

Resigning after disciplinary action but before sanction - what is the legal effect?

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The Labour Court in a recent judgment* considered whether an employee who has been found guilty of serious misconduct can avoid the ultimate sanction of dismissal by resigning before the employer imposes the sanction.



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In summary, the Labour Court found that because the employee had already been subject to a disciplinary hearing and the only outstanding step was the announcement of a sanction of dismissal, the employee's resignation had no legal effect.

Facts

Mr M (the employee) was employed by Standard Bank from 1 June 2016. Between February and May 2020, the employee allegedly misconducted himself in a grossly dishonest and fraudulent manner. The employee attended a disciplinary hearing and on 19 August 2020, the chairperson of the hearing issued a guilty finding against the employee. Before Standard Bank could impose the sanction, the employee on 21 August 2020 resigned with immediate effect. Standard Bank sought to hold the employee to a 30-day notice period. On 24 August 2020, a sanction of dismissal was issued to the employee. The employee, however, resisted the sanction on the basis that Standard Bank did not have any jurisdiction over him any longer. He demanded that Standard Bank abandon and nullify the dismissal before close of business on 1 September 2020. Standard Bank refused to do so. The employee did not wish to have a dismissal record attached to his name as he feared that this would jeopardise his application for pupillage to the bar.

The employee approached the Labour Court on an urgent basis seeking an order declaring his dismissal null and void, on the basis that he had resigned before it was announced by Standard Bank.



You can't fire me, I resign!

Shan Raddcliffe 19 Mar 2018



The legal effect of resignation before sanction

Given that, legally, a resignation is a unilateral act which does not require acceptance by the employer in order to be effective; the critical question in this matter was whether the termination had taken effect or not? The court also considered court judgments** where it was held that since a valid resignation is incapable of being withdrawn, an employer has no right to discipline an employee once resignation has taken effect.

The Labour Court, however, distinguished this matter on the facts, finding that because the employee had already been disciplined and the only outstanding step was the announcement of a sanction (dismissal), the tactical resignation by the employee in this matter had no legal effect.

The court also applied the following contractual principles to this matter –

- An employee who is contractually obliged to serve a notice period repudiates a contract where he or she does not serve the notice period.
- In response to repudiation, the aggrieved party has a right in response to accept or reject the repudiation. If the aggrieved party accepts the repudiation, the contract will be rescinded once this is communicated to the party who repudiated the contract. If the aggrieved party rejects the repudiation and does not rescind the contract, the contract will be kept alive. In this matter, Standard Bank did not rescind the contract despite the repudiation by the employee.
- The election to cancel and rescind the contract lies in hands of the aggrieved party and not the aggressor party.

In other words, a breach of the contract, the court held, does not necessarily end the contract of employment. The aggrieved party may choose to end the contract and if this happens, the contract will come to an end. The court also used a sport analogy in concluding that Standard Bank was

“ entitled to tack the ball since it elected to keep the playing field – the contract of employment – alive or open for play. ”

In light of the above, the employee's application was dismissed with costs.

* Mthobisi Mthimkhulu v Standard Bank of South Africa (J928/20) (18 September 2020)

** Naidoo and another v Standard Bank SA Ltd and another (J1177/19) [2019] ZALC JHB 168 / Toyota South Africa Motors (Pty) Ltd v CCMA and others (2016) 37 ILJ 313 (CC)

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