

You can't fire me, I resign!

By [Shan Raddiffe](#)

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Another day, another high level resignation. The past year has seen many heads opt to duck out of a sticky situation rather than face the music in a disciplinary inquiry; Matshela Koko, Anoj Singh and Shaun Maritz - and that's just from Eskom. Now although a company can still proceed with criminal charges to seek reparations for damage caused, does a company have any right or reason to reject a 'resignation with immediate effect' and hold the employee to contractual obligations and make them go through the disciplinary process?



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I posed the question to Johan Botes, partner and head of the Employment and Compensation Practice over at Baker McKenzie, Johannesburg, and this is what he had to tell me...

Resignation to avoid dismissal

"'You can't fire me, I resign!' sounds like something one of Harvey Spectre's clients might say. But if your employment relationship is not in Hollywood, but South Africa, what would the legal position be in respect of resignation to avoid dismissal? May an employee resign in the face of disciplinary action to avoid dismissal? The truth will raise even a seasoned scriptwriter's well-sculpted eyebrow," said Botes.



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"Notice periods are inherent in every employment contract. The Basic Conditions of Employment Act (BCEA) prescribes a minimum notice period. Thus, even where there is no written employment contract between parties, the employee may terminate the employment contract by providing the notice prescribed in the BCEA. If the parties agreed to a longer notice period in a written employment contract, the employee has to serve the longer notice period. Of course, where the employee agrees to work for a fixed period, the contract will typically provide that the employee may not give notice (resign)

prior to the expiry of the fixed term.

"This becomes very relevant when the employer initiates disciplinary action against the employee and the employee seeks to avoid having his or her employment terminated by means of dismissal. In a country with a 27% official unemployment rate, finding a job is difficult: finding a job with the tag of having been dismissed from your previous employment is nigh impossible. An employee facing a hearing could thus resign with the hope of avoiding the disciplinary enquiry," Botes continued.



Shaun Maritz resigns from Eskom, thus avoiding disciplinary hearing

Robert Laing 2 Mar 2018



"Employers feeling strongly that the reason for termination should reflect 'dismissal' rather than 'resignation' would typically continue with the disciplinary hearing during the notice period, even where the employee plays truant or refuses to participate. Thus, provided the employer could wrap up the hearing before the end of the notice period, it could dismiss the employee even where the employee had resigned.

"But what happens when the employee does not serve out the notice period?" Botes asked. "The employment contract provides that the employee must give the contractual notice to resign. If the employee fails to serve notice, the employee would be in breach of the employment contract. As many often forget, the employment contract – though clothed with notions of equity and fairness and infused with the common law and supplemented with statutory rights – is still a contract. If one party to the contract breaches it, the other may exercise its right on how to deal with such a repudiation. It can either accept the breach and sue for damages or approach a court for an order of specific performance (asking the court to order the other party to do what it agreed to do in the contract). However, considering that specific performance would mean that a court forces an employee to continue working for an employer, our courts are reluctant to order specific performance against an employee where the employee breached the contract.



Eskom's Matshela Koko resigns

16 Feb 2018



"Forcing employees to work against their will sounds a lot like slave labour, even when they get paid for their labour. In select circumstances, our courts have been willing to order employees to return to work and serve out their notice periods or the remainder of their employment contracts. For example, in cases where an airline could not readily replace a pilot who otherwise would have to serve a three-month notice period, or where a football coach did not want to stay bound to a fixed-term contract in order to take up a position with another club. In both instances, the court agreed that it could make an exception to the general apprehension to force an employee to continue an employment relationship," Botes explained.

The erstwhile employee

"But, in *Mtati v KPMG Services (Pty) Ltd (2017)*, the court went one step further. It held that the employee terminated the employment relationship when she resigned, notwithstanding the fact that she did not serve the requisite notice period. The court concluded that once the employee resigns, even without notice, her status changes from being an employee to an erstwhile employee. In this case, the court interdicted the employer from proceeding with the hearing and dismissing the employee. An employee could thus assail an adverse finding in a hearing and exit an employment relationship as having resigned rather than being dismissed.



Suspended Eskom CFO Anoj Singh resigns

23 Jan 2018



"It remains conceivable that an employer may approach the court, on an urgent basis, to interdict an employee's resignation and obtain an order holding the employee to the contractual notice period. It is difficult to conceive those facts that will cause a court to agree that the employer will suffer irreparable harm, warranting the court interdicting the resignation to allow the disciplinary hearing to be concluded. The upshot of the law as it stands is that we are likely to see more employees opting to resign rather than stay and face the music when confronted with allegations of misconduct," Botes concluded.

ABOUT SHAN RADCLIFFE

Shan Radcliffe is the editor of Bizcommunity HR, Education and Legal.

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