal' 2012 *SA Merc LJ* 346). It was for this reason that in *Murray v Minister of Defence* (2009 3 SA 130 (SCA) par 8), it was said that constructive dismissal "represents a victory for substance over form."

In the *Reinecke* judgment, the Supreme Court of Appeal seems to have made a few worrying findings. One, the court seems to have declared that if the process of dismissal is statutory in nature and in origin, then constructive dismissal or any reliance on common law contractual remedies is not available. In those circumstances the court suggested that a victim of intolerable conduct should instead approach the High Court to remedy the intolerable situation through an interdict. On this point Wallis JA, after finding that the process for the discharge of a magistrate from service was statutory and after going through the applicable provisions of the statute, held (par 21):

It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable) at the instance of the magistrate by resort to the high court. It would, for example, have been open to Mr Reinecke to apply for an interdict...

Two, the court appeared to be saying that before claiming constructive dismissal or contractual damages based on repudiation of the contract of employment, the employee has to be certain that the intolerable conduct complained against was committed by someone who had the power to dismiss in the first place. In this regard the court held (par 22):

In practical terms Mr Booi had no power to dismiss Mr Reinecke. How then can his conduct be invoked as constituting a repudiation of the latter's contract of employment as a magistrate? It would be entirely anomalous to hold that the conduct by someone, who had no power to appoint or to discharge the magistrate, could nonetheless provide contractual grounds upon which a magistrate subjected to such conduct could terminate their appointment as a magistrate and claim damages.

Three, the court seemed to suggest that for constructive dismissal or contractual damages arising from a repudiation of an employment contract to succeed the claimant should not have had another remedy available to him but to resign. In particular the court held (par 23):

I do not think that Mr Reinecke can contend that there was no remedy other than resignation available to him in response to Mr Booi's conduct.

He had available, and used in relation to his financial claims, the grievance procedures laid down in the regulations to address this type of situation.

It is not suggested that Mr. Reinecke's case was without difficulties. For starters, there were difficulties relating to whether Mr. Reinecke had cited the correct parties. But the judgment falls to be criticized for the narrow stance it took on the application of the common law rights to contractual damages in the employment sphere as well as its application of the constructive dismissal doctrine which now forms part of "the constitutionally developed common law" (*Murray v Minister of Defence supra* par 9).

In criticizing the judgment, this note will argue that the judgment gives an incorrect impression that a statute like the Magistrates Court Act extinguishes existing common law rights of an employee to claim contractual damages resulting from a repudiation of the contract of employment; or somehow prevents an employee from claiming constructive dismissal. It should be noted that although constructive dismissal is a statutory invention under the LRA, its function closely resembles the contractual action for damages an employee would have against an employer who through unacceptable conduct repudiates a contract of employment. This, Corbett JA explained in *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A), occurs:

Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract [to claim damages] (22D-F).

In those circumstances once an employee accepts the employer's repudiation as was done by Reinecke who accepted the repudiation by resigning, that employee becomes entitled to claim contractual damages. The note will submit that it cannot be said that just because a litigant potentially has another cause of action emanating from a particular statute or another source therefore he is barred from instituting a constructive dismissal claim under the LRA or an action for contractual damages at common law.

The note will further submit that a conclusion that says a litigant is barred from instituting a claim of constructive dismissal merely because he has another cause of action arising from a particular statute goes against the dictum of *Fedlife Assurance Ltd v Wolfaardt* (2002 2 All SA 295 (A)). In this case a differently constituted Supreme Court of Appeal considered the impact of the LRA on the common law contract of employment and held that the effect of the unfair dismissal regime introduced by the LRA has not been to extinguish existing common law rights but, so reasoned the court, the LRA operates to supplement the common law rights of an employee whose employment could at common law be lawfully terminated at the will of the employer (par 13).

This finding in *Fedlife Assurance Ltd v Wolfaardt supra* was fitting because it accords with the wholesome rule of our law that for a statute to alter the common law, that statute must either expressly say so or the inference must be such that no any other conclusion could be reached (*Casserly v Stubbs* 1916 (TPD) 310 312). In the absence of express provisions to that effect there is no presumption that a statute extinguishes existing common law rights. To the extent that a suggestion was made in the *Reinecke* judgment that the Magistrates Court Act somehow extinguishes existing common law rights of magistrates, the court was clearly wrong as the Magistrates Court Act has no express provision stating that it in any way interferes with existing common law rights of magistrates and the court did not say it was reading such an interference with the common law rights into the Act by necessary implication.

