A CRITICAL APPRAISAL OF THE IMPLICATIONS OF A TACTICAL RESIGNATION: SOME PERSPECTIVES FROM SOUTH AFRICA, ESWATINI AND LESOTHO

BY

NKHENSANI PRECIOUS MAOLANA

SUBMITTED IN ACCORDANCE WITH THE REQUIREMENTS

FOR THE DEGREE OF

MASTER IN LABOUR LAW

AT THE

UNIVERSITY OF LIMPOPO

SUPERVISOR: PROF. TC MALOKA

23 MAY 2023

Table of Contents

ABSTRACT

It is settled law that an employee is at liberty to voluntarily end his or her employment contract by resigning subject to serving a notice period. If an employee fails to serve a notice period, that constitutes breach of contract of employment. The usual contractual remedies for breach apply. A familiar problem encountered in labour relations environment is pre-emptive resignation with immediate effect by employees under suspension pending the institution of disciplinary charges. Also prevalent are resignations while disciplinary proceedings are in process. The ultimate of purpose strategic resignation is evasion of accountability for alleged workplace misconduct. Additionally, premeditated resignation is intended to divest the employer of disciplinary jurisdiction with the departing misconducting employee asserting that she has ceased to be the employee.

The important question for critical consideration is the legal effect of resignation on the employer's disciplinary jurisdiction over escaping employee. This question warrants close scrutiny and extended study in light of conflicting authorities on the powers of the employer to discipline an employee post the resignation from South Africa, eSwatini and Lesotho. The message emerging from three leading eSwatini cases namely: *Dludlu v Emalangeni Foods Industries* [2007] SZIC 21, *Rudolph v Mananga College* [2007] SZIC 17 and *Mdluli v Conco Swaziland Ltd* [2009] SZIC 12 is that resignation with immediate effect deprives the erstwhile employer of disciplinary power over the departing employee. Likewise, the Lesotho Labour Appeal Court in *Mohamo v Nedbank Lesotho Ltd* [2011] LSLAC 9 has held that a former employer has no right to proceed against an employee who has resigned. The implications of the jurisprudential posture from the Kingdoms is that escape artists are shielded from accountability and accorded a free pass to simply disappear into the sunset.

While the approach taken in eSwatini cases and by the LSLAC in *Mohamo* is in line with the minority of judgement Zondo J in *Toyota SA Motors (Pty) v CCMA* (2016) 37 *ILJ* 313 (CC); a different stance emerges in key cases such *Mzotsho v Standard Bank of SA (Pty) Ltd* (unreported case number J2436/18 of 24 July 2018), *Coetzee v Zeitz Mocca Foundation Trust* (2018) 39 *ILJ* 2529 (LC), *Naidoo v Standard Bank SA Ltd* (2019) 40

ILJ 2589 (LC) and *Mthimkhulu v Standard Bank of SA* (2021) 42 *ILJ* 158 (LC). To illustrate, in *Mzotsho*, the LC determined that the contractual power to discipline endured despite the fact that an employee resigned immediately upon being given a notice to attend a disciplinary hearing. The clear message from the recent LC decision in *Mthimkhulu* is that that the resignation before the announcement of a sanction of dismissal has no legal effect.

DECLRATATION BY SUPERVISOR

I, Prof TC Maluka, hereby declare that this mini dissertation for the degree of Masters of Laws (LLM) in Labour law by Ms Nkhensani Precious Maolana be accepted as examination.

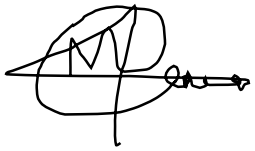
Signed:

Date: 2023

Prf. TC MALUKA

DECLARATION BY STUDENT

I, Nkhensani Precious Maolana, declare that this mini dissertation for the degree of Masters of Laws (LLM) in Labour Law at the University of Limpopo hereby submitted, has not been previously submitted by me for a degree at this or any other university. This is my own work in design and execution and all materials contained herein have been duly acknowledged.

Signed: 

Date: 2023

DEDICATION

I dedicate this mini – dissertation to my parents, Adelede Maolana my mother and John Soto my father for believing in me throughout my academic life and the sacrifices they have made just so that I can have a better future.

ACKNOWLEDGEMENTS

Ndza khensa unto the LORD God almighty. Being among the young, educated, and influential black women in my town has always been a dream of mine, and I'm grateful that it's now on the verge of coming true.

Additionally, I want to express my gratitude to my supervisor, professor Maluka. I would not have completed this dissertation if it was not for his guidance. I have learned so much. Without a doubt, I can state that my research skills have significantly improved, and it's all thanks to him.

I will always be indebted to my family for their love and support as they helped me on this journey.

Finally, I want to thank myself for persevering. I rose to the occasion, and now I can look back and say, 'I Precious Maolana accomplished this!'.

LIST OF ABBREVIATIONS AND ACRONYMS

BC – BARGAINING COUNCIL

BCEA – BASIC CONDITIONS OF EMPLOYMENT ACT

CC – CONSTITUTIONAL COURT

CCMA – COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

CANLII – CANADIAN LEGAL INFORMATION INSTITUTE

CEPPWAWU – CHEMICAL, ENERGY, PAPER, PRINTING, WOOD AND ALLIED WORKERS' UNION

DA – DEFENCE ACT

EAT – EMPLOYMENT APPEAL TRIBUNAL

EEA – EMPLOYMENT EQUITY ACT

ILJ – INTERNATIONAL LAW JOURNAL

LSLAC – LESOTHO LABOUR APPEAL COURT

LRA – LABOUR RELATIONS ACT

MEC – MEMBER OF THE EXECUTIVE COUNCIL

NEDLAC – NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

NPA – NATIONAL PROSECUTING AUTHORITY

NUMSA – NATIONAL UNION OF METALWORKERS UNION OF SOUTH AFRICA

NZEMPC – EMPLOYMENT COURT OF NEW ZEALAND

PPWWAU – PAPER, PRINTING WOOD AND ALLIED WORKERS' UNION

PELJ – POTCHEFSTROOM ELECTRONIC LAW JOURNAL

PSA – PUBLIC SERVICE ACT

POPCRU – POLICE AND PRISONS CIVIL RIGHTS UNION

SA – SOUTH AFRICA

SACCAWU – SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION

SADC – SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

SAFLII – SOUTHERN AFRICAN LEGAL INFORMATION INSTITUTION

SANDF – SOUTH AFRICAN NATIONAL DEFENCE FORCE

SAPA – SOUTH AFRICAN POLICE ACT

SCA – SUPREME COURT OF APPEAL

SMS – SHORT MESSAGE SERVICE

TABLE OF CASES

eSwatini

Dludlu v Emalangeni Foods Industries [2007] SZIC 21

Mdluli v Conco Swaziland Ltd [2009] SZIC 12

Rudolph v Mananga College [2007] SZIC 17

Lesotho

Mahamo v Nedbank Lesotho [2011] LSLAC 9

Pekeche v Thabane 1998 LSCA 50

The White Horse Party v Judicial Service Commission [2020] LSHC 57

Australia

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

Canada

SJBRWDSUL v Canada Safeway Ltd [2007] CanLII 71031

New Zealand

Air New Zealand v Grant Kerr [2013] NZEmpC 153 ARC 38/13)

United Kingdom

Credit Suisse v Armstrong [1996] ICR 882

Justice v Hibbert UKEAT 0289 13 3007

Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183

Martin v Yeomen Aggregates Ltd [1983] ICR 314

TABLE OF STATUTES

Basic conditions of employment act 75 of 1997

Constitution of the RSA Act 103 of 1996

Defence Act 42 of 2002

Insolvency Act 24 of 1936

Labour relations act 66 of 1995

Public Service Act 103 of 1994

South African Police Act 68 of 1995

CHAPTER ONE

CONCEPTUALISATION AND FRAMEWORK OF THE STUDY

1.1 Framing the Issues

Section 23 of the 1996 Constitution proclaims that everyone has the right to fair labour practices. This right to fair labour practices extends to employees and employers alike, although for employees it affords security of employment.[1] The 'right to fair labour practice' lacks a precise definition and as a result it is up to the courts to give meaning and determination to the concept.[2] The courts play a vital role in ensuring that the rights contained in section 23(1) are honoured.[3] The Labour Relations Act 66 of 1995 ('LRA') enhances employment security by providing in section 185 that every employee has the 'right not to be unfairly dismissed'. The LRA is a vital component of an employment relationship contemplated by the Constitution founded on openness, democracy, social justice, and human rights.[4] The LRA was promulgated to give effect to the fundamental rights conferred by section 23 of the Constitution.

Relevantly, the constitutional norm of accountability must at all times be observed, fulfilled and respected within the sphere of employer-employee relations.[5] Simply put, employees who have contravened workplace rules must be held to account. Implicit in section 188 of the LRA is a right to dismiss for reasons of misconduct, incapacity and operational requirements. In taking disciplinary measures against misconducting employees or incapacity proceedings in case of underperforming employees, the employer is invoking its right to fair labour practices. As corollary to the

---

[1] Schooling, S 'Does an Employer Have A Constitutional Right To Fair Labour Practices?' 2003 *Contemporary Labour Law* 45.

[2] *NEHAWU v UCT* 2003 (3) SA 1 (CC) para 40; *FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 *ILJ* 1213 (CC) paras 36-37; *AMCU v Royal Bafokeng Platinum Ltd* (2020) 41 *ILJ* 555 (CC) paras 47-54.

[3] *Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) para 7.

[4] Van Niekerk, A 'In search of justification: The Origins of the Statutory Protection of Security of Employment in South Africa' (2004) 25 *Industrial Law Journal* 853, 'Speedy Social Justice: Structuring the Statutory Dispute Resolution Process' (2015) 36 *Industrial Law Journal* 837 and 'The Labour Courts, Fairness and the Rule of Law' (2015) 36 *Industrial Law Journal* 2451; Wallis, M 'The Rule of Law and Labour Relations' 2014 35 *Industrial Law Journal* 849.

[5] Botha, M 'The Different Worlds of Labour and Company Law: Truth or Myth?' (2014) *Potchefstroom Electronic Law Journal* 17.

right not to be unfairly dismissed and being subjected to unfair labour practice lies the right to dismiss fairly and to practice fair labour practices.[6]
Unravelling the resignation and its effect is the central concern of this study. Resignation is a unilateral termination of employment relationship by the employee without requiring acceptance by the employer.[7] It should be noted that a termination of a contract, particularly a contract of employment has important consequences for the reciprocal rights and duties of the parties. Statutorily and contractually, an employee is required to serve out his or her notice period, if required and once this notice period has been served, the resignation can be said to have taken effect. The general effect of breach of contract is that an aggrieved party has as 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.[8] In sum, mere resignation does not result in an abrupt end to an employment relationship.
The scope of statutory employment protection on dismissal is shaped by jurisdictional hurdles. In order to be able to bring a claim for unfair dismissal, the first obstacle an applicant must cross is that of eligibility. There are a number of reasons why she may be ineligible. The first requirement is that the applicant must be an employee.[9] The definition of employee is that contained in sections 213 of the act.[10] Section 200A of the LRA does also

[6] *SABC (Soc) Ltd v Keevy* [2020] ZALCJHB 31 para 51.

[7] *Sihlali v SABC* [2010] 5 BLLR 542 (LC) para 11 (*Sihlali*).

[8] McGregor, M *et al*, *Labour Law Rules* (Siber Ink, 2017) 51.

[9] See generally, *Jack v Director-General Department of Environmental Affairs* [2003]1 BLLR 28 (LC); *Wyeth SA (Pty) Ltd v Manqele* (2005) 26 *ILJ* 749 (LAC); *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256(LAC); *Woolworths (Pty) Ltd v Whitehead* [2006] 6 BLLR 640 (LAC); *ER24 Holdings v Smith NO* 2007 (6) SA 147 (SCA); *Discovery Health Ltd v CCMA* (2008) 29 *ILJ* 1480 (LC); *SITA v CCMA* (2008) 29 *ILJ* 2234 (LAC); *Phaka v Bracks NO* (2015) 36 *ILJ* 1541 (LAC); *Vermooten v DPE* (2017) (38) *ILJ* 607 (LAC); *SA Metal (Pty) Ltd v Holroyd* [2020] ZALCJHB 32. For analysis, see Maloka, T and Okpaluba, C 'Making Your Bed As An Independent Contractor But Refusing 'To Lie On It': Freelancer opportunism' (2019) *South African Mercantile Law Journal* 54; Benjamin, P 'An Accident Of History: Who Is (And Who Should Be) An Employee Under South African Labour Law' (2004) 25 *ILJ* 787; Le Roux, R 'The Meaning of 'Worker' and The Road Towards Diversification: Reflecting on *Discover*y, *SITA* and *Kylie*' (2009) 30 *Industrial Law Journal* 49; Christianson, M 'Defining who is an employee: A review of the law dealing with the differences between employees and independent contractors' (2001) *Contemporary Labour Law* 21; Manamela, E 'Employee and independent contractor: The distinction stands' (2002) *South African Mercantile Law Journal* 107; Van Niekerk, A 'Employees, independent contractors and intermediaries: The definition of employee revisited' (2005) *Contemporary Labour Law* 1 and 'Personal service companies and the definition of "employee"' (2005) 26 *Industrial Law Journal* 1909.

provide a presumption of who an employee is.[11] The second jurisdictional hurdle concerns the existence of dismissal. The applicant must also demonstrate that there was a dismissal.[12] The categories of dismissal are to be found in section 186(1) (*a*)-(*f*) of the LRA.[13] The onus is on the employee

---

[10] Section 213 of the LRA defines an employee as:

a. Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration, and
b. any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee"

[11] Presumption as to who is employee
(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
a. the manner in which the person works is subject to the control or direction of another person
b. the person's hours of work are subject to the control or direction of another person
c. in the case of a person who works for an organisation, the person forms part of that organisation;
d. the person has worked for that other person for an average of at least 40 hours per month over the last three months;
e. the person is economically dependent on the other person for whom he or she works or renders services;
f. the person is provided with tools of trade or work equipment by the other person; or
g. the person only works for or renders services to one person. (2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.
(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.
(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.

