

Case Study



Naughty employees can no longer get away with murder

Employers cringed at the recent case of *Kalipa Mtati // KPMG Services (Pty) Ltd* in which the court dealt with whether an employer can discipline an employee after he has resigned with immediate effect.

In summary, the court held that:

- Resignation is a unilateral act and does not require the acceptance or consent of the employer to take effect. All that is required is for the employer to receive the notice of termination.
- If an employee resigns **on notice** the employer retains its right (and the jurisdiction) to discipline the employee during the notice period.
- If an employee resigns **with immediate effect** the employer loses the right to discipline the employee, also with immediate effect. As such, a chairperson would lose the jurisdiction to chair the disciplinary hearing.

We have always maintained that this judgment is wrong and that we were willing to challenge it.

Fortunately for employers, this will no longer be necessary because this decision has recently been overturned on appeal on the basis that the dispute before the Labour Court was moot. Therefore, the court in the recent case of *Mark Michael Coetzee v the Zeitz Mocaa Foundation Trust and Others* found that insofar as the KPMG judgement is in conflict with the law as it stood before then, it is no longer persuasive.

The KPMG judgment was wrong because it conflicted with many other judgments, some of which were delivered by higher courts. For example, in the *Vodacom (Pty) Ltd v Mosa and Another* case the court summarized the (correct) legal position quite succinctly as follows:

- Resignation is a unilateral act.
- When an employee gives the required notice, the contract terminates at the end of the notice period.
- When an employee does not give the required period of notice, the employee breaches the contract. Ordinary contractual rules dictate that the employer may **hold the employee to the contract and** seek an order of specific performance requiring the employee to serve the period of notice. Alternatively, the employer may elect to **accept the employee's repudiation, cancel the contract and claim damages**.

- It is always open to the parties to terminate an employment contract on agreed terms and for either of them to waive whatever rights they might otherwise have enjoyed

Importantly, if an employee resigns with immediate effect the employer must elect whether it is going to accept the employee's repudiation of the contract or hold the employee to his notice period.

In the latter instance, the employer must respond to the employee's resignation by acknowledging receipt thereof but stating that in terms of the parties' contractual agreement, the employee is obliged to work his notice period and that the employer is going to hold him to his notice period. This was recently discussed at length in the recent *Mark Michael Coetzee*.

In light of the above, employers need no longer fear that their naughty employees will escape disciplinary action (and a tainted employment record) if they resign with immediate effect. If an employer feels strongly about a matter they will still be entitled to hold the employee to his notice period and run the disciplinary hearing during the notice period.

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