Moreover, this note will further argue that the judgment, in requiring that the conduct causing resignation must emanate from someone who has the power to dismiss, is out of touch with reality and must be rejected on that basis. Although it is clear that constructive dismissal is said to arise where an “employer” has made continued employment intolerable, the construction of the term “employer” need not be too narrow or restrictive as the nature of employment itself has meant that the term “employer” is a broad construction.

Furthermore, in light of the Constitutional Court’s judgment in *Strategic Liquor Services v Mvumbi* (2010 2 SA (CC) par 4) where it was held that the test for constructive dismissal is not whether the employee has no choice but to resign, but only that the employer made continued employment intolerable, this note will submit that Wallis JA’s judgment cannot stand in so far as it purports to hold that an employee can only claim constructive dismissal where there are no other remedies. If the correct test for constructive dismissal is not whether an employee resigned as a last resort, then by parity of reasoning it should not matter if that employee had other remedies available to him.

2 The Facts

The case concerned Reinecke, a magistrate who was appointed for the district of Germiston but performed the duties of a relief magistrate throughout South Africa. As a relief magistrate, Reinecke relieved magistrates who were indisposed, or absent and at times assisted with the clearing of backlog of cases. He lived in Pretoria whilst his wife and children lived outside Rustenburg. He intended joining them but initially could not do so as he spent most of his time in Gauteng and on the East Rand performing his duties as a relief magistrate (par 1).

In October 2000, the Magistrates’ Commission advertised a number of posts for magistrates throughout the country, including at Randburg which was for a relief magistrate. Reinecke applied for this post as the Randburg Court provided relief magistrates for the North West province

and he expected to perform relief duties in Rustenburg, nearer to his family. He made it clear in his interview for the position that he did not want the post if it meant he would continue performing relief duties primarily in Gauteng and not in the North West province. In 2001, Reinecke got the post in the Randburg Court but it did not work out the way he had envisioned (par 2).

Months into the job he clashed with Booï, the chief magistrate at the Randburg Court. The clash began immediately after Reinecke's appointment at the Randburg Court when he lodged a claim for payment of a relocation allowance due to him in terms of the applicable regulations. Booï objected to Reinecke's claim, taking a view that since his family was already in Rustenburg before he came to the Randburg Court, Reinecke's claim for a relocation allowance could not stand (par 18). This caused Reinecke to make a few complaints about Booï's conduct, in response to the complaints Booï unilaterally and without consultation decided that Reinecke would no longer perform relief duties and that from that point onwards Reinecke would only perform the duties of a magistrate in the Randburg Court. Booï also advised the regional office of the department to terminate Reinecke's standing advances and to recover past payments from his salary (par 19).

Booï also ensured that at the Randburg Court, Reinecke was not allocated any judicial work except for a few postponements and that he was allocated work of an administrative nature (par 19). Such conduct, the court accepted would amount to a repudiation of the contract of employment in a conventional employment relationship (par 20). As a result of all the frustrations emanating from Booï's conduct and the complaints against him that went unanswered; Reinecke resigned and claimed constructive dismissal, unfair labour practice as well as damages for loss of earnings against the defendants, namely the President of South Africa, the Minister of Justice as well as the Magistrates' Commission. There was also a claim for *injuria* which was dismissed by the court *a quo*.

3 Judgment

Wallis JA began his judgment by embarking on a lengthy enquiry into whether or not magistrates were employees of the state and part of the public service, a question that was later abandoned without making any final decision on the basis that the decision "would not on its own serve to resolve the dispute in favour of Mr Reinecke" (par 16). The Supreme Court of Appeal noted that Reinecke's claim had both contractual and statutory elements to it and that he incorrectly, so the judge reasoned, sought to rely solely upon the contractual elements thereby divorcing the relationship from its statutory background. The court then upheld the appeal and in the process made a few findings this note will take issue with.

4 Analysis and Discussion of Judgment

4 1 Courts to Decide Cases on Pleaded Causes of Action

In *Khanyile v Commission for Conciliation, Mediation & Arbitration* (2004 25 ILJ 2348 (LC)) Murphy AJ considered the question of magistrates in the employment sphere and concluded that magistrates were not employees under the LRA. He held that: “In the premises I am persuaded that a magistrate is not an employee as defined within the Labour Relations Act, by virtue of the special constitutional position a magistrate holds as a judicial officer appointed in terms of Chapter 8 of the Constitution” (par 30).

