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EMPLOYMENT

# Employer's threat of criminal and civil proceedings against an employee

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## ISSUE

Can an employer's threat of criminal and civil proceedings against an employee arising out of the employee's misconduct constitute conduct which renders the working environment intolerable for the employee?

## SUMMARY

An employer's threat to an employee of criminal and civil proceedings in relation to misconduct does not constitute conduct that amounts to the constructive dismissal of an employee, as the threat signals the reservation of an employer's legal rights.

## COURT'S DECISION

In the case of *Nokeng TSA Taemane Local Municipality v Karen Louw N.O and Others* JA7/18 (LAC), the Labour Appeal Court was tasked with assessing whether Mr David Louw ("Louw"), an employee of Nokeng TSA Taemane Local Municipality ("the municipality"), was constructively dismissed. Louw was employed by the municipality as a manager of the income section in the finance department. In 2008, Louw was issued with a notice of suspension pending an investigation into allegations of financial misconduct by him. He was later furnished with a charge sheet and notified of a disciplinary hearing. Louw's attorney sent a letter to the municipality indicating that Louw would resign on payment of two to three months' salary as a settlement of the matter. The municipality's attorneys rejected the offer but countered, stating that the municipality was prepared to accept Louw's resignation without any financial settlement. In terms of the municipality's letter, Louw was advised that in the event of Louw not tendering his resignation, the disciplinary enquiry would proceed and the municipality would consider instituting criminal and civil proceedings against Louw. Louw's attorney responded, stating that these "threats" left Louw with no alternative but to resign. Louw's attorney argued that due to the threat of legal action, the trust relationship between Louw and the municipality had irretrievably broken down. This conduct on the part of the municipality, it was alleged, constituted a constructive dismissal.

Louw failed to attend the disciplinary enquiry. He referred an unfair dismissal claim with the bargaining council, where he testified that he interpreted the municipality's letter as a threat rendering his employment intolerable, as he believed that he would be found guilty of the charges regardless of the merits. Louw did not tender any evidence in support of his claim of constructive dismissal. The commissioner dismissed Louw's application on the basis that Louw had failed to show on a balance of probabilities that the municipality had made the continuation of employment intolerable.

Louw subsequently filed an application in the Labour Court to review and set aside the arbitration award. The Labour Court construed the threat in the letter as an intention to coerce Louw to resign without compensation. The Labour Court held further that a reasonable man, guilty or not, would not want to be involved in criminal and civil proceedings. The Labour Court concluded that Louw was constructively dismissed.

On appeal, the Labour Appeal Court detailed the test for determining whether an employee was constructively dismissed. In this regard, the onus rests on the employee to prove that the resignation was not voluntary, constituted a constructive dismissal and was not intended to

terminate the employment relationship. The enquiry is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The court must assess the employer's conduct as a whole and determine whether its effect, judged reasonably and sensible, is such that the employee cannot be expected to tolerate. The test does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable. The Labour Appeal Court held that the primary issue in this case was whether the municipality's letter constituted a threat which made continued employment intolerable.

The Labour Appeal Court held that the threat of civil and criminal proceedings in relation to financial misconduct cannot reasonably constitute a threat rendering continued employment intolerable. The threat was an attempt by the municipality to avoid the possible lengthy disciplinary hearing and also a legitimate signal that the municipality reserved its rights to pursue criminal and civil proceedings. The municipality's conduct was legitimate, appropriate and defensible and of an order that an employee might reasonably be expected to tolerate. The Labour Appeal Court concluded that Louw made an informed decision to resign in order to avoid discipline and criminal and civil proceedings, which decision does not allow for compensatory relief.

## IMPORTANCE OF THIS CASE

An employer may reserve its rights to institute criminal and civil proceedings against an employee in relation to his/her misconduct and the doing so can reasonably be expected to be tolerated by the employee.




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