[12] Section 192(1) of the LRA.

[13] S 186(1) of the LRA states that 'Dismissal' means that –
(a) an employer has terminated a contract of employment with or without notice.
(b) An employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
(c) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment.
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

to prove dismissal, so that if there is any dispute on this point before a labour tribunal she goes first. Thus, if the employer succeeds in showing that the contract was terminated by the resignation of the employee or by the mutual agreement,[14] the employee will not be treated as dismissed. Resultantly, the Commission for Conciliation, Mediation and Arbitration (CCMA) or Bargaining Council (BC) would not have jurisdiction to entertain the alleged dismissal dispute. [15]

Although direct dismissal is generally obvious at first sight, there can be no doubt as to the fact that there are also situations in which it is not so clear cut to determine whether the employee has been dismissed,[16] or whether the termination or dismissal has been caused by the employer.[17]

More specifically in circumstances of termination of employment by operation of law or deemed dismissal. Deemed dismissal/discharge arises when a public sector employee absents himself or herself from his or her official duties without permission of his or her employer for a period exceeding one calendar month. In case of public sector employee, section 17(3) of the Public Service Act 103 of 1994 (PSA) can be invoked.[18] Absconding educator faces discharge in terms of section 14 of the Employment of Educators Act 76 of 1998 (EEA).[19]

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employer.

(f) An employee terminated a contract with or without notice because the employer, after a transfer in terms of section 197 or 197A, provided the employee with conditions of service that are substantially less favourable to the employer than those provided by the employer.

[14] *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd* (2016) 37 *ILJ* 2723 (CC) (*Gbenga-Oluwatoye*).

[15] Section 191 of the LRA.

[16] *Molefe v Eskom Holdings SOC* [2017] ZALCJHB 281; *DA v M of Public Enterprises; Solidarity TU v Molefe* [2018] ZAGPPHC 1.

[17] Dekker, A 'Gone with The Wind and Not Giving a Damn: Problems and Solutions in Connection with Dismissal Based on Desertion' (2010) *South African Mercantile Law Journal* 22; Parsee, L 'Absenteeism in the workplace: analyses' (2008) *South African Mercantile Law Journal* 20.

[18] *Grootboom v NPA* 2014 (2) SA 68 (CC); *Grootboom v NPA* (2013) 34 *ILJ* 282 (LAC); *Ramonetha v Department of Roads and Transport, Limpopo* [2018] 1 BLLR 16 (LAC); *MEC for Dept of Health v DENOSA obo Mangena* [2014] 4 BLLR 393 (LC). See also Mathiba, M 'Deemed Dismissals and Suspensions in the Public Sector *Grootboom v National Prosecuting Authority* 2014 ILJ 121 (CC)' (2015) *Obiter* 223.

[19] See for e.g., *Phethini v Minister of Education* (2006) (27) *ILJ* 477 (SCA); *MEC: Department of Education, Eastern Cape v Batwini* 2018 ZALCPE 3. See also Van der Walt, A, Abrahams, D & Qotoyi, T 'Regulating the termination of employment of absconding employees in the public sector and public education in South Africa' (2016) *Obiter* 140.

In the case of the defence force members, a delinquent soldier's services can be terminated after absence of 30 days in terms of section 59(3) Defence Act 42 of 2002.[20] Section 36(1) of the South African Police Act 68 of 1995 (SAPA) is designed to deal with the discharge of a member if he/she has been convicted and sentenced to a term of imprisonment.[21] In short, termination of employment by operation of law forecloses an unfair dismissal claim. A key step in accessing the protective ambit of the LRA starts with an employee discharging the onus of establishing the existence of dismissal in terms of section 192 of the LRA.[22]

Given the serious challenges of accountability, good governance and systematic corruption which are located in the sphere of employment, it should be apparent that the principal response of enablers of State Capture is to escape accountability by simply resigning. Indeed, resignation impinges on the broader question of accountability.[23]

It is therefore unsurprising that the typical reaction that employees under suspension with looming institution of disciplinary charges is to pre-emptively resign with immediate effect. Added to this are resignations while the disciplinary proceedings are in process. The eventual of purpose strategic resignation is evasion of accountability for alleged workplace misconduct. More importantly, premediated resignation is intended to divest the employer of disciplinary jurisdiction with the misconducting employee asserting that she has ceased to be the employee.

1.2 Problem Statement

The important question for critical consideration is the legal effect of resignation on the employer's disciplinary jurisdiction over escaping employee. This question warrants close scrutiny and extended study in light of conflicting authorities on the powers of the employer to discipline an employee post the resignation from South Africa, eSwatini and Lesotho. The message emerging from three leading eSwatini cases namely*: Dludlu v*

[20] See *Maswanganyi v Minister of Defence and Military Veterans* (2020) 41 *ILJ* 1287 (CC): *Minister of Defence and Military Veterans v Mamasedi* 2018 (2) SA 305 (SCA).

[21] See *Sello v Divisional Commissioner, HRD, SAPS* [2016] ZALCJHB 347.

[22] Section 192 of LRA.

[23] Thabane, T and Snyman-Van Deventer, E 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) *Potchefstroom Electronic Law Journal* 21*;* Lufuno Nevondwe, Kola Odeku, and Itumeleng Tshoose, 'Promoting the Application of Corporate Governance in the South African Public Sector' (2014) *Journal Social Sciences* 40.

Emalangeni Foods Industries[24]; *Rudolph v Mananga College*[25]; and *Mdluli v Conco Swaziland Ltd*[26] is that resignation with immediate effect deprives the erstwhile employer of disciplinary power over the departing employee. Similarly, in the Mountain Kingdom Mosito AJ in *Mohamo v Nedbank Lesotho*[27] has held that a former employer has no right to proceed against an employee who has resigned. While the approach taken in eSwatini cases and by the Lesotho Labour Appeal Court (LSLAC) in *Mohamo* mirror the minority of judgement *Zondo* J in *Toyota SA Motors (Pty) v CCMA*;[28] a different stance emerges in key cases such as *Mzotsho v Standard Bank of SA (Pty) Ltd*,[29] *Coetzee v Zeitz Mocca Foundation Trust*,[30] *Naidoo v Standard Bank SA Ltd*[31] and *Mthimkhulu v Standard Banks of SA*.[32] To illustrate, in *Mzotsh*o, the LC determined that the contractual power to discipline endured despite the fact that an employee resigned immediately upon being given a notice to attend a disciplinary hearing. The clear message from *Mthimkhulu* is that the resignation before the announcement of a sanction of dismissal has no legal effect.

1.3 Aims and Objectives

First, to determine the implications of tactical resignation pending the institution of disciplinary charges and/or while disciplinary proceedings are underway. Second, to examine the South Africa approach to pre-emptive resignations with parallel developments from neighbouring Kingdom jurisdictions of eSwatini and Lesotho. Third, are there any lessons South Africa can distil from "*smallanyana*"[33] kingdom jurisdictions of eSwatini and

[24] *Dludlu v Emalangeni Foods Industries* [2007] SZIC 21 (*Dludlu*).
[25] *Rudolph v Mananga College* [2007] SZIC 17 (*Rudolph*).
[26] *Mdluli v Conco Swaziland Ltd* [2009] SZIC 12 *(Mdluli*).
[27] [2011] LSLAC 9 (*Mahamo*).
[28] (2016) 37 *ILJ* 313 (CC) (*Toyota SA Motors*).
[29] [Unreported case number J2436/18 of 24 July 2018] (*Mzotsho*).
[30] (2018) 39 *ILJ* 2529 (LC) (*Coetzee*).
[31] (2019) 40 *ILJ* 2589 (LC) (*Naidoo*).
[32] (2021) 42 *ILJ* 158 (LC) (*Mthimkhulu*).
[33] The phrase 'smallanyana' went viral after the former Social Development Minister Bathabile Dlamini famously said that most politicians have 'smallanyana skeletons' lurking. Noxolo, M 'Smallanyana Skeletons of Our Politicians' (2017) *HUFFPOST* <https://www.huffingtonpost.co.uk/2017/10/16/top-five-smallanyana-and-not-so-smallanyana-skeletons-of-our-politicians_a_23244483/>accessed 4 July 2021. The word "nyana" is a miniature conjunction in the Sesotho language, meaning "very small".When combined with the English word "small" it loosely translates to 'tiny-little".Diseko L, 'How Jacob Zuma's presidency shaped South Africa' (2018) BBC News <

Lesotho? Lastly, the overarching objective is to bring to surface the extent to which the norm of accountability is observed, fulfilled and respected in a nascent constitutional democracy under strain,[34] and at the margins of Southern African Development Community (SADC) an insecure absolute monarchy of eSwatini[35] and a fragile constitutional monarchy of Lesotho.[36]

---

https://www.bbc.com/news/world–Africa-4230752-How Jacob Zuma's presidency shaped South African speech - BBC News/
>accessed 18 May 2023.

[34] See for example, *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* [2021] ZACC 28, *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* [2021] ZACC 18; *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* [2021] ZACC 2. In the aftermath of former President Zuma's incarceration anarchy in engulfed parts of Gauteng and Kwa-Zulu Natal. Erasmus, D 'SANDF Deployed to Contain KZN and GP violence and looting in Wake of Incarceration of Jacob Zuma' *Daily Maverick* (2021) <https://www.dailymaverick.co.za/article/2021-07-12-breaking-sandf-to-be-deployed-to-contain-kzn-and-gp-violence-and-looting-in-wake-of-incarceration-of-jacob-zuma/>accessed 10 August 2021.

[35] Tsunga, T and Mazarura, A 'Eswatini Crisis: Time to Rethink and Allow Multiparty Democracy' (2021) *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-07-18-eswatini-crisis-time-to-rethink-governance-and-allow-multiparty-democracy/> accessed 10 August 2021; Fabricius, P 'King Mswati Ignores Calls for Change in First Response to ESwatini Crisis' https://www.dailymaverick.co.za/article/2021-07-16-king-mswati-ignores-calls-for-change-in-first-response-to-eswatini-crisis/; Kasambala, T 'Cry for Regional Help: Southern African Leaders Must Stand with Eswatini People in their Demands for Urgent Political and Economic Reform' (2021) *Maverick Citizen* <https://www.dailymaverick.co.za/article/2021-07-06-cry-for-regional-help-southern-african-leaders-must-stand-with-eswatinis-people-in-their-demands-for-urgent-political-and-economic-reform/>accessed 30 August 2021.

[36] For instance, SADC's endless mediation reforms: Aerni-Flessner, J 'Lesotho at 50: The Politics of Dysfunction or the Dysfunction of Politics?' (2016) *Daily Maverick* <https://www.dailymaverick.co.za/article/2016-10-04-lesotho-at-50-the-politics-of-dysfunction-or-the-dysfunction-of-politics/>accessed 20 August 2021; Ngatane, N 'Rethinking SADC Borders: The Case of Lesotho' (2018) *Daily Maverick* <https://www.dailymaverick.co.za/article/2018-11-04-rethinking-sadc-borders-the-case-of-lesotho/ >accessed 1 October 2021; Fabricius, P 'Lesotho Government Agrees to Allow Prime Minister Tom Thabane a Dignified Exit' 2020 *Daily Maverick* https://www.dailymaverick.co.za/article/2020-04-20-lesotho-government-agrees-to-allow-prime-minister-tom-thabane-a-dignified-exit/>accessed20 August 2021 ; Mills, G and Nwokolo, MN 'Lesotho under its New Prime Minister: Time to Think Out of the Box' (2020) Daily *Maverick* <https://www.dailymaverick.co.za/article/2020-05-22-lesotho-under-its-new-prime-minister-time-to-think-out-of-the-box/ >accessed 20 August 2021. See generally, Nyane, H 'Revisiting the Powers of the King under the Constitution of Lesotho: Does the He Still Have Any Discretion' (2020) *De Jure* 11; 'Bicameralism in Lesotho: A Review of the Powers and Composition of the Second Chamber' (2019) *Law, Democracy and Development* 2 and 'The Constitutional Rules of Succession to the Institution of Monarch in Lesotho' (2019) *Potchefstroom Electronic Law Journal* 24. For a glimpse into the problems afflicting the judiciary, see Sehapi, R *SADC LA Report on the*

1.4 Literature Review

Although resignation and dismissal are siblings that dominate the exit process from employment, there are other means of bring end to the relationship. Cessation of employment can be triggered by demise,[37] insolvency,[38] in appropriate circumstances ill-health and disability,[39] imprisonment,[40] expiry of fixed-term contract,[41] as well by mutual separation.

Termination of contract by mutual agreement merits elaboration. One of the purposes of the LRA is to provide ways in which labour disputes can be resolved.[42] It further empowers parties in a labour dispute to resolve the matter by way of concluding a mutual agreement to resolve the matter.[43] Acceptance by an employee of a sum of money in return for agreeing to terminate the employment contract constitutes a consensual termination of

---

Independence of the Judiciary in the Kingdom of Lesotho - Sehapis' Blog 22 March 2021; *The White Horse Party v Judicial Service Commission* [2020] LSHC 57.

[37] Grogan, J *Workplace Law* (Juta, 2009) 159.

[38] Section 38 of the Insolvency Act 24 of 1936. See e.g. *Marais v Shiva Uranium (Pty) Ltd (In Business Rescue)* (2019) 40 *ILJ* 177 (LC); *SA Airlink (Pty) Ltd v SAA (SOC) Ltd (In Business Rescue)* and *BRPs* [Case No. 2020/01078 2 March 2020]; *SA Airlink (Pty) Ltd v SAA (SOC) Ltd* [2020] ZASCA 156.

