The Implications of a Tactical Resignation Before the Announcement of a Sanction of Dismissal

Mthimkhulu v Standard Bank of SA
(2021) 42 *ILJ* 158 (LC)

1 Introduction

Unlike the typical cases interdicting disciplinary proceedings – which have often not been greeted with judicial applause because of their adverse impact on the Labour Court's urgent court roll (*Magoda v Director-General of Rural Development & Land Reform* (2017) 38 *ILJ* 2795 (LC) par 1; *Booysen v Minister of Safety and Security* (2011) 32 *ILJ* 112 (LAC) par 54 (*Booysen*); *Jiba v Minister: Department of Justice & Constitutional Development* (2010) 31 *ILJ* 112 par 17 (*Jiba*); *Mosiane v Tlokwe City Council* (2009) 30 *ILJ* 2766 (LC) par 15) – *Mthimkhulu v Standard Bank of SA* ((2021) 42 *ILJ* 158 (LC) (*Mthimkhulu*)) stands on a slightly different footing. Moshoana J's instructive decision speaks to the problematic persistence of urgent applications to invalidate unlawful dismissals. The case also replicates a set of fundamental issues concerning the legal effect of post-resignation disciplinary proceedings. In essence, the vexed question is whether an employee who has been found guilty of a serious offence may avoid the ultimate sanction of dismissal by resigning before an employer announces the sanction. To invoke Moshoana J's colourful language, the applicant's stance is that "being the first man on the ball, the respondent employer forfeited the right to tackle and play the ball".

Mthimkhulu also invites consideration of jurisdictional quandaries in contemporary labour-dispute resolution regarding the power of the Labour Court to set aside an unlawful dismissal. In a word, the judgment is too good to escape scholarly attention. To respond adequately to the crisp questions arising, the essential starting point remains the pertinent facts at issue in *Mthimkhulu*. This note conducts an overview of the principles underpinning disposal applications for interim relief. The decision of the Labour Court in the case at hand also affords an opportunity for critical appraisal of all facets of resignation, the instances of the institution and/or continuation of disciplinary proceedings post-resignation, as well as the jurisdictional footprints implicated whenever the Labour Court is asked to invalidate unlawful dismissal.

2 The factual matrix

In the case at the bar, the employee was charged with misconduct relating to gross dishonesty and fraudulent conduct. As such, the material facts mirror

those in companion cases such as *Naidoo v Standard Bank SA Ltd* ((2019) 40 *ILJ* 2589 (LC) (*Naidoo*)) and *Mahamo v Nedbank Lesotho Ltd* ([2011] LSLAC 9 (*Mahamo*)). He appeared before an internal disciplinary inquiry and was found guilty. The presiding officer afforded the applicant and the Bank an opportunity to present mitigating and extenuating factors before he could determine an appropriate sanction. Cunningly, Mthimkhulu resigned with immediate effect. Upon receipt of the resignation, the Bank sought to hold Mthimkhulu to the terms of his employment contract to serve a 30-day notice period. Later, a sanction dismissing Mthimkhulu from the Bank's employ was announced. Mthimkhulu vigorously resisted the announcement of the sanction on the basis that the Bank no longer had jurisdiction over him. He demanded that the employer abandon and nullify the dismissal before the close of business on 1 September 2020 (*Mthimkhulu supra* par 6). The demand was rejected by the Bank. The rebuff prompted Mthimkhulu to launch an urgent application.

3 Interdicting workplace disciplinary hearings

Interdicting uncompleted disciplinary proceedings is a contentious issue and has been subject to extensive commentary (see generally, Maloka "Interdicting an In-House Disciplinary Enquiry With Reference to *Rabie v Department of Trade and Industry* 2018 ZALCJHB 78" 2019 *Journal for Juridical Science* 10; Peach and Maloka "Is an Agreement to Refer a Matter to an Inquiry by an Arbitrator in Terms of Section 188A of the LRA a Straitjacket?" 2016 *De Jure* 368; Cohen "Precautionary Suspensions in the Public Sector: *MEC for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2012 (LAC)" 2013 (34) *ILJ* 1706; Smit and Mpedi "An Update on Labour Law Developments From the South African Courts" 2012 *TSAR* 522; Moletsane "Challenges Faced by a Public Sector Employer That Wants to Dismiss an Employee Who Unreasonably Delays a Disciplinary Enquiry" 2012 13 *ILJ* 1568; Mischke "Delaying the Disciplinary Hearing: Strategies and Shenanigans" 2001 *Contemporary Labour Law* 21). It cannot be denied that many applicants approach the Labour Court on an urgent basis intent on either derailing the disciplinary proceedings or bypassing the dispute-resolution procedures set out in the Labour Relations Act (66 of 1995) (LRA). The reasoning in *Jiba* is generally considered to provide a definitive statement on the undesirability of intervening in uncompleted disciplinary proceedings:

> "Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during a disciplinary inquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145." (*Jiba supra* par 17; see also *Neumann v WC Education Department* (2021) 42 *ILJ* (LC) 561 par 13 (*Neumann*); *Ngobeni v PRASA* (2016) 37 *ILJ* 1704 (LC) par 14)

The statutory imperative of effective and expeditious dispute resolution means that the Labour Court will only intervene in pending disciplinary proceedings where truly "exceptional circumstances" are shown to exist

(*Steenkamp v Edcon Ltd* (2016) 37 *ILJ* 564 (CC) par 33 (*Steenkamp*); *CUSA v Tao Ying Metals Industries* (2008) 29 *ILJ* 2451 (CC) par 65; *Golding v Regional Tourism Organisation of Southern Africa* [2017] ZALCJHB 376 par 6. See also Van Niekerk "Speedy Social Justice: Structuring the Statutory Dispute Resolution Process" 2015 36 *ILJ* 837; Wallis "The Rule of Law and Labour Relations" 2014 35 *ILJ* 8491). If the Labour Court were to intervene readily in ongoing disciplinary inquiries, the vital role of statutory labour dispute-resolution forums would be negated. The LRA places a premium on the value of self-regulation (*NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) par 26 and 65; *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) par 47. See also Steenkamp and Bosch's "Labour Dispute Resolution Under the 1995 LRA: Problems, Pitfalls and Potential" 2012 *Acta Juridica* 120).

Section 158(1)(*i*) of the LRA confers on the Labour Court the discretion to grant interim relief subject to the applicant satisfying the prerequisites thereof. The applicant must establish that the application ought to be heard as one of urgency and, if so, must establish that they are entitled to interim relief (*State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma* [2021] ZACC 2 par 71; *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) par 41; *Ngoye v PRASA* [2021] ZALCJHB 21 par 21–30; *Mbana v FAWU* [2021] ZALCCT 2 par 20; *Neumann supra* par 16). Quite apart from the crucial requirement of urgency, the applicant has to scale over other well-known hurdles for granting interim relief as re-affirmed in countless cases. It is standard learning that the applicant must establish among other matters: (a) the existence of a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the absence of an alternative remedy (see e.g., *Mkasi v Department of Health: Kwa-Zulu Natal* [2019] ZALCD 4 par 20; *Golding v Regional Tourism Organisation of Southern Africa supra* par 6; *Moroenyane v Station Commander of SAPS-Vanderbijlpark* [2016] ZALCJHB 330 par 55).

An applicant for urgent relief must be open to a searching examination as to the reasons for the urgency, and the basis upon which it is said that substantial redress would not be obtained at a hearing in due course. The majority of applications for urgent interim relief collapse for lack of urgency. This is particularly so where urgency was entirely self-induced. It has been held:

> "Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary." (*Maqubela v SA Graduates Development Association* (2014) 35 *ILJ* 2479 (LC) par 32. See also *AMCU v Northam Platinum Ltd* (2016) 37 *ILJ* 2840 (LC) par 26)

Moreover, the Labour Court is unlikely to be persuaded that the urgent application was not an opportunistic attempt to scupper the disciplinary enquiry from proceeding (*Malehopo v Athletics SA* [2011] ZALCJHB 220 par