A finding that magistrates are not employees within the definition of an employee under the LRA means that they are excluded from the ambit of the protection afforded by the LRA. This point is particularly important for it means that Reinecke would not have been entitled to the relief afforded by constructive dismissal under the LRA, but argues this note, Reinecke would have been entitled to claim contractual damages arising from the repudiation of his contract of employment because that is his existing common law right which has not been extinguished by either the Magistrates Court Act or the LRA.

Going further, excluding magistrates from the ambit of the protection afforded by the LRA did not leave them without rights or remedies in that together with “everyone” magistrates have a right to fair labour practices as guaranteed by section 23(1) of the Bill of Rights. When that right to fair labour practices is in anyway infringed, magistrates are entitled to choose a cause of action which they believe sufficiently advances their individual cases and vindicates their infringed rights. That cause of action could either be found at common law or on any statute including the Magistrates Court Act. Courts are only entitled to decide a case on a pleaded cause of action not on some other cause of action which may be applicable and was not utilized. The only time courts can decide on an issue that is not specifically pleaded it is when that issue was fully canvassed at trial (see *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd* 1976 (1) SA 708 (A) 714G).

It is not unusual for one act of dismissal to give rise to various causes of action especially in instances where the employer, like in Reinecke is an organ of state, or where the exercise of public power was involved (*Majake v Commission for Gender Equality* (2010 1 SA 87 (GSJ) par 3). In *Gcaba v Minister of Safety and Security* (2010 1 SA 238 (CC) par 53) a case that concerned the intersectionality of rights and remedies available to police officers in the public service the Constitutional Court correctly fortified this argument as follows: “[f]irst, it is undoubtedly correct that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law, often even to be pursued in different courts or fora”.

There is another reason offered by Nugent JA in *Makhanya v University of Zululand* (2010 1 SA 62 (SCA)) as to why a single wrongful act may give rise to multiple remedies and causes of action. This is primarily so held Nugent JA (par 8) because:

The law does not exist in discrete boxes, separate from one another. While its rules as they apply in various fields are often collected together under various headings, that is, for convenience of academic study and treatment that should not be allowed to disguise the fact that the law is a seamless web of rights and obligations that impact upon one another across those fields.

It is also not unusual for a litigant that potentially has various causes of action to choose that cause of action which in the mind of that litigant properly and sufficiently vindicates her infringed rights. When a litigant has chosen a particular cause of action amongst the many, it is then not open for courts to second guess the litigant's chosen cause of action. It was not open for Wallis JA to tell Reinecke that he should have applied for an interdict in the high court instead of resigning and claiming contractual damages emanating from the repudiation of his employment contract. The court should have decided the pleaded case and provided sound reasons as to why the pleaded case was bad in law. This would have been in line with Langa CJ's dictum in *Chirwa v Transnet Ltd and Others* (2008 4 SA 367 (CC) par 168) where the then chief justice correctly stated that a claim "must be approached as it is pleaded".

4 2 Contract Remains the Basis of Employment Relationship

The judgment can also be criticized for suggesting that those whose employment is regulated by statute should look at the statute for remedies and not rely on the contract. Implicit in this suggestion is that the statute somehow alters the nature of the employment relationship and that the contract, which is the basis of the relationship, yields or defers to the statute. This seems to go against what the Constitutional Court held in *Chirwa v Transnet supra* where after a careful examination of whether dismissals of public sector employees constitute administrative action for purposes of PAJA, Ngcobo J held (par 142):

The subject-matter of the power involved here is the termination of employment for poor work performance. The source of the power is the employment contract ... The nature of the power involved is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising contractual power.

What the Constitutional Court did in this decision, was to put it beyond doubt that the existence of a statute does not change the nature and character of the employment relationship. This is the position even if the statute in question is the Magistrates Court Act. The basis of the employment relationship even if regulated by statute remains contractual and can attract both contractual and statutory remedies. To

this end, Basson J in *MEC for the Department of Health, Eastern Cape v Odendaal & Others* (2009 30 ILJ 2093 (LC) par 52) authoritatively held that “[t]he contract of employment (although influenced by labour legislation, collective bargaining and the constitutional imperative of fair labour practices) remains the basis of the employment relationship”.

It is trite that both statute and contract constitute separate and independent sources of obligations in our law. However, it is doubtful if one can maintain a stringent separation between statute and contract in employment matters. This is so because the employment relationship itself has become highly legislated. So legislated is the employment relationship, that Cheadle in his chapter ‘Employment (including Master and Servant)’ (in Coaker & Zeffert (eds) *Wille and Millin’s Mercantile Law of South Africa* (1984) 340)) correctly argued that:

The employment relationship is so shot through by statute and collective bargaining agreement that it has become an inextricable complex of rights and obligations with its sources in contract, common law, trade custom and practice, legislation and collective bargaining.