[39] See for example, *Adcock Ingram Healthcare (Pty) Ltd* (2001) 2 *ILJ* 1799 (LAC); *DG: Office of the Premier of the WC v SAMA obo Broens* (2011) 32 *ILJ* 1077 (LC); *IMATU obo Strydom v Witzenburg Municipality* (2012) 33 *ILJ* 1081 (LAC); *Strydom v Witzenburg Municipality* (2008) 29 *ILJ* 2947 (LC); *Rikhotso MEC for Education* [2004] ZALC 83.

[40] See for example, *Maswanganyi v Minister of Defence and Military Veterans* (2020) 41 *ILJ* 1287 (CC); *Sello v Divisional Commissioner, HRD, SAPS* [2016] ZALCJHB 347.

[41] See for example, *Dube v University of Zululand* [2019] 3 BLLR 285 (LC); *Central Technical Services (Pty) Ltd v MEIBC* (2017) 38 *ILJ* 1651 (LC); *SAMWU obo Nkunzo and Pikitup Johannesburg* (2017) 38 *ILJ* 2167 (CCMA); *NEHAWU obo Madulo and Performing Arts Council FS* (2017) 38 *ILJ* 2157 (CCMA); *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty)* (2015) 36 *ILJ* 1923 (LC); *Enforce Security Group NUMSA v Abancedisi Labour Services CC* (2012) 33 *ILJ* 2824 (LAC). For analysis: Maloka, T and Mangammbi, M 'The Complexities of Conditional Contracts of Employment' (2020) *South African Mercantile Law Journal* 295; Geldenhuys, J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) *Potchefstroom Electronic Law Journal* 1; Gericke, E 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed term contracts as opposed to indefinite employment' (2011) *Potchefstroom Electronic Law Journal* 105.

[42] Section 1 of the LRA.

[43] Section 7(3) of the LRA provides that: No person may advantage, or promise to advantage, an employer in exchange for that employer not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

contract.[44] In contractual terms, a settlement agreement is entered between an employer and a former employee settling all claims arising from the employment and the termination thereof may constitute compromise which has the effect of *res judicata* which is an absolute defence to any action based on the employment relationship.[45] Settlement agreement extinguishes all disputes between parties.[46] To be sure, mutual separation often allows the employee who has done wrong a soft exit.[47]

In terms of section 142A of the LRA,[48] the commissioner can make the settlement agreement an arbitration award. The Labour Court (LC) is empowered to make settlement agreement order of court[49] even though the agreement was concluded before the matter was referred in terms of the LRA.[50] Where a settlement agreement is made an order of court this enables an aggrieved party to institute contempt proceedings if the order of court is not complied with.[51]

---

[44] Cutler, J 'Legal Guide to Human Resource: Drafting Effective Settlement Agreement' *Research Gate* (2018) < https://www.researchgate.net/publication/327368892_Drafting_Effective_Settlement_Agreements> accessed 10 August 2021.

[45] *Van Staden v Busby Sawmills (Pty) Ltd* [1994] 9 BLLR 127 (IC).

[46] *POPCRU v Minister of Correctional Services* [2006] 12 BLLR 12212 (E); *Naidu v Ackermans (Pty) Ltd* [2000] 9 BLLR 1068 (LC).

[47] *Van As v African Bank Ltd* [2005] 10 BLLR 959 (LC); *Straub v Barrow NO* [2001] 6 BLLR 679 (LC). See also Mvulane, N 'Mutual Separation Agreements' (2020) *Rajaram Mvulane* <https:// www.rajarammvulane.co.za/mutual-separation-agreements> accessed 20 August 2021.

[48] (1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award.
(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court, excluding a dispute that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).

[49] A settlement agreement that may be made an order of court by the Labour Court in terms of s158(1)(*c*), must
(i) be in writing,
(ii)be in settlement of a dispute (i.e. it must have as its genesis a dispute);
(iii) the dispute must be one that the party has a right to refer to arbitration.
See also *Greef v Consol Glass (Pty) Ltd* (2013) 34 *ILJ* 2385 (LAC) para 19.

[50] *Harrisawaak v La Farge (SA)* [2001] 6 BLLR 614 (LC); *Ngwenya v Premier of KZN* [2001] 8 BLLR 924 (LC); *Bramley v John Wilde t/a Ellis Alon Engineering* [2003] 4 BLLR 360 (LC).

[51] Willful breach of settlement agreement can amount to contempt of court if the agreement has been made order of court, see *SA Forestry Company Ltd V AWAWU* [1999] 9 BLLR 997 (LC); *CT International Financiers (Pty) Ltd v Van Rooyen* [2019] ZALCCT 42 para 24. It is worth noting that in a recent judgment of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State v Zuma* [2021] ZACC 18, the Constitutional

As a general proposition, acceptance of an offer of a sum of money in settlement of a dispute between parties is by and large considered as amounting to waiver by the employee of her right to litigate over the issue. Having said that, uncritical endorsement of this proposition may give rise to injustices. For example, an illiterate, unrepresented employee in tight financial situation is likely to be 'bought off' before launching legal proceedings with offer of a sum of money as 'full and final settlement'. In one case, Industrial Court declined to accept the employer's contention that the employees had waived the right to pursue their action for their alleged unfair dismissal because they had accepted money 'in full and final settlement' of their claim.[52] According to Grogan:

> If this approach were pressed too far no dismissal disputes could be settled before a matter comes before an arbitrator or court. This would clearly frustrate the purpose of statutory dispute resolution procedures. The courts should therefore be, and have been, willing to investigate whether disputes have really been settled – and whether such settlements constitute consensual terminations of the employment relationship on the terms contained in the deed of settlement.[53]

To constitute a waiver, the parties must have tendered to settle an existing dispute in full and final settlement. In that case none should be lightly released from an undertaking seriously and willingly embraced.[54] This especially so where the parties were operating from the necessary position of approximate equality of bargaining power.[55] Moreover, in Gbenga–Oluwatoye, the mutual separation agreement so where was for the benefit of the party seeking to escape the consequences of his own conduct. In that case an escape artist who obtained employment by misrepresentation sought to overturn a settlement agreement on the basis that it unduly infringed his right to access to courts.

In the settlement agreement, Mr Gbenga-Oluwatoye unconditionally waived his right to approach the CCMA and/or any court for any relief against Reckitt in any dispute arising from his employment or from the separation agreement (waiver provision). Even though Mr Gbenga-Oluwatoye accepted the waiver this clause, he approached the Labour

---

Court emphasised that contempt of court proceedings which the court is charged with, the critical constitutional obligation is defending the rule of law.

[52] *PPWWAU v Delma (Pty) Ltd* (1989) 10 *ILJ* 424 (IC); *Mdlalose v I E Laher & Sons (Pty) Ltd* (1988) 6 *ILJ* 350 (IC).

[53] Grogan, J *Dismissal* (Juta, 2002) 46.

[54] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 28 and 60.

[55] *Gbenga–Oluwatoye* para 24.

Court on urgent basis seeking declaratory relief. He challenged the validity of the separation agreement. He alleged that the employer coerced him to sign the agreement. Alternatively, he said that because the waiver provision restricted his right to seek judicial redress, it was against public policy and therefore invalid.

The LC found that the separation agreement reflected a valid compromise between the parties. It was in full and final settlement of any disputes arising from their employment relationship. The Labour Appeal Court (LAC) endorsed the LC's findings. In the same vein, the Constitutional Court (CC) upheld the judgement of the courts below and noted that Mr Gbenga-Oluwatoye was a senior manager with prior work experience at a senior level. Nothing indicated that his bargaining power was unequal or that he did not understand the agreed waiver provision.[56] The CC further observed that the employee had confessed that he had no defence to the charge of misrepresentation.[57] It was after this that he had entered into the separation agreement to put a present dispute to bed. In short, the waiver provision was constitutionally compliant.

Although it is said that resignation if the final, unilateral act of an employee bringing an end to the employment contract,[58] controversy still persist as to the ramifications of resignation. The following comments are of relevance to this discussion:

> The concept of a resignation is of relevance in two contexts. The first is in the context of a contractual dispute. Here the question will be whether an employee's attempt to terminate a contract of employment constitutes a lawful termination thereof through resignation or whether the employee's action constitutes a breach of contract. The second arises when an employee claims unfair dismissal and the employer raises the defence that the employee was not dismissed but in fact resigned.[59]

---

[56] *Gbenga–Oluwatoye* para 20.
[57] *Gbenga–Oluwatoye* para 23.
[58] See *Rustenburg Town Council v Minister of Labour* 1942 TPD 220; *Potgietersrus Hospital Board v Simons* 1943 TPD 269*; Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC); *ANC v Municipal Manager, George* [2009] ZASCA 139 para 11; *Morna v Commission on Gender Equality* (2001) 22 *ILJ* 351 (LC); *Asuelime/University of Zululand* [2017] 12 BALR 1312 (CCMA); *Hamden and Christian Centre (Abbotsford) East* London (2017) 38 *ILJ* 2140 (CCMA).
[59] Pieter Le Roux, 'Resignations – An Update: The Final, Unilateral Act of an Employee; (2010) 19 *Contemporary Labour Law* 51.

The issue of claims of unfair dismissal after resignation take centre stage as constructive dismissal disputes.[60] Constructive dismissal is a deemed dismissal; this is because it involves the employer breaching the employment contract. The requirement that the conduct of the employer must be intolerable means that the employer must have purposely conducted himself or herself in a way that would make the employee feel oppressed in the workplace.[61]

The idea of constructive dismissal is derived from English law.[62] In labour law, constructive dismissal addresses a triumph for substance over structure. Dekker observes that the unilateral act of resignation by the employee was compared with common law in light of the fact that such a demonstration fell on the idea of end of agreement by one party as a result of the others party's disavowal.[63] Vettori contends that analysis of South African case law developments reveals that the link between constructive dismissal and common law repudiation of contract has been severed.[64] Put simply, a new concept of constructive dismissal has been created unrelated to repudiation of contract.

Needless to say, English case law establishes that this is not the case in England, as well as the fact that what an employee needs to prove in a constructive dismissal case (based on the common law) is the same as what such employee needs to prove in terms of legislation. The result is that in South Africa, even though the purpose of legislation was to extend protection for employees, there may be instances where an employer would escape liability for constructive dismissal in terms of legislation but not in terms of the common law.

---

[60] See generally, *Murray v Minister of Defence* [2006] 8 BLLR 790 (C) (*Murray*); *Eagleton v You Asked Services (Pty) (Ltd)* (2009) 30 *ILJ* 320 (LC*); Chabeli v CCMA* (2010) 31 *ILJ* 1343 (LC)*; Foschini Group v CCMA* (2008) 29 *ILJ* 1515 (LC); *SmithKline Beechman (Pty) Ltd v CCMA* (2000) 21 *ILJ* 98 (LC); *Nash v Golden Dumps (Pty) Ltd* [1985] 2 All SA 161 (A); *Van Rooyen v Minister van Openbare Werke* 1978 (2) SA 835 (A). For further discussion: Nkosi '*The President of RSA v Reinecke* 2014 (3) SA 295 (SCA)*'* (2015) *De Jure* 48.

[61] Grogan *Workplace Law* (Juta, 2020) 288.

[62] *Murray* para 8.

[63] Adriette Dekker, 'Did He Jump or Was He Pushed? Revisiting Constructive Dismissal' (2012) 24 *South African Mercantile Law Journal* 346.

[64] Stella Vettori, 'Constructive Dismissal and Repudiation of Contract' (2011) *Stellenbosch Law Review* 173 (Vettori).

Likewise, Whitear-Nel makes it known that 'constructive dismissal is a tricky horse to ride'. [65]The writer states that Jordaan's[66] case highlights just how hard it is to establish a viable claim of constructive dismissal. It shows that even where an employee experiences a loss of job security as a result of attempts by the employer to protect his business, and this leads to the employee's resignation, it will not rise to the standard of constructive dismissal. The LAC saw Jordaan's case as an attempt to "stretch the law relating to constructive dismissal" and held that this was not only inappropriate but that such an attempt "should not be contemplated" by future courts.[67]

The other feature of constructive dismissal concerns resignation caused by emotional stress.[68] In analysis the case of Yona, Tshoose sheds light on the tricky issue of employee's psychological health and management's inappropriate response. According to the commentator:

The LAC in National Health Laboratory Service highlighted the notion of constructive dismissal juxtaposed with incapacity arising from work-related stress. In particular, the court made it clear that the circumstances behind Ms Yona's resignation related to the unfair conduct on the part of the appellant's employee (Mr Abraham) towards her. The court held that the appellant's unfair conduct towards Ms Yona rendered her continued employment with the appellant intolerable. Ms Yona submitted a medical report from her doctor, and, notwithstanding the medical certificates, the employer through the acts of Mr Abraham continued to treat her unfairly.[69]

In a nutshell, constructive dismissal is a very flexible and complex subject. There are different factors or situations that may give rise to it. Hence, there are no exact rules that can lead to one being sure if constructive dismissal did take place. Each presented case and its facts ought to be established, translated, and measured with the general principles used to establish if constructive dismissal requirements are met.

---

[65] Nicci Whitear-Nel, 'Constructive Dismissal: A Tricky Horse to ride - *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC)' (2012) *Obiter* 193 (Whitear-Nel).
[66] *Jordaan v CCMA* (2010) 31 *ILJ* 2331 (LAC) 2338.
[67] Whitear-Nel 193.
[68] *Metropolitan Health Risk Management v Majatladi* (2015) 36 *ILJ* 958 (LAC), *National Health Laboratory Service v* (2015) 36 *ILJ* 2259 (LAC) (*Yona*); *Cairncross/Legal and Tax (Pty) Ltd* [2019] 2 BALR 137 (CCMA). See also Itumeleng Tshoose, 'Constructive Dismissal Arising from Work Related Stress' (2017) *Journal for Juridical Science* 121 (Tshoose).
[69] Tshoose 130.