5 and 9). On the matter of self-induced urgency, the Labour Court in *Mthimkhulu* found that the time constraints were due to the applicant's conduct. The applicant was prodded to seek urgent relief largely because he was scheduled on 18 September 2020 to undergo an interview to become a pupil in the following year. The only reasonable inference was that the applicant "sought the blemish of him having been dismissed removed before the interview" (*Mthimkhulu supra* par 3). Moshoana J concluded that the court application had to be struck from the roll for that reason alone. Notwithstanding that a lack of urgency put paid to the applicant's case, the court went on to address the difficult and interesting questions concerning the interplay between a tactical resignation before the pronouncing of disciplinary penalty on the one hand, and the tricky issue of the jurisdiction of the Labour Court to invalidate a dismissal, on the other. The resolution of these issues brings into sharp focus the effect of post-resignation disciplinary action.

4 The legal principles of resignation

Resignation may be effected by conduct as well as words. It is the term ordinarily used to denote the termination of employment by the employee. Equally, dismissal is used to refer to termination by an employer. Like dismissal, the circumstances in which resignation can occur are layered (*TISO Black Star Group (Pty) Ltd v Ndabeni* [2020] ZALCJHB 187 par 17–19; *DA v Minister of Public Enterprises Solidarity Trade Union v Molefe* [2018] ZAGPPHC 1 par 57–65; *Sunshine Solutions (Pty) Ltd v Ngwenya* [2017] ZALCJHB 39 par 2–7 (*Sunshine Solutions*); *ANC v Municipal Manager, George Local Municipality* (2010) 31 *ILJ* 69 (SCA) par 5–9 (*George Local Municipality*); *Lottering v Stellenbosch Municipality* [2010] ZALCCT 42 par 2–3 (*Lottering*)). Resignation can arise from cancellation for breach, which is often rooted in the acceptance of repudiation. If the contract permits, resignation can manifest itself in the form of termination on notice. In *Sihlali v SABC* ((2010) 31 *ILJ* 1477 (LC) (*Sihlali*)), the resignation was held to be a unilateral termination of a contract of employment by the employee. Thus, as a rule, resignation brings an end to the contract of employment. It is underscored by "a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention" (*Sihlali supra* par 11; see also *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LAC) 772C–D; *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSSA) par 6 (*SALSTAFF obo Bezuidenhout*); *George Local Municipality supra* par 11). It is said that once an employee delivers a resignation to the employer it cannot be retracted. However, the employer may consent to a withdrawal. In the absence of such consent, it is a final and unilateral act by the employee (*Municipal Manager, George Local Municipality supra* par 11). In short, an employee needs to communicate their resignation to the employer for it to be effective (*Sunshine Solutions supra* par 36).

In general terms, voluntary resignation means that there is strictly no dismissal within the purview of section 186 of the LRA. Having said that, resignations are a trigger for allegations of constructive dismissal, which are

continually contested pursuant to section 186(1)(*e*) of the LRA. (Some prominent examples include *September v CMI Business Enterprise CC* (2018) 39 *ILJ* 987 (CC) par 10 (*September*); *Strategic Liquor Services v Mvumbi NO* 2010 (2) SA 92 (CC) par 4; *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) par 11–12; *Metropolitan Health Risk Management v Majatladi* (2015) 36 *ILJ* 958 (LAC) par 21). The link between resignation and subsequent constructive dismissal claims is palpable. Resignation avoids the odium of being dismissed. An employee is considered to have been constructively dismissed if the employer made continued employment unbearable. Expressed differently, by resigning the employee is saying in effect that the situation has become so intolerable that they can no longer fulfil their duties (*Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) 984E–F; *HC Heat Exchangers (Pty) Ltd v Araujo* [2019] ZALCJHB 275 par 49; *Bakker v CCMA* [2018] ZALCJHB 13 par 55–60 and 97–98. See also Tshoose "Constructive Dismissal Arising from Work-Related Stress: *National Health Laboratory Service v Yona & Others*" 2017 *Journal of Juridical Science* 121; Nkosi "The *President of RSA v Reinecke* 2014 3 SA 295 (SCA)" 2015 *De Jure* 18; Whitear-Nel and Rudling "Constructive Dismissal: A Tricky Horse to Ride: *Jordaan v CCMA* 2010 31 *ILJ* 2331 (LAC)" 2012 *Obiter* 193; Rycroft "The Intolerable Relationship" 2012 33 *ILJ* 2271).

