

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: J1177/19

In the matter between:

**TRISTYN NAIDOO**

**First Applicant**

**SEDAYSHUM NAIDU**

**Second Applicant**

And

**STANDARD BANK SA LTD**

**First Respondent**

**SBG SECURITIES (PTY) LTD**

**Second Respondents**

**Heard: 15 May 2019**

**Delivered: 24 May 2019**

**Summary: Urgent interdict – Jurisdiction of an employer to discipline an employee post resignation with immediate effect.**

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**JUDGMENT**

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NKUTHA-NKONTWANA. J

Introduction

[1] The first and second Applicants (the Applicants) challenges the jurisdiction of the First Respondent Standard Bank of SA Ltd (Standard Bank) to continue with the disciplinary hearing post their resignation with immediate effect on 9

May 2019. Furthermore, they seek the Court to interdict Standard Bank from proceeding with, and finalising such disciplinary hearing post their resignation, and costs.

- [2] The standard Bank is opposing the application but elected not to file an answering affidavit and preceded by way of oral legal submissions in Court.
- [3] The second respondent, SBG Securities (Pty) Ltd (SBG) is joined only as an interested party and nothing further needs to be said of that, save to state that no order is sought against it since it is not opposing the application.

#### Background Facts and Chronology

- [4] The Applicants were employed by Standard Bank as Equities Traders which positions they held until their resignations. At the core of the dispute before this Court is a trade transaction involving the applicants. According to the founding affidavit, the applicants were approached by Mr Luke Middlewick: Head of Equities on 1 and 2 March 2019 respectively, to provide statements regarding the said trade transaction. The applicants duly complied.
- [5] On 4 March 2019, the applicants were issued with notices of precautionary suspension. The notification provided *inter alia*, that the nature of the allegations against the applicants was serious and that if proven, could impact on the trust relationship between them and Standard Bank. On 28 March 2019, the applicants were notified to attend a meeting scheduled for 29 March 2019 with a forensic investigator. The applicants attended the said meeting and again on 4 April 2019, they were requested to attend a further meeting with the forensic investigator on 5 April 2019.
- [6] Subsequently, on 7 May 2019, the applicants were informed of a further meeting scheduled at Standard Bank on 9 May 2019 which the applicants duly attended. In this meeting, they were handed notices to attend a disciplinary hearing on 16 and 22 May 2019 at 09h00 respectively. The charges against the applicants were formulated as follows:

'The purpose of the Hearing will be to consider the Bank's concerns relating to-

- Gross misconduct in that on 26 February 2019, you facilitated and/or executed and/or allowed a trade to the value of R2.500, 000,000.00 for Coronation Fund Managers (Coronation) without having obtained the necessary approvals from the appropriate authorities within the Global Markets Function. Your conduct resulted in you and/or the Bank exceeding several limits of which, exposed the Bank to financial risk.
- Dishonesty in that on 27 February 2019 and 28 February 2019, you deliberately and knowingly failed to disclose the Coronation trade and/or accurately reflect your position to Market Risk when submitting your end of day balances. You further knowingly and/or deliberately failed to accurately reflect the abovementioned trade under the Facilitation Account, instead placing the trade under Proprietary Account.
- Gross misconduct in that you failed to abide by the Johannesburg Stock Exchange Rules when you facilitated the reporting of a trade for Coronation only on 1 March 2019, outside of the time lines as stipulated in the Johannesburg Stock Exchange Rules. Your conduct exposed the Bank to reputational risk.'

[7] On the same day, the applicants tendered their letters of resignation, which resignation was with immediate effect. The letters respectively read:

*First Applicant (Tristyn Naidoo)*

'I hereby tender formal notice of my resignation as an Equities Trader in terms of my dual employment contract with SBG Securities and Standard Bank of South Africa.

This resignation is effective immediately and without notice.

Yours sincerely'

*Second Applicant (Sedayshum Naidu)*

'Please accept this letter as notification that I am resigning from my position with Standard Bank on 9 May 2019. I apologise for not being able to provide

28 days' notice. I regret that, due to circumstances beyond my control, I need to resign immediately.

Please let me know what the process will be for receiving my last pay cheque and remaining benefits.

Thanks so much for the support that you have provided me during my tenure with the company. I greatly appreciate your years of guidance'

- [8] On the same day, at around 17h37/8 the applicants received identical emails from Ms Rita Boshoff (Ms Boshoff) Head of HR at Standard Bank which reads:

'I refer to your resignation letter dated 9<sup>th</sup> of May 2019.