While constructive dismissal is well researched,[70] there are two overlooked dimensions of the subject-matter that has so far escaped scholarly attention. The first relates to resignations by employees facing disciplinary hearings who subsequently lodge a constructive dismissal litigation. The second concerns strategic resignation pending the completion of disciplinary proceedings ostensibly to evade the consequences of misconduct and/or incapacity. In the language of management practitioners, both categories to the surface the tricky issue of 'consequence management'.

While the primary concern of this study is on the implications of tactical resignations, a brief discussion of the consequences of resignation pending disciplinary proceedings for later constructive dismissals claim is necessary. Broadly speaking resignation to sidestep internal disciplinary inquiry has often proved fatal to subsequent constructive dismissal.[71] An employee under cloud is expected to exhaust grievance process to finality. *HC Heat Exchangers (Pty) Ltd v Araujo*[72] illustrates that premature resignation is fatal to a constructive dismissal claim. Interestingly, a constructive dismissal claim was upheld in *SALSTAFF obo Bezuidenhout v Metrorail* despite the fact that the employee resigned ostensibly avoid to disciplinary proceedings.[73]

1.5 Scope of the Inquiry

This study focuses on repercussions of pre-emptive resignation pending finalisation of disciplinary or performance proceedings. The crux of the matter is accountability for workplace misconduct and/or incapacity. The starting point of analysis is domestic jurisprudential developments is accountability. 'In effect', as pointed out by one legal scientist Okpaluba, 'accountability' is an elastic, all-embracing word such that where a

[70] See generally, Smit, E *Constructive Dismissal and Resignation due to Work Stress* (LLM-dissertation UNW Potchefstroom Campus, 2013), Thulare, M *Constructive Dismissal in South Africa Prospects and Challenges* (LLM-dissertation UL, 2014); Ngcobo, S *An Analysis of Intolerable Conduct as a Ground for Constructive Dismissal* (LLM-dissertation, UKZN, 2014); Cele, N *Proving Constructive Dismissal: A Critical Evaluation of Section 186(1)(e) of the Labour Relations Act 66 of 1995 and Recent Judgments* (LLM-dissertation, UKZN, 2018).
[71] *Cape Peninsula University of Technology v Mkhabela* [2021] ZALAC 30.
[72] [2020] 3 BLLR 289 (LC).
[73] [2001] 9 BALR 926 (AMSA).

functionary is said to be accountable, it means that they must be answerable and responsible both politically and legally as well as being morally bound. Above all, the functionary is liable in terms of the Constitution, in both delict and criminal law.[74] The accountability principle applies with greater force to the sphere of employment and labour law.

1.6 Research Methodology

The nature of this study requires a doctrinal research approach which entails a systematic review of literature, legislation and case law. The study extensively relies on primary and secondary data available in the physical and virtual libraries of the University of Limpopo.

1.7 The Way Forward

This chapter has outlined the scope of inquiry, thereby highlighting the interplay with the broader context of accountability. Chapter two examines the complexities surrounding resignation. Chapter three then wrestles with the implications of tactical resignation in light of seminal South African case law.

[74] Okpaluba, C 'The Constitutional Principle of Accountability: A Study of Contemporary South Africa Case Law' (2018) 33 *South African Public Law* 1, 7.

CHAPTER TWO

THE COMPLEXITIES OF RESIGNATION

2.1 Introduction

Resignation can simply be defined as the act of terminating employment with notice by the employee. The act of resignation is not as straightforward as it seems, the nature of such an act is determined by different circumstances.[75] Moreover, in some instances employees resign with immediate effect only to end up regretting their hasty actions.[76] This is because some resign without being aware that the manner in which they tender their resignation can have serious consequences on them as individuals.[77]

Before the CCMA or Bargaining Council (BC) conciliates, mediates or arbitrate the fairness or unfairness of a dismissal, it must be satisfied by employees that they have been dismissed in accordance with section 186(1)(*a*)-(*f*) of the LRA. According to the technical definition of section 186, if an employee has not been dismissed or has resigned, the CCMA or BC cannot entertain unfair dismissal dispute.[78] To elaborate, section 191 of the LRA confers jurisdiction on the CCMA to arbitrate disputes regarding unfair dismissals. The first step in unfair dismissal disputes is to determine whether there was a dismissal. The employee bears the onus of proof in relation to the existence of the dismissal.[79] This preliminary issue must be decided before the dispute can be arbitrated to determine whether the CCMA has the jurisdiction to arbitrate the matter. If there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of section 191 of the statute. This chapter delves into the intricacies of resignation.

---

[75] Smit 'Resignation - An act that is not as straightforward as it seems?' (2011) *Sabinet African Journals* 100.

[76] Viljoen 'Resignations - if, what and when?: labour' 2011 *Sabinet African Journals* 2011.

[77] Koltz and Bolino 'Saying Goodbye: The Nature, Causes, and Consequences of Employee Resignation Styles (2016) 101 *Journal of Applied Psychology* 1386 – 1404.

[78] See e.g. *SA Rugby Players Association v SA Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC) paras 39-41('*SARPA*').

[79] S 192(1) of the LRA.

2.2 Dismissal or Resignation

To fit within section 186(1) (*a*)-(*f*) employees may show that their employer terminated the employment relationship with or without notice, but they must demonstrate that the employment relationship was by the employer. Thus, if the employer succeeds in showing that the employment relationship was terminated by the resignation of the employee[80] or by the employee's repudiation or self-dismissal,[81] or automatic termination of employment clause[82] or by operation of law,[83] or by supervening impossibility[84] or mutual agreement,[85] the employee will not be treated as dismissed for the purpose of this provision.

---

[80] See e.g. *FAWU v Phakedi* ZALCJHB 103 paras 17-20 (*Phakedi*) *Morna v Commission on Gender Equality* (2001) 22 *ILJ* 351 (LC); *Asuelime/University of Zululand* [2017] 12 BALR 1312 (CCMA); *Hamden and Christian Centre (Abbotsford) East London* (2017) 38 *ILJ* 2140 (CCMA).

[81] Dekker 'Gone with the wind and not giving a damn: Problems and solutions in connection with dismissal based on desertion' (2010) *South African Mercantile Law Journal* 22; Parsee, 'Absenteeism in the workplace: Analyses' (2008) *South African Mercantile Law Journal* 20.

[82] See for e.g. *Khum MK and Bie Joint Venture (Pty) Ltd v CCMA* (2020) 41 *ILJ* 1129 (LAC); *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty)* (2015) *36 ILJ* 1923 (LC) para 29*Phakedi* para See generally, Geldenhuys 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' [2017] *PER/PELJ* 1; Gericke 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' [2011] *PER/PELJ* 105; Cohen 'Debunking the legal fiction – *Dyokhwe v De Kock NO & others*' (2012) 33 *ILJ* 2318 and 'Legality of the automatic termination of contract of employment' 2011 *Obiter* 66; Bosch 'Contract as a barrier to 'dismissal': The plight of the labour broker's employee' (2008) 29 *ILJ* 813; (2005) 26 *ILJ* 2224 (CCMA Maloka and Mangammbi 'The complexities of conditional contract of employment: SA *Metal (Pty) Ltd v Holroyd* (J2274/17) 2020 ZALCJHB 32 (05 February 2020)' (2020) 32 *South African Mercantile Law Journal* 295.

[83] See for e.g. *Grootboom v NPA* 2014 (2) SA 68 (CC); *Western Cape v Weder and MEC for Dept of Health* [2014] 4 BLLR 393 (LC); *Ramonetha v Department of Roads and Transport, Limpopo* [2018] 1 BLLR 16 (LAC), *Minister of Defence and Military Veterans v Mamasedi* 2018 (2) SA 305 (SCA); *Maswanganyi v Minister of Defence and Military Veterans* (2020) 41 *ILJ* 1287 (CC); *Masinga v Chief of the SANDF* [2022] ZASCA 1 (5 January 2022). See also Van der Walt, Abrahams & Qotoyi 'Regulating the termination of employment of absconding employees in the public sector and public education in South Africa' (2016) *Obiter* 140; Mathiba 'Deemed dismissals and suspensions in the public sector: *Grootboom v National Prosecuting Authority* 2014 ILJ 121 (CC)' (2015) *Obiter* 223.

[84] In *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] All SA 255 (SCA) paras 28-29*,* the law on supervening impossibility was clarified thus:

> This brings me to the appellant's defence of supervening impossibility of performance. As a rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not

2.3 The Legal Principles Governing Resignation

Resignation is an ultimate unilateral act, which an employee cannot withdraw without receiving consent from the employer.[86] When resigning employee have to be clear about their intention to terminate the employment contract by either words or actions, which will show to the reasonable person that the employee has really terminated their employment contract.[87] The act of resignation is determined by a subjective intention to end the employment contract.[88] An employer is not entitled to accept or reject the employee's resignation letter.[89] This is because one cannot be coerced to work against their will.

In *SACAWU obo Sithole Afrox Gas Equipment Factory (Pty) Ltd*,[90] it was held that the employee was incorrect in believing that the employer has to accept the resignation and that there was a procedure which had to be followed. It stated that the legislation do not require such. The court in *Mnugti v CCMA*,[91] provided factors constituting a valid resignation. The employee must indicate unequivocally his intention to resign, the termination is effective on a specified date, it must be the unilateral act of the employee and lastly such an action must make a reasonable person

---

> always do so. In each case it is necessary to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. *Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant*.
>
> … I am unpersuaded that the appellant discharged the burden of establishing that performance of its obligation in terms of the contract was rendered impossible.

See also *Phakedi* paras 23-26.

[85] See *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd* (2016) 37 *ILJ* 2723 (CC).

[86] *Rustenburg Town Council v Minister of Labour* 1942 TPD 220; *Potgietersrus Hospital Board v Simons* 1943 TPD 269, *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).

[87] *Sihlali* para 11; *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (AD) and *Fijen v Council and Industrial Research* (1994) 15 *ILJ* 759 (LAC).

[88] *Sihlali* para 13.

[89] *Rosebank Television and Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T).

[90] *SACAWU obo Sithole Afrox Gas Equipment Factory (Pty) Ltd* [2006] 6 BALR 593 (MEIBC).

[91] *Mnugti v CCMA* 2015 36 *ILJ* 311(LC) para 33.

believe that the employee has terminated the employment. Interestingly, resigning by using a Short Message Service (SMS) is also considered as valid. This was dealt with in the *Sihlali* case where Judge Van Niekerk held that in accordance to section 12 of the Electronic Communications and Transactions Act 25 of 2002, an SMS is considered a notice in writing.[92]

The common law rules relating to termination on notice by an employee are succinctly summarised by Cheadle AJ in *Lottering v Stellenbosch Municipality*[93] 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* para 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 if the employer – *Honono v Willowvale Bantu School Board* 1961 (4) SA 408 (A) 414H–415A. (*Lottering* par 15.1-15.7).[94]

---

[92] *Sihlali* para 18. See also *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (CC) para 113, where the court held that 'An SMS is an effective mode of communication just like an email or a written document.' See also See also Manamela '"To meet is to part": Resignation by SMS constitutes notice in writing as required by the Basic Conditions of Employment Act: *Mafika v SA Broadcasting Corporation Ltd*: case comment' (2011) *South African Mercantile Law Journal* 521.

[93] [2010] ZALCCT 42 (*Lottering*).

[94] *Lottering* paras 15.1-15.7).

Regard must also be had to the statutory framework. Section 37 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) provides the minimum periods of notice, also the individual employment contract can provide the require notice period to be served.[95] In short, resignation is the unilateral act by the employee to terminate the employment relationship, which does not require acceptance by the employer.[96] Once communicated, a notice of termination cannot be withdrawn unless the employer consents to such a revocation.[97]

2.4 Heat of the Moment Resignation and Subsequent Retraction

The complexities surrounding resignations are better illustrated by what is characterised as a 'heat of the moment' resignation. The phrase hear of the moment means doing something without pausing to think about your actions because you are either angry or excited.[98]Having been given and accepted, an employee would often regret and then actively seek to have it set aside. As already explained, resignation is a final and unilateral act that ends the contract of employment. As basic rule, an employer is generally able to treat a clear and unambiguous resignation as a resignation.[99] The question that arises is: Can an employee rescind resignation tendered in the heat of the moment?

The issue of 'hot-headed resignation' has been authoritatively dealt with in the English precedents such as *Sothern v Franks Charlesly & Co*[100] and

---

[95] Van Wyk and Roux 'Resignation "With immediate effect" – Consequences for disciplinary action' 2019 *Sabinet African Journals* 19.

[96] See also Le Roux 'Resignations – The final, unilateral act of an employee' 2010 *CLL* 5; Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) 145; PAK le Roux *Current Labour Law* (2002) 4.

[97] See e.g. *Lottering v Stellenbosch Municipality* [2010] ZALCCT 42 paras 12-15; *ANC v Municipal Manager, George Local Municipality* (2010) 31 *ILJ* 69 (SCA) para 11.

[98] Collins Dictionary, 'In the heat of the moment' Collins Dictionary (2023) <https://www.collinsdictionary.com/dictionary/english/in-the-heat-of-the-moment> accessed 21 May 2023.

[99] See e.g. *Mohlwaadibona v DR JS Moraka Municipality* [2022] ZALCJHB 66 (18 March 2022) paras 23-26; *SAMWU obo Hlonipho MM v SALGBC* (17 Unreported decision. Case no: JR 2159/09. Delivered: 22 March 2013) para 19. See also *SJBRWDSUL v Canada Safeway Ltd* [2007] CanLII 71031 (SKLA); *Z v European Patent Organisation* (Judgment No. 4053 Session 126th ILO Administrative Tribunal (26 June 2018) para 9; *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200, 206.

[100] [1981] IRLR 278 ('*Sothern*').