Cheadle AJ comprehensively distilled the common-law rules relating to termination on notice by an employee as follows:

> "Notice of termination must be unequivocal – *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (SCA) 830E.
>
> Once communicated, a notice of termination cannot be withdrawn unless agreed – *Rustenburg Town Council v Minister of Labour* 1942 TPD 220 and *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).
>
> Termination on notice is a unilateral act – it does not require acceptance by the employer – Wallis *Labour and Employment Law* par 33, 5–10. This rule is disputed by the applicants in so far as it applies to notice not in compliance with the contract. The rule is accordingly dealt with more fully below.
>
> Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires – *SALSTAFF obo Bezuidenhout* par 6.
>
> If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay.
>
> If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages – *SA Music Rights Organisation v Mphatsoe* [2009] 7 BLLR 696 and *Nationwide Airlines (Pty) Ltd v Roediger* (2006) 27 *ILJ* 1469 (W).
>
> If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words, if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month – *Honono v Willowvale Bantu School Board* 1961 (4) SA 408 (A) 414H–415A." (*Lottering* par 15.1–15.7)

Furthermore, and with respect to the statutory landscape, the provisions of sections 37 and 38 of the Basic Conditions of Employment Act (75 of 1997)

(BCEA) are applicable. Section 37(1)(*c*) provides that a contract cannot be terminated at the instance of a party to the contract on notice of less than four weeks if an employee has been employed for a year or more. Section 38(2) read with subsection (1) stipulates that if an employee gives notice of termination and the employer waives any part of the notice, the employer must pay the remuneration the employee would have received if the employee had worked the full notice. It follows that although section 37(1)(*c*) requires an employee to give a minimum period of notice, section 38(2) permits an employer to waive any part of that notice if it pays the employee an amount equal to what the employee would have earned for the unworked part of the notice (*Lottering supra* par 34). If notice is given and not waived, the contract terminates on expiry of the notice. That said, if the employer waives any part of the notice, the contract terminates when the employee leaves work (i.e., at the commencement of the waived period). Where an employee has given notice to terminate but fails to work the notice, that failure constitutes a breach of contract entitling the employer to hold the employee to the contract (i.e., work out the notice) or cancel the contract. It is worth noting how section 37 or 38 affects the application of common-law principles to a failure to comply with the contract until its expiry at the end of a notice period. If an employer fails to pay an employee who works the full notice period, the employee can sue the employer for the remuneration earned for that work (*Lottering supra* par 37). Sections 37 and 38 do not alter the common-law principles in cases where an employer fails to pay an employee for working out their notice period. The same would apply to an employee who tenders to work the full period but is not permitted by the employer to do so. In the end, what sections 37 and 38 do is guarantee a minimum period of notice that may be waived by an employer. If waived, the employer must pay the employee an amount equivalent to what the employee would have earned had they worked out their full notice.

5 Effect of post-resignation disciplinary action

A central question that cannot be overlooked is: when does a resignation take effect? It bears repeating that the termination of a contract, particularly a contract of employment, has important consequences for the reciprocal rights and duties of the parties. Notably, statutorily and contractually, if required to do so, an employee is required to serve out their notice period, and once this notice period has been served, a resignation can be said to have taken effect. In a situation where an employee resigns without giving notice, they are in breach of the contract of employment (*Vodacom (Pty) Ltd v Motsa* (2016) 37 *ILJ* 1241 (LC) par 11 (*Vodacom*)). The general effect of a breach of contract is that an aggrieved party has a right, in response to repudiation, to accept the repudiation and make an election either to cancel and sue for damages or seek specific performance (*Segal v Mazaar* 1920 CPD 634 644–645; *Consol Ltd v Twee Jongee Gezellen (Pty) Ltd* 2005 (4) All SA 517 (C) 533–537. See also Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* 4ed (2012) 288–290; Christie and Bradfield *Christie's The Law of Contract in South Africa* 6ed (2011) 563–565). It must be added that judicial discretion to order specific performance within the overall sphere of employment relations is generally circumscribed (*Masetlha v President of the RSA* 2008 (1) SA 566 (CC) par