We acknowledge receipt of such, however we wish to inform you that the Bank is not amenable to accepting your immediate resignation and will still hold you to your 28 days' notice period as contractually obligated and will be continuing with our internal process.

The disciplinary enquiry will therefore proceed as scheduled as per the attached DE notification letter handed to you today.

We wish to remind you to collect your evidence pack as annotated on the letter and to reach out in need.' [Emphasis added]

- [9] From that time until the proceedings before this Court, it becomes apparent that Standard Bank did not accept the applicants' immediate resignation and sought to hold them to their notice periods. However, the applicants disagreed and this is clear in their response to Ms Boshoff, which reads in part:

'...

Kindly note that it is trite law that my resignation is a unilateral termination of the employment contract and is therefore not subject to Standard Bank's acceptance or approval.

In light of the fact that this is an effective termination of the employment relationship, Standard Bank cannot proceed against any person who is no longer an employee of the company.

...'

- [10] In the same email, the applicants outline their lack of faith in the disciplinary process by stating, firstly that the chairperson will be someone on Standard Bank's retainer and will thus not be objective, secondly that their work station has been cleared and furniture removed, which according to them, is indicative of the fact that their case has been predetermined and that they will not be afforded a fair hearing. As a final point, they made an unequivocal demand for a formal undertaking from Standard Bank not to proceed with any disciplinary action as the employment relationship has terminated and further promised to seek legal remedies should such undertaking not be forthcoming.
- [11] On Monday 13 May 2019, Ms Boshoff responded to the applicants and reiterated the stance of Standard Bank, that it still intended holding the applicants to their contractual notice period, and that they remain its employees. The applicants are further advised that their disciplinary enquiries will proceed as scheduled on 16 and 22 May 2019 and that should they fail to attend, the enquiries will proceed in their absence.
- [12] On the same day, 13 May 2019, the applicants filed this application on extremely urgent basis.

#### Legal Principles

- [13] The issues that must be determined by this Court are whether the applicant's immediate resignation had the effect of immediately terminating the employment relationship and whether Standard Bank has the right to hold the applicants to their notice periods and if so, whether it can proceed with the disciplinary enquiries against them despite their resignation with immediate effect.

#### *The effect of resignation*

- [14] In *Sihlali v SA Broadcasting Corporation Ltd*<sup>1</sup>, resignation was held to be a unilateral termination of a contract of employment by the employee. Therefore, resignation brings an end to the contract of employment. In legal

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<sup>1</sup> (2010) 31 ILJ 1477 (LC).

parlance, once an employee has resigned, he ceases to be an employee of that employer, this much is clear from the authority in *Toyota SA Motors (Pty) v CCMA and Others*<sup>2</sup>, where the Constitutional Court held thus:

'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.'

- [15] It is a statutory requirement of our law, for an employee to give and serve an employer a notice period upon resignation. However, both parties may agree to waive the said notice period and the employee is free to leave. This is ideally a desirable event-free situation, however, there are instances where the employer does accept the resignation but however, wishes to hold the employee to its statutory or contractual notice period.
- [16] In giving effect to the principle in *Toyota*<sup>3</sup>, one has to establish when does the resignation take effect. This will depend on the type of resignation: the first one will of course be resignation on notice, in this instance the resignation will only take effect at the end of the notice period. The second instance would be where an employee resigns with immediate effect, which means that the employee will not serve out his notice period and the resignation will take effect immediately.

*When does resignation take effect*

- [17] As already stated above, mere resignation does not bring an abrupt end to an employment relationship. Statutorily and contractually, an employee is required to serve out his notice period, if required and once this notice period has been served, the resignation can be said to have taken effect. In the situation however, where the employee resigns without giving notice period, such as in this case, she/he is in breach of the contract of employment.

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<sup>2</sup> (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC); 2016 (3) BCLR 374 (CC) at para 142.

<sup>3</sup> *Supra* n 2.

[18] In *Sihlali*<sup>4</sup> the Court held that where an employee resigns without giving the required notice period, that employee breaches the employment contract. In this situation, what would be the recourse available to the employer? This question was aptly answered in *Vodacom (Pty) Ltd v Motsa and Another*<sup>5</sup>, which was quoted with approval in *Sihlali* as follows:

'When an employee gives the required notice the contract terminates at the end of the notice period. When an employee leaves his or her employment without giving the required period of notice the employee breaches the contract. Ordinary contractual rules dictate that the employer may hold the employee to the contract and seek an order of specific performance requiring the employee to serve the period of notice. Alternatively, the employer may elect to accept the employee's repudiation, cancel the contract and claim damages.'