Sovereign House Services Ltd v Savage.[101] In *Sothern* 'I am resigning' these word uttered by Mrs Sothern. She returned to work the following day after uttering these words and stayed on for a few weeks. The Court of Appeal concluded that Mrs Southern words 'I am resigning' were unambiguous and meant 'I am resigning now!' Fox LJ explained that such words should be given their ordinary meaning and did not mean 'I am going to resign in the future'. After all, this was not a case of an immature employee or of a decision taken in the heat of the moment, or an employee being jostled into a decision by the employers.

The employee in *Sovereign* was employed as a security officer. After a discovery that money was missing, the employee was telephoned by his superior, and informed that he was being suspended forthwith-pending police investigation. The employee replied by saying 'I am not having any of that, you can stuff it, I am not taking the rap for that'. He then contacted his immediate superior Mr Scroggie and informed him that he would not be in to relieve the following morning as arranged. The employee later lodged an unfair dismissal claim with the Industrial Tribunal. The tribunal upheld his unfair dismissal claim. The employer appealed, and that appeal was dismissed. The employer then appealed to the Court of Appeal, which also dismissed the appeal. The court found that there was no real resignation despite what it might appear at first sight. May LJ observed that 'the words actually used by the employee to Scroggie were used in the heat of the moment and should not have been accepted at full face value by the employers … The applicant was not tendering his resignation to Mr Scroggie'.[102]

What is clear from the authorities is that the employer should be slow to accept a resignation made in the heat of the moment. Rather, such a situation calls for a 'cooling off' period before acting upon the resignation. The 'special circumstances' exception according to English authorities is not strictly a true exception to the rule.[103] Rimer LJ explained in *Willoughby v CF Capital Plc*:[104]

---

[101] [1989] IRLR 115 (CA) (`*Sovereign*').
[102] *Sovereign* para 14.
[103] See *Secretary of State for Justice v Hibbert* UKEAT 0289 13 3007 (30 July 2013) para 25;*Kwik-Fit (GB) Ltd v Lineham* [1992] ICR 183, 191 (`*Kwik-Fit*'); *Martin v Yeomen Aggregates Ltd* [1983] ICR 314, 314-318F (`*Martin*').
[104] [2011] EWCA Civ 1115 (`*Willoughby*').

> It is rather in the nature of the cautionary reminder for the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. …
>
> The essence of the 'special circumstances' exception is therefore that, in appropriate cases, the recipient of the notice will be well advised to allow the giver what is in effect a 'cooling off' period before acting upon it.[105]

The cases demonstrate that the need will almost inevitably arise in cases in which the purported notice has been tendered orally in the heat of the moment by words that may quickly be regretted. Put another way, it is important where unambiguous words are uttered in a moment of anger or in the heat of the moment or during at time the employee's mental faculties are clouded, there is obligation on the employer not accept such a resignation too readily.

The 'special circumstances' exception or the need for 'cooling off' period is demonstrated by *Martin* and *Kwik-Fit*. In the *Martin* case, there was an altercation between the claimant employer and a director of the company. During the course of tense argument, the director told the employee that he was dismissed. Within five minutes, the director cooled down and retracted the dismissal. The employee insisted that he was dismissed, and sought to pursue his statutory remedies for unfair dismissal. The Employment Appeal Tribunal held that it was possible to have second thoughts. Words of dismissal spoken in the heat of the moment were ineffective if withdrawn immediately the heat died down. *Kwik-Fit* likewise emphasised that a reasonable period should be allowed to lapse and if circumstances where resignation was communicated in the heat of the moment or under extreme pressure ('being jostled into a decision').

On returning from the pub, the employee Mr Lineham used the toilet after hours at the depot where he worked. The employer publicly reprimanded him, and gave him a final written warning. The employee threw down his keys, drove off, and phoned the company the next day, asked for his salary and informed the boss, he was going to tribunal. Wood J held that the employer was not entitled to assume that the phone call was a resignation. He stated that the employer should accept a resignation within a reasonable time, but this was not that.[106]

---

[105] *Willoughby* paras 37-38.
[106] See also *Gale Ltd v Gilbert* [1978] ICR 1198.

The question of resignation in the heat of the moment arose in *CEPPWAWU v Glass and Aluminium 2000 CC*.[107] *CEPPWAWU* concerned a claim of constructive dismissal by an employee that he resigned because the employer had made continued employment intolerable. While executing his duties as a shop steward, the employee was involved in an intense argument with his manager. The manager allegedly told the shop steward 'We do not want you here again'. The employee then left his employment 'in the heat of the moment. He turned the following day to get his job.' The LAC considered when a resignation in the heat of the moment was effective and held that if the shop steward resigned he did so in the heat of the moment such a resignation was ineffective. It went on to conclude that the shop steward's resignation was triggered by unbearable situation caused by anti-union hostility.[108] Consequently, he was constructively dismissed. In addition, the dismissal found to be automatically unfair within the ambit of section 187(1) (*d*) (*i*) as it was connected to the execution of the employee's duties as a shop steward.

Cairncross/Legal and Tax (Pty) Ltd[109] brings another perspective on the employee's ability to retract resignation tendered in haste. In the case at bar, the employee, a team leader tendered her resignation after being told by the company's managing director at staff at the branch in which she was acting as *de facto* manager were frustrated with her. She was told to go home while the matter was being 'sorted out'. At the time, the employee's line manager was aware that she had undergone an operation, and that the stress caused her to bleed heavily and her wound had become infected.[110] Rather than assisting Ms Cairncross, she was accused of being involved in the break-in her office. According to the line manager,

> They wanted to accept the resignation letter but were concerned about the applicant's health. The sick note said she will resume work on 21 May 2018 and it was a red flag when they saw it was depression. They were not sure how to convey that the resignation was accepted. In the past there was another branch manager who committed suicide and the branch went through a rocky patch.[111]

Given that the employee's judgement was troubled by depression, the employer should have appreciated that resignation should not have been considered seriously and was an immature response. There be no doubt

[107] (2002) 23 *ILJ* 695 (LAC) (*CEPPWAWU*).
[108] *CEPPWAWU* para 39.
[109] [2019] 2 BALR 137 (CCMA) ('*Cairncross*').
[110] *Cairncross* para 12.
[111] *Cairncross* para 22.

that the employee considered herself to be under siege. It bears noting that resignation was abruptly tendered and promptly revoked; the employer was still addressing the staff grievances against the employee. According to the arbitrator, the employer acted opportunistically.

> It is highly probable that the respondent, now being placed in this position where a grievance had to be attended on and consequently internal hearings, concluded that it would be in its best interests to now accept the applicant's resignation. Essentially seizing the resignation of the applicant and not accepting the applicant's withdrawal knowing the circumstances as to why the applicant resigned and that she wanted to withdraw.[112]

It can be seen that to separate the resignation induced by depression from unfolding grievance process would be tantamount to endorsing opportunistic employer behaviour. There is also a notable English case of *Barclay v City of Glasgow District Council*.[113] The employee in *Barclay* had mental illness and was looked after by his sister. There was a heated exchange with the District Manager and the foreman over work allocation, which ended by the employee saying that he wanted his books 'the next day.' The following day was a Friday, payday and the District Manager gave instructions for the employee to sign the necessary form for termination of employment. Although reluctant to do so, he nevertheless did so but during the weekend, he realised what had transpired.

On Monday, he reported for work and he was sent home on the basis that he had resigned. The Employment Appeal Tribunal (EAT) ruled that the employer was dealing with a person suffering from a mental handicap, it was the employer's duty to investigate the matter to be certain that the employee really intended to resign. The employer should have enquired at his home and should have taken his appearance for work on Monday as a sign that he did not intend to give up his job. The dismissal was unfair. Similarly, in the Australian case of *Marks v Melbourne Health*[114] the employer's purported acceptance of the resignation was held to constitute a termination of employment at the employer's initiative. While was distressed and unwell, the employee sent a letter to the employer indicating an intention to resign in the future. It was held this not to be an effective notice of resignation.

---

[112] *Cairncross* para 45.
[113] [1983] IRLR 313 (`*Barclay*').
[114] [2011] FWA 4024.

The observations emanating from *NUMSA obo Williams and Southern Wind Shipyard*[115] are relevant:

> In the cases dealing with an employer's refusal to accept an employee's withdrawal of a resignation the law, generally, is that resignation is a unilateral act, and it can only be withdrawn with the unless of the employer. However, the courts have recognised that failure to accept a withdrawal of resignation made in the heat of the moment, and withdrawn soon thereafter, could amount to an unfair labour practice (*Nashwa v Unisel Gold Mine* [1995] 9 BLLR 132 (IC). Arguably, if section 186 is not regarded as a closed list, failure to accept a withdrawal of a resignation could, in certain circumstances amount to a type of constructive dismissal. If the employer pushed the employee to resign as in *CEPPAWU & another v Glass and Aluminium 2000 CC* (2002) 23 *ILJ* 695 (LAC) it amounts to constructive dismissal.[116]

In a nutshell, where a resignation is tendered in the heat of the moment or under extreme pressure, special circumstances may arise. In special circumstances, an employer may be required to allow a reasonable period to pass. In other words, the appropriate course of action for the employer in such situations is to accept that a reasonable period should be allowed to elapse between the point of the purported resignation and acceptance in order for the employer to see whether the resignation was really intended.

2.5 Forced Resignation

The issue of forced resignation leads to one of the contested terrains of the law of unfair dismissal – constructive dismissal. A forced resignation is when an employee has no real choice but to resign.[117] The onus is on the employee to prove that they did not resign voluntarily. The employee must prove that the employer forced their resignation. In brief, the line separating conduct that leaves an employee no real choice but to resign, from employees resigning at their own initiative is a narrow one.[118]

---

[115] (2003) 24 *ILJ* 1454 (BCA) 1454 ('*NUMSA obo Williams*').
[116] *NUMSA obo Williams* 1461.
[117] See *Cape Peninsula University of Technology v Mkhabela* [2021] ZALAC 30; *Sunshield Solutions (Pty) Ltd v Ngwenya* [2017] ZALCJHB 39; *Meijer No v Firstrand Bank Ltd (formerly as First National Bank of Southern Africa)* [2012] ZAWCHC 23; *Murray v Minister of Defence* 2009 (3) SA 130 (SCA).
[118] *DA v Minister of Public Enterprises* 2018 ZAGPPHC 1 para 17. After being served with a notice to attend a disciplinary hearing, the applicant in *Nogoduka v Minister of Higher Education & Training* [2017] 6 BLLR 634 (LC) resigned 'with immediate effect'. The hearing proceeded in his absence and he was dismissed. The applicant claimed that the tribunal had no authority to him because he was no longer in the employer's employment when the decision to dismiss him was taken. The LC noted that the Public Service Act

Leaving aside the important question of whether the employer's conduct rendered continued employment intolerable, thereby justifying employee forced departure, there tendency whereby disgruntled employees resign ostensibly to avoid disciplinary or incapacity inquiry but later instituting constructive dismissal claims.[119] In short, this worrying serves to underscore the importance of adherence to workplace dispute resolution resort to statutory dispute resolution mechanism created under the LRA 1995.

2.6 Conclusion

When resigning, the employee ought to have a clear intention to terminate the employment contract. Such an act must also be done lawfully or else the employee will be held to the notice period. If a resignation happens during the heat of the moment, the 'special circumstances' exception will apply, meaning that the employer must not be quick in concluding that the employee indeed resigned. The resignation ought to always be clear and unambiguous. The employee that resigns must take note that they cannot later claim that they have been unfairly dismissed because resignation and dismissal are not the same thing. However, in the case where the employee was forced to resign by the employer, they can claim constructive dismissal, and the onus lies in them to prove that indeed they were constructively dismissed. Resignation is a very complex subject; therefore employees who wish to resign have to think carefully because it may lead to unwanted consequences.

---

103 of 1994 expressly prohibits executive authorities from accepting notice shorter than is required from employees charged with misconduct. It followed that when the decision to dismiss was taken, the applicant was still in employment. The application was dismissed.

[119] See *HC Heat Exchangers (Pty) Ltd v Araujo* [2020] 3 BLLR 289 (LC) (*HC Heat Exchangers*); *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSA) (*Bezuidenhout*).

CHAPTER THREE

PRE-EMPTIVE RESIGNATION

3.1 Overview

The chapter addresses the vexed issue of pre-emptive resignation by employees under suspension pending the institution disciplinary or capability inquiries or while the internal processes are underway in order to evade accountability. In unpacking pre-emptive resignation, the analytical framework has three main components. Firstly, the effective date of resignation. Secondly, the effect of resignation on the employer's disciplinary jurisdiction. Thirdly, the effect of a resignation prior to the announcement of sanction of dismissal. Finally, the chapter considers the jurisprudential trends on tactical resignation from eSwatini and Lesotho.

3.2 Effective Date of Resignation

The answer to the question when does a resignation take effect is generally straightforward in cases of the expiry of notice and the completion of a fixed term. In the case of summary dismissal, without notice, the effective date of termination is regarded as the day of summary dismissal.[120] It should be stressed that the notice requirements of the BCEA are applicable to both employers and employees. As noted earlier, resignation ends employment contract from the moment it is accepted by the employer. Once the employer has accepted an employee's resignation, the acceptance cannot be unilaterally rescinded. For example in *University of the North v Franks*,[121] the employees accepted the university's offer of early voluntary retirement and severance benefits. The university then withdrew the offer.

The LAC held that once accepted, the offer bound the university and remained binding until the arrival of the specified date. On the set date, the employer was obliged to release the employees and pay them the benefits to which it had agreed. The same outcome transpired in the case of tactical resignation in *Meyer v Provincial Department of Health &*

[120] *Fijen v Council for Scientific & Industrial Research* (1994) 15 *ILJ* 759 (LC).
[121] (2002) 23 *ILJ* 1252 (LAC). See also *Wiltshire v University of the North* (2005) 26 *ILJ* 2440 (LC).