88; *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C) 78–81. For analysis, see Louw "'The Common Law … Not What It Used to Be': Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 3)" 2018 *PER/PELJ* 33; Mould "The Suitability of the Remedy of Specific Performance to Breach of a 'Player Contract' With Specific Reference to the *Mapoe* and *Santos* Cases" 2011 *PER/PELJ* 8). It should not, however, be assumed that there is an absolute bar to granting an order for the specific performance of a contract of employment. For example, in *Nationwide Airlines (Pty) Ltd v Roediger* [2006] JOL 17221 (W), an airline captain was held to his contractual undertaking to give three months' notice. In sum, mere resignation would not result in an abrupt end to an employment relationship.

As already indicated, the bedrock principle is that resignation is a unilateral act that does not require acceptance by the employer for it to be effective. In legal parlance, once an employee has resigned, they cease to be an employee of that employer. The critical question remains whether the termination has taken effect. This question is of particular importance since there are conflicting authorities regarding the powers of the employer to discipline an employee post-resignation. It has been held that resignation with immediate effect divests the erstwhile employer of disciplinary jurisdiction over the departing employee (*Mtati v KPMG Services (Pty) Ltd* (2017) 38 *ILJ* 1362 (LC) par 25 (*Mtati*)). The proposition in *Mtati* was given explicit support in an unreported decision in *Chiloane v Standard Bank of SA Ltd* (J2270/2018), handed down on 5 July 2018, when the Labour Court emphasised that the employer's power to discipline the employee ceased when she tendered an unequivocal resignation with immediate effect, but held that the employer could avail itself of common-law remedies.

In *Mahamo*, Mosito AJ stated that "the erstwhile employer had no power in our law to discipline its erstwhile employee. The disciplinary power reposes in the employer so long as the employment relationship subsists between the parties" (*Mahamo supra* par 24). The employee in *Mahamo* had purported to resign from her employment with immediate effect on 3 April 2006. The employer responded on 4 April, indicating that it still considered her as an employee until her disciplinary case had been finalised. On the same day, the employer served Ms Mahamo with disciplinary charges accusing her of gross dishonesty and/or theft. The hearing scheduled to take place on 10 April 2006 was postponed. In correspondence with the employer, Ms Mahamo made it clear that she would not attend the hearing scheduled for 13 April 2006, because she was no longer an employee. The hearing proceeded in her absence, and she was found guilty and dismissed. The conclusion in *Mahamo* was based on a trilogy of eSwatini decisions, namely*: Dludlu v Emalangeni Foods Industries* (IC Case No 47/2004) (*Dludlu*); *Rudolph v Mananga College* (IC Case No 94/2007) and *Mdluli v Conco Swaziland Ltd* (IC Case No 12/2004). In *Dludlu*, President of the Industrial Court of Swaziland PR Dunseith gave the following reasons for dismissing the employer's prerogative to exercise post-resignation disciplinary power:

> "Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance ... Whilst the Respondent took every effort to ensure that the disciplinary hearing was

> procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20th October 2000. The question whether the termination of the Applicant's services was fair and reasonable does not arise in circumstances where the Applicant has resigned and no case for constructive dismissal has been pleaded or established." (*Dludlu supra* par 15–15.2)

The approach endorsed in *Mtati* and related cases from eSwatini and Lesotho align with the reasoning of the minority judgment in *Toyota SA Motors (Pty) v CCMA* ((2016) 37 *ILJ* 313 (CC)) (*Toyota SA Motors*). Zondo J (as he then was) concluded:

> "Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer an employee of that employer, and that employer does not have jurisdiction over the employee anymore." (*Toyota SA Motors supra* par 142)

At this juncture, it is apposite to deal with the contrary views expressed in *Mzotsho v Standard Bank of South Africa (Pty) Ltd* (Case J2436-18), delivered on 24 July 2018 (*Mzotsho*), and in *Coetzee v Zeitz Mocca Foundation Trust* ((2018) 39 *ILJ* 2529 (LC)). In the former case, Whitcher J dealt with an instance where an employee resigned immediately upon being given notice to attend a disciplinary hearing. She concluded that the contractual power to discipline endured. This conclusion is at variance with the reasoning of the minority in *Toyota*. In the latter case, the approach of the Labour Court appears to suggest that *Mtati* stands on shaky grounds since the correct reflection of the law is the one laid down in *Vodacom*. *Vodacom* restated the contractual principle that an employer who is confronted with an immediate resignation in breach of the contract of employment may hold the employee to the contract by seeking an order for specific performance. Since it is accepted that resignation terminates the contract of employment unilaterally, the practical effect of an order of specific performance would be to reinstate the contract and direct performance in accordance with its terms.