It is generally accepted that legislating in employment matters is primarily aimed at correcting the power imbalance that exist between the employer and employee at common law, but by the same token it has not be said that the common law contract of employment has been completely eroded by legislation. If anything, the true import of legislating in the employment relationship has been that the contract of employment which remains the basis of the relationship is now reinforced and suffused by legislation. Of this Basson J in *MEC for the Department of Health, Eastern Cape* (*supra* par 50) correctly remarks:

Labour legislation has therefore supplemented the common law principles regulating the *termination* of a contract of employment with the import of the requirement of *fairness* ... From the foregoing it therefore does not appear that the LRA has overtaken the common law in respect of the termination of the contract of employment although, as already indicated, it is accepted that the fairness principles embodied in the LRA have soften the harsh effects a mere lawful termination of the contract may have.

Due to the fact that the contract remains the basis of the employment relationship, it follows that, in appropriate circumstances, litigants will rely on the contract to find causes of action even in circumstances where the employment relationship has statutory elements governing it. In the *Reinecke* judgment Reinecke did exactly that and was well within his rights to do so. In those circumstances, courts should not deny causes of action founded on contract, but should say why that cause of action is bad in a particular case.

4 3 Changed Nature and Identity of Employer

Going further, Wallis JA’s judgment in so far as it suggests that Booï’s could not have constructively dismissed Reinecke because he (Booi) in practical terms did not have the power to dismiss, is stuck in time from

an era where the employment relationship was simple and straight forward. The judgment is steeped in tradition where the employer-employee relationship consisted of an easily identifiable employer who at common law had, amongst others, a duty to receive his employee into service, supervise the work done, remunerate the employee and provide a safe working environment (*SAR & H v Cruywagen* 1938 (CPD) 219 229). This was a simple relationship, the regulation of which was in many ways straight forward and did not present many difficulties. An employee knew who the person of his employer was and was constantly under that person's supervision. But the economies of the world have changed and the employer-employee relationship has followed suit thereby necessitating a change in the laws that regulate and govern the employer-employee relationship. The reality of the situation is that Booi's conduct constituted the repudiation of Reinecke's employment contract necessary to entitle Reinecke to contractual damages similar to what he would have been entitled to under the LRA had he been an employee under that Act claiming constructive dismissal.

Wallis JA may find support for his view in section 186(1)(e) of the LRA, which defines constructive dismissal as a dismissal where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee". The provisions of section 186(1)(e) are clear in providing that it must be an "employer" that made continued employment intolerable. It is axiomatic that in an employment relationship, it is the employer that has the power to dismiss. Perhaps Wallis JA had this in mind. If indeed Wallis JA had the provisions of section 186(1)(e) in mind, then it is submitted that he narrowly and too literally construed the word "employer" and this is out of touch with the way in which modern enterprises, the state included, are run and managed. Modern undertakings are run and managed in such a way that various people through their titles and positions within those undertakings qualify as "employer" and that is the reality courts need to be aware of.

Courts should be mindful of the fact that the nature and the identity of the employer in modern times have changed and continue to change. The end result has been that an employer is no longer an individual or a natural person. It is now often a juristic person or a corporate of one form or another. This juristic person or corporate is managed by a collective calling itself "the management" of the enterprise. In this context, the employment relationship exists not between any identifiable person or member of the corporate, but between the employee and the enterprise. This is so because there is a separate liability between members of the enterprise and the enterprise. The management of the enterprise possesses some managerial prerogative which enables it, amongst other things, to control and discipline the employees of the enterprise (see Strydom 'The Origin, Nature and Ambit of Employer Prerogative (Part 1)' 1999 *SA Merc LJ* 42). This in essence is a chain of command within the working environment which must be observed by all employees. These are the realities in management which all employees are subjected to.

