

Could your boss having an affair with your spouse be deemed a constructive dismissal?



By [Johan Botes](#)

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Employers meddling in the private affairs of their employees have been the topic of many a discussion in the past. Typically, this revolves around the employer's right to take action against employees for their afterhours conduct on social media or in public. Most workers are now aware that they may face disciplinary action, even dismissal, where their social media conduct can cause embarrassment to their employer. However, it appears that some employers take their right to interfere in the private conduct of employees a step too far...



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The Labour Court recently considered allegations that an affair between the employee's boss and his wife made continued employment intolerable. The court had to consider whether the conduct by the manager (employer) could sustain a claim of constructive dismissal.

Constructive dismissal is now a statutory claim whereby the employee claims that the employer's culpable conduct has resulted in the termination of the employment relationship. Essentially, the employee must claim and show that:

1. he resigned from employment,
2. that the employer's culpable conduct caused the relationship to become intolerable, and
3. that the problematic conduct was the main cause for the decision to terminate the relationship.

This category of dismissal intends to protect employees from situations where employers no longer wish to retain an employee in service, but instead of dismissing them, make continued employment intolerable. But for a claim for constructive dismissal, employees suffering in abusive relationships would have resigned without recourse.

However, not every disagreement in the workplace gives rise to a valid claim of constructive dismissal. Our courts place a very high hurdle in the path of a disgruntled employee seeking to succeed in claiming constructive dismissal. Continued employment must be intolerable. This may translate into "no reasonable employee could be expected to accept such behaviour any longer". Being upset about your employer's refusal to pay you a bonus or grant you a salary increase does not satisfy this test. Being unhappy because your boss shouted at you similarly does not meet the requirement. But what is the situation when your boss has an ongoing affair with your wife? Our court recently considered this conundrum.

In *Niland v. Harvey & others*, the Labour Court considered what Judge Steenkamp referred to as "... a tale of white mischief in the farming community of the Eastern Cape". The judgment records that the employee, after commencing employment, got married. His wife then had an affair "for some years" with his employer. The employee eventually resigned, claiming that the employer made continued employment intolerable (by having and continuing an affair with his wife). The employment tribunal dismissed the employee's claim, holding that he failed to prove constructive dismissal. The employee asked the court to review and set aside the arbitration award.

The court considered the sad facts of the matter. It concluded that the employee was not induced into resigning as a result of the employer's conduct. The lapse of time between the seminal event and the employee's resignation belied his claim that the employer's conduct caused the intolerability. His own testimony during the arbitration (as to what was actual the cause of the breakdown) also proved to be his undoing.

There are arguably many morals to be taken from the above story. From an employment law perspective, the judgment again confirms that our courts and tribunals will not merely accept the employee's contention that the employer's conduct caused the intolerable situation. Employees should act with trepidation before they resign and claim that they were constructively dismissed. Addressing the underlying causes for workplace unhappiness while still in employment often proves to be more effective than seeking relief after resigning.

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