Welfare.[122] In the instant case, the employee resigned while facing disciplinary charges. The employer accepted the resignation on a 'without prejudice' on basis, but later reconsidered. The court concluded that the term 'without prejudice' basis, did not change the legal effect of the otherwise unambiguous acceptance of the employee's resignation by which the employer was bound.

It bears repeating that a 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, an employee is required to serve out his or her notice period, if required and once this notice period has been served, the resignation can be said to have taken effect. In a situation where the employee resigns without giving notice period, she or he is in breach of the contract of employment. Employers may sue employees for damages if they do not serve out their notice period, but only if they prove they have suffered loss.[123]

The central issue in *Vodacom (Pty) Ltd v Motsa*[124] was whether Vodacom waived its right to have Motsa work out his notice period or, it elected to terminate Motsa's employment with immediate effect and pay him lieu of notice. On 23 December 2015, Motsa, a senior executive at Vodacom resigned effective from 1 January 2016 to take up position with MTN. On 24 December at 14h32, the CEO of Vodacom issued an internal communique to staff announcing that Motsa 'will be leaving the company immediately'.[125]

Clause 16 of Motsa's contract of employment afforded Vodacom three options in respect of the notice period. In terms of the first option, Motsa could be required to work a notice period, during which he would continue to work normally and be paid.[126] The second option triggered the 'garden leave'[127] during which Motsa would be paid to remain at home but remain

[122] (2006) 27 *ILJ* 2055 (T).
[123] *SA Music Rights Organisation Ltd v Mphatsoe* [2009] 7 BLLR 696 (LC).
[124] 2016 37 *ILJ* 1241 (LC) (*'Vodacom'*)).
[125] *Vodacom* para 14.
[126] *Vodacom* para 29.
[127] The concept of garden leave primarily originates from English law. A garden leave clause forms part of an employee's contract of employment, the employer may elect to relieve the employee from performing his/ her duties for the duration of any notice period, on full pay. Essentially, during the garden leave, the employee remains an employee and must remain accessible to the employer. See for e.g. *Credit Suisse v Armstrong* [1996] ICR 882 and of *Air New Zealand v Grant Kerr* [2013] NZEmpC 153 ARC

available to 'assist' Vodacom and provide 'a seamless transition of his responsibilities'. The third option-involved payment in lieu of notice, in which event the contract would terminate with immediate effect and Vodacom would pay Motsa the remuneration he would have earned during the notice period.[128]

Motsa contended that Vodacom elected to pay him in lieu of notice and that his contract of employment terminated immediately.[129] Vodacom denied any agreement to this option and contends that by failing to give the required notice, Motsa breached the contract of employment. Vodacom sought to hold Motsa to both the 'garden leave' option and the post-termination restraint period. The LC pointed out that 'on Motsa's own version, at the time when the communique was issued on 24 December 2015, he did not understand this as any form of election or waiver - his only concern was for his reputation and in particular, that the wording might be construed to the effect that he had been dismissed for misconduct.'[130] According to Van Niekerk J 'this is simply inconsistent with a belief that he had been the beneficiary of a waiver entitling him to leave Vodacom's employ immediately with six months' remuneration.'

The communique could be nothing more than typical euphemistic public relations response by any company to the resignation of a senior executive; it is quite capable of sustaining the conclusion that Motsa would no longer be physically present at work, with immediate effect, for the balance of the employment relationship.[131] In short, based on his own account, Motsa has failed to establish that Vodacom waived its rights to enforce the notice period.

38/13). *See generally,* Mupangavanhu 'The Relationship between Restraints of Trade and Garden Leave' (2017) 20 *PER/PELJ* 1.

[128] *Vodacom* para 29.

[129] *Vodacom* para 27.

[130] *Vodacom* para 34.

[131] *Vodacom* para 35.

3.3 The Effect of Resignation on the Employer's Disciplinary Power

3.3.1 Mtati v KPMG Services (Pty)Ltd[132]

The employee resigned with notice after being alerted that there are allegations of misconduct against them. After receiving notice of the disciplinary action, the employee then tendered resignation with immediate effect. During the disciplinary proceedings, the employee argued that the chairperson lacked the jurisdiction to hold the disciplinary hearing because the employment had already been terminated with immediate effect. The chairperson, however, decided to continue with the disciplinary proceedings in the absence of the employee. Consequently, the employee was found guilty and dismissed.

The employee then approached the LC on an urgent basis seeking the court to declare the chairperson's decision to dismiss the employee null and void because the employee had already resigned with immediate effect. The court differentiated the two circumstances under which employees resign. First, if an employee resigns with notice, the employer retains the power to discipline such an employee because the contract of employment terminates upon expiry of the notice period ends. The second circumstance is where the employee resigns with immediate effect, in such a case; the employer is deprived of disciplinary jurisdiction over departing employee since termination of employment was with immediate effect. The court therefore found the chairperson's decision to discipline the employee to be null and void.

With respect, the approach shown *Mtati* is problematic. It indirectly works in favour of the escaping employee who has committed the misconduct. Simply put, it allows such an employee evade accountability for workplace wrongdoing. Meaning that resigning with immediate effect makes employees untouchable.

3.3.2 Toyota SA Motors (Pty)Ltd v CCMA[133]

The primary issue in *Toyota SA* was whether an order for reinstatement of an employee was competent in circumstances where such employee has

[132] *(2017) 38 ILJ 1362 (LC) (Mtati).*
[133] *(2016) 37 ILJ 313 (CC) (Toyota SA).*

resigned prior to the grant of such order. In the present case, the notice of resignation was tendered on 7 March 2011 (dated 1 March 2011), effective 31 March 2011. The employer decided to proceed with the disciplinary action against the employee in spite of his letter of resignation. He was found guilty of misconduct and was dismissed on 24 March 2011. That was seven days before the expiry of his notice period when his resignation would take effect and when he would have left employment.

The dilemma in the present case was that the resignation had preceded the dismissal. The jurisdictional point arising was that the CCMA would have had no jurisdiction and an award would not have been competent because an employee who resigned cannot be reinstated.[134] The CC addressed this issue of follows:

> Since an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer, this means that as at the date of his dismissal, Mr Makhotla was bound to leave Toyota's employ on 31 March 2011. As already indicated, Mr Makhotla was dismissed a few days before his resignation would take effect. One can, therefore, say that the dismissal interrupted the resignation. That is why we cannot say that Mr Makhotla's employment with Toyota came to an end as a result of his resignation. We say that it came to an end as a result of his dismissal on 24 March 2011. However, the fact that Mr Makhotla's employment came to an end as a result of dismissal and not as a result of resignation does not mean that the fact that he was dismissed at a time when he had submitted a letter of resignation and was serving his notice period and was due to leave Toyota's employ in seven days' time is irrelevant. The fact that Mr Makhotla was dismissed at a time when in seven days' time his contract of employment with Toyota would have come to an end by his resignation and he would have left Toyota's employ is highly relevant if his dismissal dispute is arbitrated or adjudicated after the date when he would have left Toyota's employ had he not been dismissed.[135]

The CC continued:

> The same applies to a case where an employee was employed on a fixed term contract of employment and he is dismissed before the expiry of that contract but the dismissal dispute is arbitrated or adjudicated after the date when, but for the dismissal, his contract of employment would have come to an end. Another example is where an employee is dismissed but, after his or her dismissal but before the dismissal dispute is adjudicated or arbitrated, a retrenchment exercise occurs in the company and it is clear that, applying

[134] *Toyota SA* para 142.
[135] *Toyota SA* para 144.

> fair and objective selection criteria, the employee would have been one of the employees selected for dismissal for operational requirements.[136]

Read in context Zondo J's proposition that 'an employee has no right of withdrawing a valid and lawful resignation once it has been communicated to the employer except with the consent of the employer' means that the employer's to discipline the employee ceased when the employee tendered an unequivocal resignation with immediate effect.

3.3.3 Mzotsho

After receiving a notice of disciplinary hearing, the employee in *Mzotsho* resigned with immediate effect. Nevertheless, the employer continued with the disciplinary inquiry post the employee's resignation. The employee then approached the LC on urgent basis seeking an order to declare that the employer has no jurisdiction to continue with disciplinary proceedings. In effect, the LC had to determine the legal effect of resigning before a sanction is imposed.[137]

The court held that if an employee resigns upon receipt of notice to appear before a workplace disciplinary hearing, the employer's power to discipline such an employee remains. If the employer exercises its election to proceed with internal hearing, the disciplinary inquiry would reach its logical conclusion.[138] This case shows that resigning while facing a disciplinary hearing has no legal effect because the employer can still elect to reject the employee's repudiation and may as such continue with the disciplinary enquiry.

3.3.4 Coetzee

In *Coetzee,* the employee under suspension pending the institution of disciplinary measures lodged an urgent application seeking an order restraining the employer from proceeding with the disciplinary hearing. The employee also sought an order declaring that any steps taken during the disciplinary proceedings be declared null and void. The employer countered by pointing that the employee's resignation with immediate effect was not accepted and the right to notice was therefore not waived. As such, the employee was bound by the provision of a notice as stated in

---

[136] *Toyota SA* para 145.
[137] *Mzotsho* para 2.
[138] *Mthimkhulu* para 11.

their agreement. In line with the contractual principles set in *Motsa*, the court held that employer was competent to go ahead with the disciplinary proceedings.[139]

3.3.5 Naidoo

The approach enunciated in *Mzotho* and *Coetzee* was also endorsed in *Naidoo*. The employees in the present case decided to resign with immediate effect after being given a notice to attend the disciplinary hearing. Upon being informed of the employees' resignation, the employer elected to hold the employees to the notice by continuing with the disciplinary action. The employees then approached the LC seeking urgent relief. They sought a declaration that the employer no longer has the jurisdiction to continue with the disciplinary proceedings given that the employees have already terminated the employment with immediate effect. The LC had to determine whether the employees' act of resigning with immediate effect has the consequence of ending the employment contract. A related issue was whether the employer can still hold these employees to the notice period. Moreover, if that is so, will the employer be permitted to continue with the disciplinary enquiry even after the immediate termination.

In answering these questions, Nkutha-Nkontwana J restated the legal principles governing resignation, its effect, when does resignation takes effect and the conflicting authorities at play. As to the effect of resignation, the court reiterated the general principle that resignation brings an end to the contract of employment. Expressed in legal parlance, once an employee has resigned, he ceases to be an employee of that employer. The LC cited *Toyota*, where this issue was dealt as follows:

> 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.[140]

The LC agreed that there was a breach of contract on the part of employees failing to serve their notice when resigning. Nkutha-Nkontwana J rejected the notion expressed in *Mzotsho* and Coetzee that if the employee resigns without a notice, the employer can hold the employee to

[139] *Coetzee* para 19.
[140] *Toyota* para 142.

the contract by seeking an order for specific performance.[141] The implication is that without getting such an order, the employer will not be able to hold the employees to the notice.

3.3.6 Mthimkhulu v Standard Bank of South Africa (2021) 42 ILJ 158 (LC)

In *Mthimkhulu,* the chairperson of the workplace inquiry found the employee guilty of misconduct. However, the employee quickly resigned with immediate effect before a sanction of dismissal was announced. The employer disregarded the resignation with immediate effect and informed the employee that the disciplinary hearing will be finalised. The employee approached the LC seeking the court to declare the dismissal null and void. The employee argued that they have resigned with immediate effect and as a result, the employer has no jurisdiction.

The LC tackled the issue of the consequence that resignation prior a sanction is issued has on the employment contract. The court referred to *Naidoo* and *Toyota* where it was held that a valid resignation cannot be withdrawn and such the employer has no power to discipline the employee once resignation has taken effect.[142] The LC was however able to differentiate the facts between the two circumstances. It was found that in this matter, the employee was already disciplined and what was remaining was for the sanction to be issued. From this, the court found that employee's resignation was of no legal effect. The employee was found to have repudiated the employment contract, and as result, the aggrieved party which is the employer had the choice to both cancel the contract and sue for damages or to seek specific performance.[143]

The court found that the employee's resignation was nothing but a ploy. It is clear that they were aware that they are facing dismissal so resignation was used as a plan to escape dismissal. It was then held that employer can still issue a sanction of dismissal even after the employee has resigned with immediate effect during the disciplinary proceedings.[144]

---

[141] *Naidoo* para 25.
[142] *Mthimkhulu* para 10.
[143] *Mthimkhulu* para 13.
[144] *Mthimkhulu* para 15.

3.4 Developments in eSwatini and Lesotho

The trends in tactical resignation from the neighbouring Kingdoms of eSwatini and Lesotho bring interesting dimension, the problem of employees who resigned with immediate effect to escape dismissal or being held liable for their misconduct.

3.4.1 eSwatini

The Industrial Court in *Dludlu,* found that resignation with immediate effect has an effect of dispossessing the employer of the power to discipline the departing employee. Dunseith also remarked that:

> Resignation is a unilateral act which brings about termination of the employment contract without requiring acceptance. While the respondent took every effect to ensure that the disciplinary hearing was procedurally fair, its effects were unnecessary because the employment contract had already been terminated.[145]

In *Matsenjwa v Medecins Sans Fronties*[146] the Industrial Court had to decide if the employer had the power to accept or reject an employee's resignation. This came after the employee had decided to tender his resignation. The court concluded that the employee has the contractual right to resign, and such an act should be done legally. Since resignation is a unilateral act done by the employee, the employer has no right to reject it. It was further held that an employee who serves a notice to resign would not be considered to have breached the employment contract. Lastly, it was held that although the employer has no right to reject an employee's resignation, he has the power to accept or reject the employee's withdrawal, if the employee revokes resignation.

In *Rudolph*, the Industrial Court dealt with a matter where the employer refused to accept the employee's resignation, instead continued with the disciplinary proceedings. The Industrial Court held that resignation deprives the erstwhile employer the jurisdiction to discipline an erstwhile employee[147].

---

[145] [2007] SZIC 21.
[146] [2018] SZIC 69.
[147] *Rudolph* para 11.