The *Naidoo* case is particularly instructive for present purposes. It arose out of the bank's attempts to discipline its employees after they tendered their resignation with immediate effect. The employees challenged the bank's jurisdiction to continue with the disciplinary hearing after their resignation with immediate effect. They also sought to interdict the bank from proceeding with and finalising a disciplinary hearing after their resignation. In granting interim relief in favour of the applicants, Nkutha-Nkontwana J noted that the bank was not deprived of remedies, but self-help was not one of them and the court could not sanction it (*Naidoo supra* par 29). The proposition that "once the employer elects to hold the employee to the terms of the contract, it must enforce that election by means of a court order" (*Naidoo supra* par 25) is out of line and cannot be supported. Moshoana J explains:

> "What obtains is an election. The correct legal position may be summed up as being, where one party to a contract, without lawful grounds indicates to the other party an unequivocal intention no longer to be bound by the contract, that party is said to repudiate the contract. Where that happens, the other

> party to the contract may elect to accept the repudiation and rescind the contract. If s/he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated. An aggrieved/innocent party by making an election not to rescind as a party to the contract keeps the contract alive. Should the aggressor persist with the repudiation the aggrieved may approach a Court of law on the strength of the same contract to compel the aggressor to comply with its contractual obligation. What keeps the contract alive is not an order for specific performance but an election by the aggrieved party. Specific remedy is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract. It is a remedy and not a right, whereas an election is a right available to an innocent party." (*Mthimkhulu supra* par 13 and the authorities cited therein)

It is clearly of critical importance for an aggrieved employer to exercise an election when faced with an employee who is contractually obliged to serve a notice period but evinces no intention to do so. If the aggrieved employer chooses to end the contract, it will be that election that ends the contract.

6 Effect of resignation prior to the announcement of a sanction of dismissal

It will be recalled that at issue in *Mthimkhulu* was the legal effect of resignation before the announcement of a disciplinary sanction. The key to deciding whether the tactical resignation of Mthimkhulu had a legal effect is not to lose sight of the fact that, when disciplinary steps were set in motion, he had not yet resigned. The short answer, therefore, is that the resignation before the announcement of a sanction of dismissal had no legal effect. In sporting parlance, "the Bank was still entitled to tackle the ball since it elected to keep the playing field – the contract of employment – alive or open for play" (*Mthimkhulu supra* par 15). Moshoana J explained why it is necessary to cut to the chase and adopt an uncompromising stance:

> "The resignation by Mthimkhulu is nothing but a stratagem. He knew very well that the inevitable consequences would be a sanction of dismissal. An employee who resigns in the face of a disciplinary enquiry cannot claim constructive dismissal. What Mthimkhulu did was an attempt to be the first man on the ball. Having done so he argues that the Bank cannot tackle the ball away from him. Of course, it is not too difficult to observe that the resignation was nothing but a beguiler." (*Mthimkhulu supra* par 8)

It must be appreciated that the contract of employment was not cancelled by the Bank despite the repudiation by Mthimkhulu. The election to resile lies with the aggrieved party and not the aggressor. In short, the answer to the essential question is that resignation prior to the announcement of a sanction of dismissal has no legal effect.

