

# Resigning to avoid disciplinary action? Not so fast...

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A common occurrence in the employment relationship is for an employee to resign in the face of disciplinary action by an employer, and South African courts have previously accepted that as long as an employee resigns with immediate effect, the employer has no power to compel the former employee to go through any disciplinary process.



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However, the Labour Appeal Court (LAC) was recently called upon, in the case of *Standard Bank of South Africa Limited versus Nombulelo Cynthia Chiloane*, to consider this thorny issue, and its approach has reinvented the landscape of this relationship.

As stated above, it is a very common occurrence for an employee to resign in the face of a disciplinary enquiry, possibly to protect his or her good name and standing as an employee from a possible dismissal, and this is exactly what occurred in this matter. The employer sought to charge the employee with misconduct after it became aware that the employee had cashed a cheque without following the proper procedure – dismissal could have resulted in the employee being placed on the financial sector's Register of Employees Dishonesty (REDS) system.

Notice to attend a disciplinary hearing was given to the employee who, on the same day of receipt, tendered her resignation with immediate effect. Her resignation was accepted by her supervisor, who also then proceeded to consult with the Human Resource official and was informed that the employee was, under her written contract of employment, required to serve a four week notice period.

Armed with this information, Standard Bank insisted that the disciplinary hearing proceed as scheduled. On 11 June 2018, the employee and her representative attended the enquiry and contended that it was unable to proceed, as there was no longer an employment relationship; emboldened by the fact that our courts have previously accepted this position, she left the enquiry while it was still on-going. Nonetheless Standard Bank proceeded with the enquiry and dismissed the employee.

The employee referred the matter to the Labour Court (LC) which held that: "Once an employee hands in her resignation while indicating that the resignation is with immediate effect, the employment relationship comes to an immediate end and the employer has no right to insist that the employee serve his/her notice period."



### Resignation with immediate effect - separate rulings confuse the matter

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The LC thus went on to declare the employee's previous dismissal "null and void". This was the accepted position under common law and South African jurisprudence.

However, Standard Bank appealed to the LAC, which overturned the decision and upheld its appeal. The court placed much emphasis on the contractual obligation of the employee to serve notice. In this regard, the court relied on the fact that

*“ the argument that, where an employee gives notice of termination by way of resigning with immediate effect, such an employee cannot be compelled to continue working for the employer because resignation is a valid unilateral act that comes into effect on the date the employee dictates that it will come to an end, is misconceived. ”*

By this statement, the LAC rejected all previous jurisprudence on the issue.

South African law has always been that resignation is a unilateral act on the part of the employee, which has the effect of terminating the employment relationship. However, the LAC essentially held that the employee's resignation with "immediate effect" was of no consequence because it did not comply with the contract which governed her relationship with the employer.

Thus essentially the court confirmed that resignation with immediate effect does not terminate the employment relationship where the employee's contract of employment provides for a notice period and the employer seeks to hold the employee to such notice; further the effect is that, notwithstanding their contractual obligation to serve a notice period, the employment relationship will terminate only at the election of the employer, who may either waive the employees' obligation to serve a notice period or seek not to enforce it.

In essence, an employer may discipline an employee during their notice period, regardless of whether an employee has resigned with immediate effect.

The impact of this judgement on the personal rights of individuals, who may now be compelled to continue with a relationship that is of a materially personal nature which they wish to exit, will probably still have long-term effects.

## ABOUT THE AUTHOR

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