3.4.2 Lesotho

The Lesotho Labour Appeal Court in *Mohamo* followed the approach taken by the Swaziland Industrial courts. In this matter, an employee decided to resign while facing disciplinary proceedings, however he was charged. The court alluded to the South African decision in *SALSTAFF obo Bezuidenhout*, where the court stated the following:

> Resignation is a unilateral act by which an employee signifies that the contract will end at his election after law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without consent of the employer, is in fact the act that terminates the contract. ...The mere fact that the employee is contractually obliged to work for the required notice period if the employer requires him to do so does not alter the legal consequence of the resignation.[148]

Mosito AJ held that resignation with immediate effect prohibits the employer from instituting disciplinary charges against the employee that has resigned. It has been reiterated that resignation is a voluntary act and no one can be coerced to continue working against his or her will. As noted by Ramodiba J in *Pekeche v Thabane*,[149] section 9 of the Constitution of Lesotho expressly prohibits any form of forced labour. It follows that employees have the right to resign at any moment when they want to, the employer's remedy will be to claim breach of contract.

3.5 Conclusion

The chapter has demonstrated that a new approach to tactical resignation that emerged since *Mzotsho/Coetsee/Naidoo* trilogy and consolidated in *Mthimkhulu* affirms the employers' disciplinary power to proceed with disciplinary process to finality despite the departing employees' immediate resignation. To sum up, if an employer resigns with immediate effect while facing disciplinary proceedings the employer still has the power to disciple such an employee. In contrast, the attitude from eSwatini and Lesotho is that an employee can resign with immediate effect to escape disciplinary proceedings, and the employer loses its power to discipline the escaping employee.

---

[148] *Bezuidenhout* para 11.
[149] [1998] LSCA 50.

CHAPTER FOUR

SUMMARY AND CONCLUSION

4.1 Overview

The study has shown that a familiar problem encountered in labour relations environment is tactical resignation with immediate effect by employees under suspension pending the institution of disciplinary charges. Even more so, there are situations of resignations by employees under cloud while the disciplinary proceedings are in process and/or before the disciplinary sanction is imposed. The overriding objective strategic resignation is avoidance of accountability and consequences for alleged workplace misconduct. Moreover, calculated resignation is intended to deprive the employer of disciplinary jurisdiction with the misconducting employee asserting that he or she has ceased to be the employee.

The message emanating from recent key cases such *Mzotsho*, *Naidoo* and *Mthimkhulu* serve as a signal that pre-emptive resignation with immediate effect pending the institution of disciplinary charges, alternatively resigning with immediate effect prior to the announcement of a sanction of dismissal has no legal effect. Put simply, the door to escaping accountability for workplace misconduct seems to be firmly shut. It will be recalled that eSwatini cases such as *Dludlu*, *Rudolph* and *Mdluli* affirm the proposition that resignation with immediate effect deprives the erstwhile employer of disciplinary power over the departing employee. In the same token, the Lesotho Labour Appeal Court case of *Mohamo* has held that a former employer has no right to proceed against an employee who has resigned.

4.2 Summary of the Chapters

Chapter one outlined the scope of the inquiry by locating the study within the broader context of accountability. The discussion highlighted the fact that pre-emptive resignation by employees under suspension pending the institution disciplinary measures, or those already undergoing disciplinary processes has the ostensible purpose of evading accountability. The flipside of tactical resignations bring to the table the problematic issue of employees resigning to avoid disciplinary or incapacity proceedings, and

then later claiming constructive dismissal. Finally, the jurisdictional difficulties regarding the existence of dismissal or resignation loom large whenever one dealing with resignation.

Chapter two provided a detailed analysis on the complexities of resignation. It discussed what constitutes resignation and the governing thereof. A person who wants to resign ought to have the intention to terminate the employment. In other words, resignation is a unilateral act and cannot be withdrawn without the consent of the employer. Extensive analysis of resignations in the heat of the moment and related cases was evident. It was therefore found that in such circumstances the exception will apply, meaning that the employer must not be quick to accept the employee's resignation; there must be a cooling off. In the case where the employee was forced to resign, the law of unfair dismissal will apply. The employee will in such circumstances have the onus to prove that their dismissal was indeed unfair.

Chapter three dealt with the contentious issue of pre-emptive resignation. It was observed that in case where the contract makes no provision for the notice period, the resignation will be said to have occurred the moment it is accepted by the employer. Whereas, where the employment contract makes a provision for a notice period, then the resignation will be said to have occurred once the notice period has been served. The chapter further gave a detailed analysis on the effect of resignation on the employer's power to discipline the employee. The recent cases such as the *Mzotsho* and *Mthimkhulu* case have come with the conclusion that in the case where an employee resigns with immediate effect while breaching the employment contract, the employer will maintain the power to discipline such an employee.

Pre-emptive resignation case law from eSwatini and Lesotho indicates that departing misconducting employees are shielded from accountability since an employer lacks the authority to discipline an employee that has already resigned.

4.3 Conclusion

Trust is a very important key element in the employment relationship. It involves both parties having faith and a mutual interest that will be to their benefit, hence it is said to be established by a mutually beneficial

behaviour of the involved parties.[150] Therefore, if the employee commits misconduct by not conducting themselves in a manner that will not be in the best interest of the company then such will result in the trust element being broken. As such, the employee will need to account for their wrongdoing. There isn't any standard definition for the term accountability; however, exceptional scholars and writers have come with motives of the phrase. Some have defined the term in the following manner:

> Accountability is the implicit or explicit expectation that one may be called on to justify one's beliefs and actions to others, and the extent to which a person's behaviours are observed and evaluated by others, with important rewards and punishments contingent upon those evaluations.[151]

Furthermore, the Galway liability paper defined accountability in this manner:

> Accountability is the obligation and / or willingness to demonstrate and take responsibility for performance in light of agreed upon expectations. Accountability goes beyond responsibility by obligating an organization to be answerable for its actions.[152]

Accountability is one of the values entrenched in the Constitution and the judiciary were given the power to ensure that indeed this principle is applied in this democratic state including the workplace.[153] Hence, it makes sense why the courts in the recent judgments found that the employers have the power to continue to discipline employees that tactically resign from their jobs to escape accountability. This precedence will assist reduce future misconducts in the workplace due to the fact that employees may be conscious that should they commit an offence they will need to account for their movements and due to the current judgments, the probabilities of them getting away with such turn out to be slim.

---

[150] Lewicka, K & Knit, D 'The Importance of Trust in Manager – Employee Relationships' (2012) *International Journal of Electronic Business Management* 10.

[151] Gabriel, AG, Marasigan, JT, Anthony, MA & Ramos, VB 'Transparency and Accountability in Local Governance: The Nexus between Democracy and Public Service Delivery in the Philippines' 2019 *Public Policy and Administration Research* 7.

[152] Abrahams, M 'Data Protection Accountability:
The essential Elements. A document for discussion' *Center for Information Policy Leadership* (2009)
<http://www.huntonfiles.com/files/webupload/CIPL_Galway_Accountability_Paper.pdf>Accessed 15 July 2022.

[153] Okpaluba, C 'The Constitutional Principle of Accountability: A study of Contemporary Southern African Case Law' 2018 *South African Public Law* 33.

BIBLIOGRAPHY

Cases

Adcock Ingram Healthcare (Pty) Ltd (2001) 2 ILJ 1799 (LAC)

AMCU v Royal Bafokeng Platinum Ltd (2020) 41 ILJ 555 (CC)

ANC v Municipal Manager, George [2009] ZASCA 139

Asuelime/University of Zululand [2017] 12 BALR 1312 (CCMA)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Bramley v John Wilde t/a Ellis Alon Engineering [2003] 4 BLLR 360 (LC)

Cairncross/Legal and Tax (Pty) Ltd [2019] 2 BALR 137 (CCMA)

Cape Peninsula University of Technology v Mkhabela [2021] ZALAC 30

Central Technical Services (Pty) Ltd v MEIBC (2017) 38 ILJ 1651 (LC)

Chabeli v CCMA (2010) 31 ILJ 1343 (LC); Foschini Group v CCMA (2008) 29 ILJ 1515 (LC)

Coetzee v Zeitz Mocca Foundation Trust (2018) 39 ILJ 2529 (LC)

Council for Scientific and Industrial Research v Fijen (1996) 17 ILJ 18 (AD)

CT International Financiers (Pty) Ltd v Van Rooyen [2019] ZALCCT 42

DA v Minister of Public Enterprises 2018 ZAGPPHC

Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256(LAC)

DG: Office of the Premier of the WC v SAMA obo Broens (2011) 32 ILJ 1077 (LC)

Discovery Health Ltd v CCMA (2008) 29 ILJ 1480 (LC)

Dube v University of Zululand [2019] 3 BLLR 285 (LC)

Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC)

Eagleton v You Asked Services (Pty) (Ltd) (2009) 30 ILJ 320 (LC)

Enforce Security Group NUMSA v Abancedisi Labour Services CC (2012) 33 ILJ 2824 (LAC)

ER24 Holdings v Smith NO 2007 (6) SA 147 (SCA)

FAWU v Phakedi ZALCJHB 103

FAWU obo Gaoshubelwe v Pieman's Pantry (Pty) Ltd (2018) 39 ILJ 1213 (CC)

Fijen v Council for Scientific & Industrial Research (1994) 15 ILJ 759 (LC)

Gale Ltd v Gilbert [1978] ICR 1198

Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd (2016) 37 ILJ 2723 (CC)

George Local Municipality (2010) 31 ILJ 69 (SCA)

Greef v Consol Glass (Pty) Ltd (2013) 34 ILJ 2385 (LAC)

Grootboom v NPA (2013) 34 ILJ 282 (LAC)

Grootboom v NPA 2014 (2) SA 68 (CC)

Hamden and Christian Centre (Abbotsford) East London (2017) 38 ILJ 2140 (CCMA)

HC Heat Exchangers (Pty) Ltd v Araujo [2020] 3 BLLR 289 (LC)

IMATU obo Strydom v Witzenburg Municipality (2012) 33 ILJ 1081 (LAC)

Jack v Director-General Department of Environmental Affairs [2003]1 BLLR 28 (LC)

Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (CC)

Jordaan v CCMA (2010) 31 ILJ 2331 (LAC) 2338

Khum MK and Bie Joint Venture (Pty) Ltd v CCMA (2020) 41 ILJ 1129 (LAC)

Lottering v Stellenbosch Municipality [2010] ZALCCT

Marais v Shiva Uranium (Pty) Ltd (In Business Rescue) (2019) 40 ILJ 177 (LC)

Masinga v Chief of the SANDF [2022] ZASCA 1

Maswanganyi v Minister of Defence and Military Veterans (2020) 41 ILJ 1287 (CC)

Mdlalose v I E Laher & Sons (Pty) Ltd (1988) 6 ILJ 350 (IC)

Minister of Defence and Military Veterans v Mamasedi 2018 (2) SA 305 (SCA)

MEC: Department of Education, Eastern Cape v Batwini 2018 ZALCPE 3

MEC for Department of Health v DENOSA obo Mangena [2014] 4 BLLR 393 (LC)

Meijer No v Firstrand Bank Ltd [2012] ZAWCHC 23

Metropolitan Health Risk Management v Majatladi (2015) 36 ILJ 958 (LAC)

Mnugti v CCMA 2015 36 ILJ 311(LC)

Mohamo v Nedbank Lesotho Ltd [2011] LSLAC 9

Mohlwaadibona v DR JS Moraka Municipality [2022] ZALCJHB 66

Molefe v Eskom Holdings SOC [2017] ZALCJHB 281

Morna v Commission on Gender Equality (2001) 22 ILJ 351 (LC)

Mthimkhulu v Standard Bank of South Africa (2021) 42 ILJ 158 (LC)

Murray v Minister of Defence 2009 (3) SA 130 (SCA)

Naidoo v Standard Bank SA Ltd (2019) 40 ILJ 2589 (LC)

Naidu v Ackermans (Pty) Ltd [2000] 9 BLLR 1068 (LC)

Nash v Golden Dumps (Pty) Ltd [1985] 2 All SA 161 (A)

National Health Laboratory Service v (2015) 36 ILJ 2259 (LAC)

NEHAWU obo Madulo and Performing Arts Council FS (2017) 38 ILJ 2157 (CCMA)

NEHAWU v UCT 2003 (3) SA 1 (CC)

Ngwenya v Premier of KZN [2001] 8 BLLR 924 (LC)

Nogoduka v Minister of Higher Education & Training [2017] 6 BLLR 634 (LC)
Organs of State v Zuma [2021] ZACC 18

SA Airlink (Pty) Ltd v SAA (SOC) Ltd [2020] ZASCA 156

SA Forestry Company Ltd V AWAWU [1999] 9 BLLR 997 (LC)
SACAWU obo Sithole Afrox Gas Equipment Factory (Pty) Ltd [2006] 6 BALR 593

SALSTAFF obo Bezuidenhout v Metrorail [2001] 9 BALR 926

SA Music Rights Organisation Ltd v Mphatsoe [2009] 7 BLLR 696 (LC)

SA Metal (Pty) Ltd v Holroyd [2020] ZALCJHB 32

SAMWU obo Nkunzo and Pikitup Johannesburg (2017) 38 ILJ 2167 (CCMA)

SA Rugby Players Association v SA Rugby (Pty) Ltd (2008) 29 ILJ 2218 (LAC)

SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) (2015) 36 ILJ 1923 (LC)

Sello v Divisional Commissioner, HRD, SAPS [2016] ZALCJHB 347

SITA v CCMA (2008) 29 ILJ 2234 (LAC)

SmithKline Beechman (Pty) Ltd v CCMA (2000) 21 ILJ 98 (LC)

Solidarity TU v Molefe [2018] ZAGPPHC 1

Straub v Barrow NO [2001] 6 BLLR 679 (LC)