7 Jurisdiction of the Labour Court to invalidate unlawful dismissal

The second contention of the applicant in *Mthimkhulu* raises closely related threshold questions concerning whether the Labour Court has jurisdiction to set aside a dismissal on the one hand, and on the other, the power to

entertain a dismissal dispute if it has not been referred to conciliation as required by section 191(5) of the LRA. The question of whether the Labour Court is empowered to determine the setting aside of dismissal has caused some difficulty since the pronouncements in *Solidarity v SABC* (2016 (6) SA 73 (LC)) (*SABC 8*). It will be remembered that in the *SABC 8* case, Lagrange J upheld the applicant's case of unlawful dismissal for contravening the public broadcaster's suppressive Protest Policy. It must be reiterated that the LRA does not envisage invalid or unlawful dismissals (notably, *Steenkamp supra* par 104–108; *Ngoye v PRASA supra* par 16–20; *Baloyi v Public Protector* [2020] ZACC 27; *Phahalane v SAPS* (2021) 42 *ILJ* 184 (LC); *Chubisi v SABC (SOC)* (2021) 42 *ILJ* 395 (LC); *James v Eskom Holdings SOC Ltd* (2017) 38 *ILJ* 2269 (LAC) par 21–25. See also Maloka "Jurisdictional Quandaries Triggered by a New Variant for Dismissal" 2021 34 *SA Merc LJ* 106). It can be fairly asserted that when an applicant claims that a dismissal is unlawful as opposed to unfair, there is no remedy under the LRA (*Mthimkhulu supra* par 17). In short, the Labour Court has no jurisdiction to make any determination of unlawfulness.

The argument concerning the power of the Labour Court to adjudicate a dismissal dispute that has not been referred to conciliation brings to the table a barrier. It is settled law that referral of a dismissal dispute to conciliation is a precondition to the Labour Court's jurisdiction. The fuller implications of this prescription are that non-compliance with conciliation formalities, including referral for conciliation, is a jurisdictional bar to the Labour Court hearing the unfair-dismissal claim (*NUMSA v Driveline Technologies (Pty) Ltd* (2000) 21 *ILJ* 142 (LAC) par 73; *September supra* par 17–18; *Uber SA Technological Services (Pty) Ltd v NUPSAWU* (2018) 39 *ILJ* 903 (LC) par 4–16. See also Maloka "Penetrating the Opacities of the Form: Unmasking the Real Employer Remains Labour Law's Perennial Problem" 2018 *Speculum Juris* 135). A restrictive approach to the interpretation of section 191 is buttressed by antecedent South African labour-law experience of nearly a century (*NUMSA v Intervalve* (2014) ZACC 35 par 116–129). Section 157(5) of the LRA specifically provides that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires the dispute to be resolved through arbitration. In the present matter, the application fell to be dismissed for lack of jurisdiction. It cannot be said that

> "what befell Mthimkhulu is a dismissal within the meaning of section 186 of the LRA read with section 213. In terms of the LRA where a dismissal is for reasons of misconduct, as is the case for Mthimkhulu, the fairness of that dismissal is justiciable at the CCMA." (*Mthimkhulu supra* par 18)

In the end, nothing prevented Mthimkhulu from challenging the fairness of his dismissal before the purpose-built labour dispute-resolution forum.

8 Concluding remarks

The decision in *Mthimkhulu* underscores the point that a tactical resignation has no legal effect. The employer retains disciplinary power over a departing employee notwithstanding resignation with immediate effect. Simply put on that analysis, the employer is entitled to continue with disciplinary proceedings to their conclusion. Stated otherwise, resignation cannot

forestall the institution of disciplinary action or interrupt a workplace inquiry already in motion. The important feature of *Mthimkhulu* relates to the labour litigation processes under the LRA. The judgment underscores the fact that the scheme of the LRA makes referral to conciliation a mandatory first step that may ultimately lead to adjudication. It must be emphasised that the mandatory nature of conciliation as a requirement for arbitration also serves to clothe the Labour Court with jurisdiction. On the crisp jurisdictional question, the benchmark of *Steenkamp* is that the Labour Court lacks jurisdiction to make any determination of unlawfulness. Stated otherwise, the concepts of "invalidity", "unlawfulness" or "wrongfulness" are alien to the scheme of unfairness envisaged in the overall scheme of the LRA unfair-dismissal dispensation. The overall message conveyed in *Mthimkhulu*, respectfully, is clear: a resignation prior to the pronouncement of sanction of dismissal is nothing but a beguiler. In a nutshell, escape artists who resign before the finalisation of disciplinary proceedings, ostensibly to avoid accountability, will be held to account.

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