[19] At this juncture, it is apposite to deal with the misconception amongst employers that they have a right to refuse to accept a resignation-this is flawed and was frowned upon by the Court in *Sihlali*<sup>6</sup> where the Court held such conduct to amount to a form of indentured labour: it said:

'If resignation to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment. Against his or her will. This cannot be-it would reduce the employment relationship to a form of indentured labour'.<sup>7</sup>

[20] It is patently clear that in this matter there is a breach of contract by the applicants, therefore, what needs to be addressed are the remedies available to Standard Bank for the breach? *Vodacom*<sup>8</sup> restates the contractual principle that an employer may hold the employee to the contract by seeking an order for specific performance. This is an equitable remedy where a court issues an order requiring a party to perform per the contract. This, in the ordinary course of events, would entail an application or in instances such as the present, a

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<sup>4</sup> *Supra* n 1.

<sup>5</sup> [2016] 5 BLLR 523 (LC); (2016) 37 ILJ 1241 (LC).

<sup>6</sup> *Supra* n 2 at para 11.

<sup>7</sup> *Id* n 5.

<sup>8</sup> *Supra* n 5.

counter-claim by Standard Bank, to seek an order for specific performance in order to hold the applicants to their notice periods. Unfortunately, this is not the case in this matter. There was no claim for specific performance and therefore the Court is not in a position to order such.

*Conflicting authorities of this Court*

[21] The applicants hinged their case on *Mtati v KPMG Services (Pty) Ltd*,<sup>9</sup> where the Court, confronted with similar facts, found as follows:

[24] In my view, the second letter of resignation of the applicant changed the status of the employee from that of being an employee, in the ordinary sense of the word, to that of being the erstwhile employee of the respondent. This means that the termination of the employment contract with immediate effect took away the right of the first respondent to proceed with the disciplinary hearing against her. The powers of the employer to discipline an employee post the resignation is well illustrated by what is said in the decision of the Labour Appeal Court of Lesotho in the case of *Mahamo v Nedbank Lesotho Limited*, where it is held that:

“Resignation is a unilateral act which brings about termination of the employment relationship without requiring acceptance...Whilst the Respondent took every effort to ensure that the disciplinary hearing was procedurally fair, its efforts were unnecessary because the employment contract had already been terminated by the Applicant himself on 20<sup>th</sup> October 2000. . .”

[22] Even though *Mtati*<sup>10</sup> was appealed successfully, the Labour Appeal Court (LAC) only dealt with the grounds of mootness of the application. *The ratio decidendi* in *Matati* was endorsed in unreported decision in *Chiloane v Standard Bank of South Africa Ltd*,<sup>11</sup> where the Court emphasised that the employer’s power to discipline the employee ceased when she tendered an unequivocal resignation with immediate effect but that the employer could avail itself to common law remedies. I agree.

<sup>9</sup> [2016] ZALCJHB 403; [2017] 3 BLLR 315 (LC); (2017) 38 ILJ 1362 (LC) at para 25.

<sup>10</sup> *Ibid.*

<sup>11</sup> Unreported case of the Labour Court J2270/2018 handed down on 5 July 2018.



- [23] A different view was expressed in *Coetzee v Zeitz Mocca Foundation Trust and Others*<sup>12</sup> and unreported case of *Mzotsho v Standard Bank South Africa Limited*.<sup>13</sup> In *Coetzee*, the Court seems to suggest that *Mtati* is no longer persuasive since the correct reflection of the law is the one expounded in *Vodacom*. As stated above, *Vodacom* restates the contractual principle that an employer who is confronted with an immediate resignation in breach of the contract of employment may hold the employee to the contract by seeking an order for specific performance. Since it is accepted that the resignation terminates the contract of employment unilaterally, the order of specific performance would, in essence, reinstate the contract and direct performance with its terms.
- [24] It is accepted that an order for the specific performance of a contract of employment will, in the exercise of the court's discretion, not normally be granted.<sup>14</sup> However, it does not mean it would never be granted. A typical example is to be found in *Nationwide Airlines (Pty) Ltd v Roediger and Another*,<sup>15</sup> where an airline captain was held to his contractual undertaking to give three months' notice.
- [25] Whilst I concur with both *Coetzee* and *Mzotsho* on contractual principles, I do however disagree with the view that the employer may proceed with the disciplinary hearing without first approaching the court for an order for specific performance. There is no legal basis for such an approach.