Strydom v Witzenburg Municipality (2008) 29 ILJ 2947 (LC)

Sunshield Solutions (Pty) Ltd v Ngwenya [2017] ZALCJHB 39

Toyota SA Motors (Pty) Ltd v CCMA (2016) 37 ILJ 313 (CC)

Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal [2008] All SA 255 (SCA)

Van As v African Bank Ltd [2005] 10 BLLR 959 (LC)

Van Rooyen v Minister van Openbare Werke 1978 (2) SA 835 (A)

Van Staden v Busby Sawmills (Pty) Ltd [1994] 9 BLLR 127 (IC)

Vermooten v DPE (2017) (38) ILJ 607 (LAC)

Vodacom (Pty) Ltd v Motsa [2016] 5 BLLR 523 (LC)

Western Cape v Weder and MEC for Department of Health [2014] 4 BLLR 393 (LC)

Wiltshire v University of the North (2005) 26 ILJ 2440 (LC)

Woolworths (Pty) Ltd v Whitehead [2006] 6 BLLR 640 (LAC)

Wyeth SA (Pty) Ltd v Manqele (2005) 26 ILJ 749 (LAC)

Phaka v Bracks NO (2015) 36 ILJ 1541 (LAC)

Phethini v Minister of Education (2006) (27) ILJ 477 (SCA)

POPCRU v Minister of Correctional Services [2006] 12 BLLR 12212 (E)

Potgietersrus Hospital Board v Simons 1943 TPD 269

PPWWAU v Delma (Pty) Ltd (1989) 10 ILJ 424 (IC)

Ramonetha v Department of Roads and Transport, Limpopo [2018] 1 BLLR 16 (LAC)

Rikhotso MEC for Education [2004] ZALC 83

Rosebank Television and
Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T)

Rustenburg Town Council v Minister of Labour 1942 TPD 220

eSwatini

Dludlu v Emalangeni Foods Industries [2007] SZIC 21

Mdluli v Conco Swaziland Ltd [2009] SZIC 12

Rudolph v Mananga College [2007] SZIC 17

Lesotho

Mahamo v Nedbank Lesotho [2011] LSLAC 9

Pekeche v Thabane 1998 LSCA 50

The White Horse Party v Judicial Service Commission [2020] LSHC 57

Australia

Mohazab v Dick Smith Electronics Pty Ltd (No 2) (1995) 62 IR 200

Canada

SJBRWDSUL v Canada Safeway Ltd [2007] CanLII 71031

New Zealand

Air New Zealand v Grant Kerr [2013] NZEmpC 153 ARC 38/13)

United Kingdom

Credit Suisse v Armstrong [1996] ICR 882

Justice v Hibbert UKEAT 0289 13 3007

Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183

Martin v Yeomen Aggregates Ltd [1983] ICR 314

Journal articles

Andre Van Niekerk, 'Employees, independent contractors and intermediaries: The definition of employee revisited' (2005) *Contemporary Labour Law* 1

Andre Van Niekerk, 'Personal service companies and the definition of "employee"' (2005) 26 *Industrial Law Journal* 1909

Adriaan Van der Walt, David Abrahams, and Thanduxolo Qotoyi, 'Regulating the termination of employment of absconding employees in the public sector and public education in South Africa' (2016) *Obiter* 140

Adriette Dekker, 'Did He Jump or Was He Pushed? Revisiting Constructive Dismissal' (2012) 24 *South African Mercantile Law Journal* 346

Adriette Dekker, 'Gone with the Wind and Not Giving a Damn: Problems and Solutions in Connection with Dismissal Based on Desertion' (2010) *South African Mercantile Law Journal* 22

Anthony Koltz and Mark Bolino, 'Saying Goodbye: The Nature, Causes, and Consequences of Employee Resignation Styles' (2016) 101 *Journal of Applied Psychology* 1386 – 1404

Arneil Gabriel, Jervin Marasigan, Marc Anthony, and Vilma Ramos, 'Transparency and Accountability in Local Governance: The Nexus between Democracy and Public Service Delivery in the Philippines' (2019) *Public Policy and Administration Research* 7

Chelsea Roux and Jacques Van Wyk, 'Resignation "With immediate effect"' – Consequences for disciplinary action' 2019 *Sabinet African Journals* 19

Craig Bosch, 'Contract as a barrier to 'dismissal': The plight of the labour broker's employee' (2008) 29 *industrial Law Journal* 813

Chuks Okpaluba, 'The Constitutional Principle of Accountability: A study of Contemporary Southern African Case Law' 2018 South African Public Law 33

Ernest Manamela, 'Employee and independent contractor: The distinction stands' (2002) *South African Mercantile Law Journal* 107

Ezette Gericke, 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed Term Contracts as Opposed to Indefinite Employment' (2011) *Potchefstroom Electronic Law Journal* 105

Hoolo Nyane,'Revisiting the Powers of the King under the Constitution of Lesotho: Does the He Still Have Any Discretion' (2020) *De Jure* 11

Hoolo Nyane, 'Bicameralism in Lesotho: A Review of the Powers and Composition of the Second Chamber' (2019) *Law, Democracy and Development* 2

Hoolo Nyane, 'The Constitutional Rules of Succession to the Institution of Monarch in Lesotho' (2019) *Potchefstroom Electronic Law Journal* 24

Itumeleng Tshoose, 'Constructive Dismissal Arising from Work Related Stress' (2017) *Journal for Juridical Science* 121

Judith Geldenhuys, 'The Effect of Changing Public Policy on the Automatic Termination of Fixed-Term Employment Contracts in South Africa' (2017) *Potchefstroom Electronic Law Journal* 1

Krot Katarzyna and Lewicka Dagmara, 'The Importance of Trust in Manager – Employee Relationships' (2012) *International Journal of Electronic Business Management* 10

Lisa Parsee, 'Absenteeism in the workplace: analyses' (2008) *SA Mercantile Law Journal* 20

Lufono Nevondwe, Kola Odeku and Itumeleng Tshoose, 'Promoting the Application of Corporate Governance in the South African Public Sector' (2014) *Journal Social Sciences* 40

Marcus Mathiba, 'Deemed Dismissals and Suspensions in the Public Sector *Grootboom v National Prosecuting Authority* 2014 ILJ 121 (CC)' (2015) *Obiter* 223

Marylyn Christianson, 'Defining who is an employee: A review of the law dealing with the differences between employees and independent contractors' (2001*) Contemporary Labour Law* 21

Nicci Whitear-Nel, 'Constructive Dismissal: A Tricky Horse to ride - *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC)' (2012) *Obiter* 193

Nicola Smit, 'Resignation - An act that is not as straightforward as it seems?' (2011) *Sabinet African Journals* 100

Paul Benjamin, 'An Accident Of History: Who Is (And Who Should Be) An Employee Under South African Labour Law' (2004) 25 *Industrial Law Journal* 787

Pieter Le Roux, 'Resignations – An Update: The Final, Unilateral Act of an Employee' (2010) 19 *Contemporary Labour Law* 51

Relebohile Sehapi, *SADC LA Report on the Independence of the Judiciary in the Kingdom of Lesotho* - Sehapis' Blog 22 March 2021

Rochelle Le Roux, 'The Meaning of "Worker" And The Road Towards Diversification: Reflecting on *Discover*y, *SITA* and *Kylie*' 2009 (30) *Industrial Law Journal* 49

Siobhan Viljoen, 'Resignations - if, what and when?: labour' 2011 *Sabinet African Journals* 2011

Stella Vettori, 'Constructive Dismissal and Repudiation of Contract' (2011) *Stellenbosch Law Review* 173

Tamara Cohen, 'Legality of the automatic termination of contract of employment' (2011) *Obiter* 66

Tebello Thabane, and Elizabeth Snyman-Van Deventer, 'Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection' (2018) *Potchefstroom Electronic Law Journal* 21

Thulani Nkosi, 'The President of RSA v Reinecke 2014 (3) SA 295 (SCA)' (2015) *De Jure* 48

Tumo Maloka and Chuks Okpaluba, 'Making your bed as an independent contractor but refusing 'to lie on it': Freelancer opportunism' (2019) *South African Mercantile Law Journal* 54

Tumo Maloka and Jeffrey Mangammbi, 'The Complexities of Conditional Contracts of Employment' (2020) *South African Mercantile Law Journal* 295

Yeukai Mupangavanhu, 'The Relationship between Restraints of Trade and Garden Leave' (2017) 20 *Potchefstroom Electronic Law Journal* 1

Legislations

Basic conditions of employment act 75 of 1997

Constitution of the RSA Act 103 of 1996

Defence Act 42 of 2002

Insolvency Act 24 of 1936

Labour relations act 66 of 1995

Public Service Act 103 of 1994

South African Police Act 68 of 1995

Books and chapters

Johan Grogan, *Dismissal* (Juta 2002)

John Grogan, *Workplace Law* (Juta 2020)

Maire McGregor *et al*, *Labour Law Rules* (Siber Ink 2017)

Online sources

Arnold Tsunga, and Tatenda Mazarura, 'Eswatini Crisis: Time to Rethink and Allow Multiparty Democracy' (2021) *Daily Maverick* < https://www.dailymaverick.co.za/article/2021-07-18-eswatini-crisis-time-to-rethink-governance-and-allow-multiparty-democracy/> accessed 10 August 2021

Collins Dictionary, 'In the heat of the moment' Collins Dictionary (2023) < https://www.collinsdictionary.com/dictionary/english/in-the-heat-of-the-moment> accessed 21 May 2023

Des Erasmus, 'SANDF Deployed to Contain KZN and GP violence and looting in Wake of Incarceration of Jacob Zuma' *Daily Maverick* 12 July (2021) <https://www.dailymaverick.co.za/article/2021-07-12-breaking-sandf-to-be-deployed-to-contain-kzn-and-gp-violence-and-looting-in-wake-of-incarceration-of-jacob-zuma/>accessed 10 August 2021

Greg Mills and Marie – Noelle Nwokolo, 'Lesotho under its New Prime Minister: Time to Think Out of the Box' (2020) Daily *Maverick*

<https://www.dailymaverick.co.za/article/2020-05-22-lesotho-under-its-new-prime-minister-time-to-think-out-of-the-box/>accessed 20 August 2021

Jerry Cutler, 'Legal Guide to Human Resource: Drafting Effective Settlement Agreement'

(2018)
<https://www.researchgate.net/publication/327368892_Drafting_Effective_Settlement_Agreements> accessed 20 February 2022

John Aerni-Flessner, 'Lesotho at 50: The Politics of Dysfunction or the Dysfunction of Politics?' (2016) *Daily Maverick*

<https://www.dailymaverick.co.za/article/2021-07-16-king-mswati-ignores-calls-for-change-in-first-response-to-eswatini-crisis/>accessed 20 August 2021

Lebo Diseko, 'How Jacob Zuma's presidency shaped South Africa' (2018) BBC News < https://www.bbc.com/news/world–Africa-4230752-How Jacob Zuma's presidency shaped South African speech - BBC News/ >accessed 18 May 2023

Martin Abrahams, 'Data Protection Accountability:The Essential Elements. A document for discussion' *Center for Information Policy Leadership* (2009) <https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/data_protection_accountability-the_essential_elements__discussion_document_october_2009_.pdf>accessed 15 July 2022

Noxolo Mafu, 'Smallanyana Skeletons of Our Politicians' (2017) *HUFFPOST* <https://www.huffingtonpost.co.uk/2017/10/16/top-five-smallanyana-and-not-so-smallanyana-skeletons-of-our-politicians_a_23244483/>accessed 4 July 2021

Nozipho Mvulane, 'Mutual Separation Agreements' (2020) *Rajaram Mvulane* <http://www.rajarammvulane.co.za/mutual-separation-agreements/>accessed 20 August 2021

Nthakoana Ngatane, 'Rethinking SADC Borders: The Case of Lesotho' (2018) *Daily Maverick* <https://www.dailymaverick.co.za/article/2018-11-04-rethinking-sadc-borders-the-case-of-lesotho/>accessed 1 October 2021

Peter Fabricius, 'Lesotho Government Agrees to Allow Prime Minister Tom Thabane a Dignified Exit' (2020) *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-20-lesotho-government-agrees-to-allow-prime-minister-tom-thabane-a-dignified-exit/> accessed 20August 2021

Peter Fabricius, 'King Mswati Ignores Calls for Change in First Response to ESwatini Crisis' (2021) <https://www.dailymaverick.co.za/article/2021-07-16-king-mswati-ignores-calls-for-change-in-first-response-to-eswatini-crisis/> accessed 20 August 2021

Tiseke Kasambala, 'Cry for Regional Help: Southern African Leaders Must Stand with Eswatini People in their Demands for Urgent Political and Economic Reform' (2021) *Maverick Citizen*

<https://www.dailymaverick.co.za/article/2021-07-06-cry-for-regional-help-southern-african-leaders-must-stand-with-eswatinis-people-in-their-demands-for-urgent-political-and-economic-reform/>accessed 30 August 2021

Tatenda Tsunga and Arnold Mazarura, 'Eswatini Crisis: Time to Rethink and Allow Multiparty Democracy' (2021) *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-07-18-eswatini-crisis-time-to-rethink-governance-and-allow-multiparty-democracy/> accessed 10 August 2021

Theses

Estie Smit *Constructive Dismissal and Resignation due to Work Stress* (LLM-dissertation UNW Potchefstroom Campus, 2013)

Mabjana Thulare, *Constructive Dismissal in South Africa Prospects and Challenges* (LLM-dissertation UL, 2014)

Nonkululeko Cele, Proving Constructive Dismissal: *A Critical Evaluation of Section 186(1) (e) of the Labour Relations Act 66 of 1995 and Recent Judgments* (LLM-dissertation, UKZN, 2018)

Sipho Ngcobo, An Analysis of Intolerable Conduct as a Ground for Constructive Dismissal (LLM-dissertation, UKZN, 2014)