The state in its capacity as employer is not immune to these realities in management. It too has a complex chain of command under which it subjects its employees. The employees of the state like their counterparts in the private sector are expected to observe and respect the chain of command. At the Randburg magistrate's court, Booie was part of that chain of command through his office and title, the office of the Chief Magistrate. That, it is submitted, brought Booie within the ambit and purview of "employer" and also by necessary implication clothed him with an implied power to dismiss. Booie was well apprised of the power his title and position gave him and he used that power to make Reinecke's working conditions intolerable. How the court missed this is inconceivable especially if one takes into account the common occurrence of delegation of powers and responsibilities in the public administration. It may well be the case that the Magistrates Court Act places the appointment of magistrates and issues incidental thereto on the ministry of justice, but the ministry may delegate some of its duties to people like Booie. When Booie acts under delegated authority as he did in Reinecke's case it is illogical to say that he did not have powers to dismiss. The reality is that in a complex working environment, there is no day to day interface between employer and employee but there is a chain of command that manages the undertaking. Any member in that chain of command has implied if not express powers of dismissal. This is the reality Wallis JA's judgment misses.

4 4 Availability of Other Remedies does not Affect Constructive Dismissal Claim

For a while there was a sense in our law that to succeed in a constructive dismissal claim a litigant had to prove that it had no other option but to resign or that resignation was a measure of last resort (*Old Mutual Group Schemes v Dreyer and Another* 2009 20 ILJ 2030 (LAC) par 18). The argument was that an employee ought to show that he exhausted all internal processes aimed at correcting the intolerable conditions to no avail. In *Albany Bakeries v Van Wyk and Others* (2005 26 ILJ 2142 (LAC) par 28), the court held that it would be opportunistic for an employee to resign and claim that the resignation was as a result of intolerable conditions when there was an avenue open to solve his problem which he did not utilize.

The only time an employee was permitted to resign without having gone through the internal processes, appear to have been in instances where the employee showed that following such internal procedures would have been futile or the outcome was pre-determined (*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* 2008 29 ILJ 356 (LC)). The requirement that an employee shows that he resigned as a last resort, or that he shows that he did not have a choice other than to resign and claim constructive dismissal, was expressly rejected by the Constitutional Court in *Strategic Liquor Services* (*supra* par 4). In this case, the Constitutional Court held that the test for constructive dismissal "does not require that the employee have no choice but to

resign, but only that the employer should have made continued employment intolerable” (par 4).

It follows therefore, that even if Reinecke had other options short of a resignation, his claim; be it for contractual damages or constructive dismissal cannot be dismissed only because he could have utilized those options and he did not. Simply put, to succeed in a constructive dismissal claim, it is no longer necessary that a litigant prove that the resignation was a last resort or that he had no choice; a requirement that he proves he did not have other options, seeks to reintroduce to the test a requirement which the Constitutional Court expressly rejected.

5 Conclusion

For constructive dismissal to remain relevant and effective, courts should not place unnecessary restrictions on the remedy, and associated concepts such as “employer” must be given their proper meaning within the context in which they operate and not be interpreted too restrictively as was done in this case. If anything, the concept of “employer” must be given a generous interpretation so as to afford protection to a greater number of employees who would otherwise be excluded. This will not be anything new seeing that section 200A of the LRA already casts a rebuttable presumption as to the existence of an employer-employee relationship in certain instances spelled out in the section. A literal interpretation of employer, that does not take into account the complex nature of employment, is tantamount to giving effect to form as opposed to substance. In modern economies employment comes about in many shapes and forms and labour laws must consistently keep up with the changes of modern economies so to be relevant. Any strict adherence to the person of the employer can potentially throw constructive dismissal as a form of dismissal into disuse as many employees will not be able to prove that the intolerable conduct causing their resignation was perpetuated by someone who had the power to dismiss in the first place.

Moreover, for reasons advanced in this note, it is apparent that magistrates, and all those whose employment contracts impact both statute and contract, lay a valid claim to the remedy of constructive dismissal where they are found to be employees under the LRA or contractual damages at common law if excluded from the ambit of the protection afforded by the LRA. For this not to be applicable, the statute impacting on their employment must expressly, or by necessary implication, exclude the application of and any reliance on the common law contractual rights (*Stadsraad van Pretoria v Van Wyk* 1973 2 SA 779 (A) 784D-H). Holding that a contractual claim for damages is not available, in the absence of any express exclusion by the relevant statute, is unjustifiable.

Furthermore, it is trite that courts do not make cases for litigants but that litigants must make their cases in the pleadings supported by evidence. Likewise, courts should only decide the pleaded case and not

any other case that potentially could have been brought but was not. There may very well be plausible reasons as to why a litigant brings the case that he does, and not any other case that potentially arises from the same facts. Having said all this, it can only be hoped that the findings made by the Supreme Court of Appeal do not escalate and become defences to constructive dismissal claims as well as claims for contractual damages where these intersect with other statutes that also regulate the employment relationship.

TG NKOSI

University of the Witwatersrand