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What is the legal effect of a resignation when attempting to avoid a disciplinary hearing or sanction of dismissal?

An employer has the right to take justified disciplinary action against employees found guilty of misconduct during their employment, while an employee also has the right to resign and terminate the employment relationship provided that the resignation is not in breach of the contract of employment.

In this article, we will look closely at six of the most important Labour Court caselaw examples and highlight the salient points in relation to submitting a letter of resignation to avoid disciplinary action or the sanction of dismissal.

Caselaw: Mtati v KPMG Services (Pty) Ltd (Labour Court of South Africa, Johannesburg - 18 October 2016)

In ***Mtati v KPMG Services (Pty) Ltd,*** the employee was informed of an investigation against her regarding *serious misconduct,* after which she submitted a letter of resignation subject to a 30-day notice period. During the employee’s contractual notice period, she received notice of a *disciplinary inquiry* which resulted in her submitting a second letter of resignation with immediate effect.

- The employee and her legal representative attended the disciplinary hearing but left after the chairperson ruled that there was jurisdiction to proceed with the hearing. The hearing proceeded in the absence of the employee. She was found guilty of the misconduct as charged and dismissed.
- The court concluded that: *“There is no requirement in law that an employee who resigns on notice, which is then accepted by the employer, cannot resign with immediate effect during the notice period.”*
- The court held that the second letter of resignation changed her status from employee to former employee of the respondent (employer), indicating that there was no longer a contract of employment and that the employer had no right to discipline an employee. The outcome of the disciplinary hearing was therefore declared null and void.

Caselaw: *Coetzee v Zeitz MOCAA Foundation Trust and Others (Labour Court of South Africa, Cape Town - 14 June 2018)*

The Court held a different view in ***Coetzee v Zeitz MOCAA Foundation Trust and Others,*** namely that a disciplinary hearing may be held, even if the employee had resigned. The Court held as follows:

- An employee is entitled to resign with immediate effect only in the case of a preceding material breach of contract by the employer; or
- During an employee’s statutory and contractual notice period, there is no legal impediment to the prosecution of disciplinary proceedings and, if warranted, the subsequent dismissal of an employee for misconduct.

This case also clarified that the contract of employment comes to an end by means of resignation at the end of the employee's notice period.

Judge Whitcher concluded in ***Mzotsho v Standard Bank of South Africa (Pty) Ltd (Labour Court - 24 July 2018)*** that where an employee resigned immediately upon receipt of a notice of disciplinary hearing, the contractual power to discipline remained.

Caselaw: *Naidoo and Another v Standard Bank SA Ltd (Labour Court of South Africa, Johannesburg - 24 May 2019)*

However, contrary to the above, the Labour Court held in ***Naidoo and Another v Standard Bank SA Ltd*** that an employer cannot proceed with disciplinary action if an employee had resigned with immediate effect before the commencement date of the disciplinary hearing. The Court held that for an employer to hold an employee to his/her contract, an order for specific performance (a remedy for the enforcement of a contract) should be sought.

Can an employee avoid the ultimate sanction by resigning before an employer announces the sanction?

In ***Mthimkhulu v Standard Bank of South Africa (Labour Court of South Africa, Johannesburg - 18 September 2020),*** the employee's employment commenced at Standard Bank in 2016. Between February and May 2020, allegations of gross dishonesty and fraudulent conduct came to light. On 19 August 2020, the chairperson found the employee guilty of the charges and commenced with mitigating and aggravating statements from the employee and employer before determining a sanction. On 21 August 2020, the employee breached his contract by resigning with immediate effect. The employer (Standard Bank) elected to keep the contract alive and hold the employee to the terms of his contract to serve a 30-day notice period. Finally, on 24 August 2020, the chairperson imposed a sanction of dismissal on the employee.

- The employee resisted the sanction of dismissal and argued that due to his resignation, he was no longer an employee of the Bank. He argued that the Bank therefore had no jurisdiction over his employment and demanded that the dismissal be nullified. The employer did not abandon the dismissal and the employee made an urgent application to the Labour Court.
- The court confirmed that a resignation by an employee was a unilateral act, which did not require acceptance by the employer for it to be effective; however, where an employee is contractually obliged to serve a notice period, and breaches the contact of employment, he or she repudiates the contract when the notice period is not served, which does not bring the contract to an end. In order to keep the contract alive or to cancel the agreement is only by the election of the employer or aggrieved party. As stated above, the employer (Standard Bank) elected to keep the contract alive and hold the employee to the terms of his contract to serve a 30-day notice period.

In the most recent caselaw, the time and date for hand down is deemed to be on 10 December 2020 of ***The Standard of Bank of South Africa Limited v Nombulelo Cynthia Chiloane,*** the Labour Appeal Court Johannesburg held:

- *"In the circumstances, where a contract prescribes a period of notice the party withdrawing from the contractor or resigning is obliged to give notice for the period prescribed in the contract. The contract and the reciprocal obligations contained in it only terminate or take effect when the specified period runs out. Alternatively, absent a contractual term the parties are bound to the notice period provided in the BCEA."*

- *"In this matter, the employee's narration that her resignation was with "immediate effect" was of no consequence because it did not comply with the contract which governed her relationship with her employer and the employer was thus correct to read into the resignation a four-week notice period within which period it was free to proceed with the disciplinary hearing."*

Should an employer approach the court for an order of specific performance prior to proceeding with a disciplinary hearing where an employee resigned with immediate effect?

No, the Court in the *Mthimkhulu* case differed from the ruling in the *Naidoo* case, stating that an employer does not need to approach a court for an order of specific performance to keep the contract of employment alive should an employee resign in breach of his/her contract.

- The court supported the ruling of Judge **Whitcher in *Mzotsho v Standard Bank of South African Limited (Labour Court),*** indicating that where an employee resigned immediately upon receipt of a notice of disciplinary hearing, the contractual power to discipline remained.
- The court stated that '*an election is a right available to an innocent party';* therefore, an employer can elect to reject the repudiation of the employee who failed to serve his/her notice period, hold the employee to the terms of his or her contract to serve the notice period, and proceed with a disciplinary hearing.

In conclusion, the current caselaw indicates that a resignation before the announcement of a sanction of dismissal has no legal effect, and the employer has the right to continue with disciplinary action, during the employee's notice period.

SERR Synergy's Labour advisors can assist and guide employers with the permitted actions in respect of discipline before and during the employee's remaining notice period or after a resignation with immediate effect should the employer elect to keep the contract alive.

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The following sources are acknowledged:

- *Mtati v KPMG Services (Pty) Ltd (J2277/16) [2016] ZALCJHB 403; [2017] 3 BLLR 315 (LC); (2017) 38 ILJ 1362 (LC) (18 October 2016)* – *http://www.saflii.org/za/cases/ZALCJHB/2016/403.html*
- *Mzotsho v Standard Bank of South African Limited (LC) (unreported case J2436-18 delivered on 24 July 2018)*
- *The Standard of Bank of South Africa Limited v Nombulelo Cynthia Chiloane, (LAC)* (reportable case no: JA 85/18, heard on 05 November 2020, the time and date for hand down is deemed to be 10 December 2020.)