#### A case for urgent relief

- [26] Turning now to the issue of relief: To be entitled to such, on an urgent basis, requires for an applicant to demonstrate to a court *inter alia*, that he has no alternative remedy and that he has a reasonable apprehension of irreparable harm. In this matter, the applicants were at pains to demonstrate their apprehension towards the fairness of their disciplinary enquiries. They contend in the founding affidavit that the disciplinary enquiries will not be fair and that their fate has already been decided by the applicant. Of issue is the

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<sup>12</sup> (2018) 39 ILJ 2529 LC;

<sup>13</sup> J2426-18 10 July 2018.

<sup>14</sup> *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

<sup>15</sup> [2006] JOL 17221 (W).

contents of the email from Ms Boshoff that the Bank intends to register the names of the applicants in the REDS. It apposite to quote the email exchange between the parties on this issue. The first applicant as part of his email that brings about his apprehension. It reads:

'I would also like to take this opportunity to voice my disappointment in the manner in which the Standard Bank has handled this matter.

In this regard, I note the following:

1. I suggest a mutual separation and was advised that such a process would need to be submitted in writing in order to initiate. The timelines for consideration and resolution of this post the submission were not made clear and beyond the mandate of the people present in the room.
2. In the discussion it was made clear that a possible chairperson for the internal hearing is someone who the bank has on a retainer. How can such a person be completely independent or objective.
3. I have been informed that Standard Bank has already removed by furniture at my workspace. And this is a clear indication that the bank has already predetermined the merits before even affording me the courtesy of a response.

[27] On 13 May 2019, Ms Boshoff respondent and stated:

'Dear Tristyn

I refer to your email below.

I do not intend to address all the allegations you have set out in your email below and reserve the Bank's right to do so at the appropriate time and forum. I further do not intend to debate the legalities by way of correspondence.

Please note that the bank maintains the view that it is entitled to hold you to your contractual notice period, being 28 days. You therefore remain an employee of the Bank until 6 June 2019. The disciplinary enquiry will

therefore proceed as scheduled on 16 May 2019. Should you fail to attend, it will proceed without you.

As you are aware, you have been charged with dishonesty and as such, in addition to the abovementioned rights in terms of notice period, the Bank retains the right, post termination of your employment, to place you on the REDS (Register of Dishonest and Dismissed Employees). Database following a post termination REDS hearing.

The Bank reiterates its intention to proceed with the hearing of the matter in a manner that is fair and just and which will allow you the opportunity to make full representation of the charges levelled against you.'

[28] It would seem that the applicants have a genuine complaint. A reading of Ms Boshoff's email evinces Standard Bank's motive for holding of the disciplinary enquiry come hell or high waters, post termination of the employment.

[29] I have already alluded to the fact that resignation with immediate effect, as in this case, brings about an end to the employment relationship in breach of the termination clause. Whilst I sympathise with Standard Bank, it is not without remedies but self-help is not one of them and this Court cannot sanction it. Once the employer elects to hold the employee to the terms of the contract, it must enforce that election by means of a court order.

[30] What Standard Bank seeks to do in this case is the control over the applicants in order to proceed with the disciplinary enquiry and eventually enlist their names on REDS, which has reputational and professional consequences for the applicants. This it can only do if the applicants are still in its employ.

#### Conclusion

[31] In all the circumstances, there is merit in the applicant's papers and they have, in my view, made out a case for an interdict.

#### Costs

[32] Although the applicants have sought a costs order, I am of the view that this matter raised pertinent questions that called for a ventilation by this Court. Therefore, in applying the principles of law and fairness, I will not make an order as to costs.

[33] In the premises, I make the following order:

Order

1. The first respondent (Standard Bank of South Africa) has no power to discipline the first and second respondents subsequent to their resignation with immediate effect.
2. Standard Bank is interdicted from continuing with the disciplinary enquires against the applicants that were scheduled to commence on 16 March 2019 and 22 March 2019 respectively.
3. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate: C Goosen

Instructed by Vanessa Naidoo Attorneys Inc.

For the respondents: Advocate: G Fourie SC

Instructed by Mervyn Taback Inc.