



MASERUMULE

Corporate Employment Law

Where results matter

EMPLOYEES CAN NO LONGER UNILATERALLY RESIGN WITH IMMEDIATE EFFECT

Coetzee v The Zeitz MOCAA Foundation Trust and others [2018] ZALCCT 20

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Previous case law

In the case of *Mtati v KPMG Services (Pty) Ltd* (2017) 38 ILJ 1362 (LC), the Labour Court found that, after having resigned by giving notice, an employee is entitled to terminate his or her contract of employment by way of a further unilateral act of resignation during the notice period. As a result, employees were able forego serving their notice periods and were thereby able to avoid being subjected to disciplinary proceedings where they had terminated their employment in such a manner.

The primary issue to be determined by the court in *Mtati* was when employment was terminated, which hinged on the court's interpretation of when the employee's resignation took effect. Kalipa Mtati, who was employed in a senior position at the auditing firm and had allegedly failed to disclose information relating to alleged conflicts of interest, had first tendered her resignation with notice and over a week later informed her employer that she had resigned "with immediate effect".

The court in *Mtati* declared the employee's dismissal null and void and went on to state that the employee is not required to seek the consent of his or her employer to resign with immediate effect during the notice period.

Our view has been and remains that resignation "with immediate effect" constitutes a breach of the employment contract, unless it is accepted by the employer. Resignation constitutes a unilateral act and, provided an employee gives proper notice,

the employer's acceptance or rejection of the resignation is of no legal consequence. However, where an employee seeks to withdraw his or her resignation, the employee requires the employer's consent for the withdrawal to have effect. Alternatively, where the employee seeks resignation on shorter than contractual notice, the employer has to agree to this.

The court in *Mtati* relied primarily on the Constitutional Court's decision in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & others* (2016) 37 ILJ 313 (CC) and that of the Labour Court in *Lottering & others v Stellenbosch Municipality* (2010) 31 ILJ 2923 (LC). However, the court's interpretation of this legal precedent was incorrect, as neither *Toyota* nor *Lottering* support the proposition that an employee is entitled to evade the obligation to serve a notice period by resigning with immediate effect.

Facts of *Coetzee v The Zeitz MOCAA Foundation Trust and others*

- In May 2018, Mark Coetzee, the executive director and chief curator of the Zeitz Museum of Contemporary Art Africa, was suspended by his employer based on allegations of serious misconduct, pending a disciplinary hearing, and was invited to make representations respect of the allegations.
- Following his suspension, Coetzee verbally tendered his resignation at a meeting on 16

May 2018. Thereafter, he made a public statement, the content of which had been agreed to between him and the Zeitz MOCAA Foundation Trust, wherein the Trust announced to the press that disciplinary proceedings had been initiated against Coetzee and that he had subsequently “tendered his resignation”.

- Coetzee approached the Labour Court directly with an urgent application, seeking that the disciplinary proceedings which had commenced against him were unlawful and invalid, alternatively interdicting his employer from completing the disciplinary process, on the basis that it had no jurisdiction to discipline him in light of his resignation “with immediate effect”.
- In court, Coetzee alleged that on 16 May 2018 he had tendered his immediate resignation. Subsequent to 16 May, Coetzee’s attorneys had, on instruction, written to the Trust on 21 May seeking written confirmation that it was the view of the Trust that Coetzee had resigned and that, therefore, he was not employed by the museum any longer. The employer responded to this on 22 May, in correspondence sent to Coetzee’s lawyers, which stated “as matters presently stand, based on the facts as recorded above, our client regards your client as having resigned with effect from 16 May, subject to four weeks’ notice as provided for in terms of law”.
- The court distilled the material issue in dispute to whether the Trust had in fact accepted the alleged immediate resignation of Coetzee on 16 May 2018.
- The court noted that the letter sent by Coetzee’s attorneys on 21 May sought clarification from the Trust as to whether it regarded Coetzee as having resigned and held that it is notable that the letter neither alleges that Coetzee had in fact already resigned nor that he had done so with immediate effect.
- There was an unsigned employment contract which included a six month notice period. However, the employer held the employee to a four week notice period, being the statutory minimum. If the employee was bound to serve

the longer notice period, there was nothing that prevented the employer from waiving a part of it.

- The court dismissed the application and Coetzee was subsequently dismissed by his employer.

Impact of the Coetzee decision in light of *Mtati*

The judge made mention of the fact that the Labour Court’s decision in *Mtati* was overturned *ex tempore* by the Labour Appeal Court and that there was no need for her to consider that judgment or apply it to the facts of the matter before her.

The judge clarified the legal position that an employee’s contract of employment comes to an end only once his or her resignation has taken effect at the end of the notice period and she referred to the *Toyota* decision in this regard.

Legal position after Coetzee decision

The legal position was confirmed to be the position prior to the *Mtati* judgment and the court in *Coetzee* confirmed that the conventional and well-established principles pertaining to resignation and breach of contract are in force.

Where an employee purports to resign without notice, this constitutes a breach of contract. The employer may then elect to either accept the breach and claim damages for loss suffered or enforce specific performance by the employee, by holding him or her to the service of the notice period. The employee may forego the requirement to serve notice only where the employer has waived this requirement, as set out in section 38 of the Basic Conditions of Employment Act. The employer is required to pay the employee the remuneration he or she would have received if he or she had worked during the notice period, unless the parties agree otherwise. In such cases, the contract comes to an end immediately when the employee is relieved of his or her duties.

The *Coetzee* decision has brought certainty and clarity after the *Mtati* decision threw this aspect of employment law into turmoil in 2016.

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