

Short Notes on:

A LUCKY ESCAPE...OR NOT SO MUCH: RESIGNING WITH IMMEDIATE EFFECT TO AVOID DISCIPLINARY ACTION

Introduction

It has now become a norm that an employee will render their resignation with immediate effect in the hopes of avoiding the consequences of being dismissed for a misconduct, and thus, free themselves from the constraints of a stained disciplinary record that may ruin their prospects of future employment elsewhere. In the same vein, the employer may wish to proceed with disciplinary action even where the employee renders resignation with immediate effect.

In the past two years, and most recently, the law has been in a state of uncertainty when dealing with the disciplining of employees who have resigned with immediate effect shortly before a disciplinary hearing to avoid disciplinary action or even dismissal. However, the matter has now been settled and in the latest case of *Standard Bank of South Africa Limited v Chiloane*, the Labour Court confirmed an employer's right to discipline an employee during their notice period regardless of an employee's resignation with immediate effect.

The Naidoo Case

In the case of *Naidoo and Another v Standard Bank SA Ltd and Another (J1177/19) [2019] ZALCJHB 168*, a couple of employees resigned with immediate effect after they had received notice to attend a disciplinary hearing. Regardless of this, the employer pursued holding the employees to their notice period and sought to proceed with the disciplinary hearings.

The Labour Court acknowledged a breach of contract by the employees, but stated however, that the employer reserved no such power to discipline employees for gross misconduct and dishonesty where they had resigned with immediate effect before the date of their disciplinary hearings. Furthermore, the Court held that the right approach would have been to hold the employees to their contracts by seeking an order of specific performance, in which case, the employer did not. In concluding its evaluation, the court held that the act of an employee rendering resignation with immediate effect puts an end to the employment relationship even though it may be in breach of the termination clause.

The Mthimkhulu Case

In the more recent case of *Mthimkhulu v Standard Bank of South Africa (J928/20) [2020] ZALCJHB 201*, the Labour Court had to consider a modification to the above-mentioned case, where an employee resigned after a guilty finding in his disciplinary hearing and before his dismissal was effected. The employee was of the view that because his resignation came first, the employer had no power to impose a dismissal, but the employer sought to hold the employee to his thirty-day notice period and ultimately effected his dismissal which triggered an urgent application by the employee to set aside his unlawful dismissal.

The Labour Court referred to the decision in the *Naidoo* case but deviated from its ruling. It stated that in a case where the employee resigned in breach of his or her employment contract, it would not be necessary for the employer to approach the court for an order of specific performance. The court held further that the employment contract is not kept alive by an order of specific performance but rather by the ability of the employer to reject repudiation of the employment contract. Here, the Labour Court emphasised that an employer may still be dismissed by an employer if the employee resigns with immediate effect to avoid a disciplinary hearing. The court cited the principles of contract law, which state that an employee who is obliged by contract to serve a notice period, repudiates a contract when the notice period is not served. In these circumstances, the employer must consider accepting the repudiation and sue for damages or reject the repudiation and hold the employee to his or her notice period; most imperative that the employer does not need to seek an order of performance from the court.

The matter was finally settled in the Labour Court of Appeal (LAC), in *Chiloane*. The LAC held that a resignation with immediate effect does not terminate the employment relationship in cases where the contract of employment has a notice period.

Conclusion

The standing on whether an employer may continue disciplining an employee even after resignation with immediate effect, has been settled after having been in a state of flux. The *Mthimkhulu* case has placed an emphasis on the election of employers in the case where an employee resigns with immediate effect in breach of his or her contract stating that the employer must consider accepting the repudiation and sue for damages or reject the repudiation and seek specific performance. This was confirmed on 11 December in the case of *Standard Bank of South Africa Limited v Chiloane*.

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