

THE LEGAL EFFECT OF A RESIGNATION BEFORE SANCTION

In the recent case of *Mthimkhulu v Standard Bank of South Africa (J928/20) [2020] ZALCJHB 201*, the Labour Court was tasked with deciding whether an employee who has been found guilty of serious misconduct can escape the sanction of dismissal by resigning before the employer imposes the sanction. This article will unpack the court's reasoning in reaching its conclusion and the legal principles it enunciated from previous cases, which helped in reaching its conclusion.

In this case, the employee had resigned with immediate effect in the face of disciplinary action. At the time of his resignation, he was awaiting his sanction and he further refused to serve his notice period as stipulated in his contract of employment. The court had to answer whether an employee may effectively resign from his vocation, pending his sanction of dismissal. The court also considered when does a resignation become effective and the legal implications thereof.

In answering these questions, the court's first point of reference was the minority judgment in *Toyota South Africa Motors (Pty) Ltd v CCMA and others*, which held that an employer's right to discipline an employee is extinguished once they resign, as a valid resignation cannot be withdrawn. However, the court distinguished this matter on the facts, finding that the disciplinary action had already been taken against the employee in this case and the only outstanding step was the announcement of a sanction. The court further revisited the case of *Mzotsho v Standard Bank of South Africa (Pty) Ltd*, where it was held that an employer's power to discipline remains in instances where an employee resigns after a disciplinary hearing.

Importantly, the court in *Mthimkhulu* held that where an employee seeks to terminate his/her contract of employment prematurely, that act amounts to a repudiation of the contract. The employee's repudiation will then give the employer the option to either accept the repudiation and thus the employment contract will come to an end. Alternatively, the employer will not accept the

repudiation and instead hold the employee to his notice period as per the employment contract. This power is derived from the principles of the law of contract.

The effect of the judgment was that where an employee resigns with immediate effect to avoid the outcome of disciplinary action, the employer may still proceed to take disciplinary action against the employee during the subsistence of the employee's notice period if the employer elected to reject the employee's resignation.

Significantly, the employer's right to enforce its contractual obligations remained, as it did not cancel the contract. This meant that the employee's resignation was futile and thus had no legal effect.

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