Monareng v Dr JS Moroka Municipality 2022 43 *ILJ* 1855 (LC)

Affirmation that resignation by an employee constitutes a point of no return: or does it?

1 Introduction

Viewed from a common-law perspective, an employment relationship can be terminated for various reasons, such as the passing of time or by mutual agreement between an employer and employee (*Strachan v Lloyd Levy* 1923 AD 670; *October v Rowe* 1898 SC 110). The tendering of an unambiguous resignation by an employee constitutes a unilateral action with the clear intention of terminating the employment relationship (see *Mafika v SABC Ltd* 2010 5 BLLR 542 (LC) para 13; and *ANC v Municipal Manager George Local Municipality* 2010 2 ALL SA 108 SCA para 15).

Even though the Basic Conditions of Employment Act 75 of 1997 (BCEA) makes provision for "notice of termination of employment" in terms of section 37, the implications of resignations and the withdrawal thereof are not dealt with in terms of legislation. Various court cases have adjudicated the implications of resignations and the subsequent withdrawal thereof on the employment relationship. However, some of the cases have come to different conclusions on the implications of the retraction of resignations, and this has created uncertainty regarding the correct position.

The Labour Court in *Monareng v Dr JS Moroka Municipality* 2022 43 *ILJ* 1855 (LC) (*Moroka Municipality*) dealt with the implications of the resignation to the employment relationship, specifically considering at what point a resignation terminates the employment relationship. *Moroka Municipality* also considered whether a resignation can be unilaterally withdrawn and, if not, what would be required to revive the employment relationship. This case note analyses whether the court made the correct decision and it considers the implications thereof. This is an important aspect to consider because of the devastating practical implications it may have on employees who may resign in the "heat of the moment" or on erroneous grounds. This contribution concludes by making observations about the decision in *Moroka Municipality* and suggests an adapted approach where resignations and the withdrawal thereof are concerned.

2 The facts

Mr Mohlwaadibona (the employee) was appointed by Dr JS Moroka Municipality (the municipality) as a deputy financial officer in February 2019. On 17 January 2020, the municipality was placed under administration in terms of section 139(1)(b) of the Constitution of the Republic of South Africa, 1996, and Mr Mhlanga was appointed as the

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administrator. Among others, the administrator was conferred with the powers of the municipal manager of the municipality. On 1 April 2021, the employee sent a letter of resignation to the administrator resigning with immediate effect because of ill health. However, in an about turn, on 15 April 2021, the employee notified the administrator of his intention to withdraw the resignation and return to work on 19 April 2021. In seeking to retract his resignation, the employee stated that it "gives me pleasure that my health [that] prompted [my] resignation has miraculously improved [to the extent] that I am normal to endure the temperature in the area" (para 22). The administrator informed the employee that he did not accept the retraction and that he should not return for duty on 19 April 2021. The employee reported for duty on 19 April 2021 and, according to him, he only received the administrator's response dated 15 April 2021 on 23 April 2021 after he had already reported for duty without any objections by the administrator (para 3). The employee received his full April salary.

The executive mayor of the municipality appointed Mr Monkoe as acting municipal manager from 6 May 2021, and on 11 May 2021, the municipal council ratified his appointment. The day before his appointment was ratified, the acting municipal manager advised the employee that he accepted his withdrawal of the resignation (paras 4 and 5).

The employee was not paid in full for May 2021 and the municipality instructed payroll to remove the employee from the payment system. This resulted in the employee seeking an interim order from the Labour Court to be declared an employee of the municipality. The court issued the interim order in terms of which the decision to terminate the employee's salary and employment was declared void (paras 1 and 6). The employee sought confirmation of the interim order and the municipality sought a discharge of the order as well an order as to costs (para 1).

3 The judgment

Moshoana J of the Labour Court held that a resignation is a voluntary unilateral act that terminates the employment relationship. The court continued to state that resignation is effective as soon as it is communicated to the employer and cannot be withdrawn unless the employer agrees to such withdrawal (para 10). Any such withdrawal, the court held, must be made during the notice period (para 15). The court stated that most decisions covering the withdrawal of resignations did not expand on

> the question how such a consent must be expressed and what it effectively meant in law. Does it mean the resignation did not take effect and it is wished away? Does it mean it took effect, but a new contract of employment is entered into or not when its effect — ending the employment relationship — is unraveled?

In answering the last question, the judge stated that "once resignation has taken its legal effect, which was the case in this matter, consent to withdraw it means re-employment or rehire" (para 14). Moshoana J furthermore stated that "[r]e-employment and or rehiring requires compliance with certain statutory requirements in the context of local government" (para 14). Because this is a local government, these requirements were not met and rehiring did not take place.

The case of Moroka Municipality stressed that the administrator's silence did not constitute consent when the employee reported for duty. Consequently, the court refused to confirm an order declaring that the employee remained an employee of the municipality and it overturned the reinstatement order (para 18). It also pointed out that the fact that the employee still received his April salary did not change the effect of his resignation (para 20). Moshoana J noted that the employee had not resigned in the heat of the moment as he provided a reason for his resignation, which was due to ill health (para 21).

The court proceeded to state that should a new contract of employment be concluded after the resignation, this must occur by means of an offer and acceptance (para 25). The person making the offer must have the legal authority to make such an offer. In the case before the court, the court held that before his appointment as acting municipal manager, Monkoe lacked the authority and legal capacity to consent to the withdrawal of the resignation (para 26). Accordingly, the court denied confirming the interim order and discharged the matter without costs (paras 27 and 28).

4 Analysis of the judgment

4 1 The appropriate point of departure

As a general rule, and based on the principles of contract of employment, contracts of employment come to life through an offer of employment and an unqualified acceptance thereof. In line with the "information theory"

> a contract is concluded when and where consensus is reached, usually at the place where and at the moment when a person who has made an offer (the offeror) is informed that it has been accepted by a person legally entitled to do so (the offeree) (see Van Huyssteen, Lubbe and Reinecke *Contract: General Principles* 2016 51-55.)

Van Huyssteen, Lubbe, and Reinecke confirm that "[r]evocation of an offer is effective only if the offeree is notified of the decision to revoke" (at 56.)

Taking the above principles into account, it is submitted that the answer to the following question must serve as the starting point, but not necessarily the beginning and the end, of any inquiry regarding the legal effects pertaining to an employee's decision to retract an utterance of

resignation. Does a resignation constitute an offer that can be withdrawn before the acceptance thereof, or is it a unilateral action that becomes effective irrespective of the acceptance thereof by the employer? In this regard, two seemingly conflicting approaches have developed in South African jurisprudence, which are briefly discussed in the parts that follow.

4 1 1 Acceptance of resignation is required

In 2002 the Labour Appeal Court (LAC) in *Chemical Energy Paper and Printing Wood and Allied Workers Union v Glass and Aluminum* 2000 CC 2002 *ILJ* 695 (LAC) (*Glass and Aluminum*) adopted the approach that a resignation constitutes an offer that must be accepted before it becomes effective. The facts were as follows: A client refused to pay for services rendered by Glass and Aluminum based on the allegation that one of the service provider's employees had damaged a louvre before installation. Glass and Aluminum threatened to deduct the cost from the employee's wages. In the ensuing dispute, the employee contended that the employer had dismissed him, whilst the employer stated that the employee had resigned. Nicholson JA of the LAC stated that "[r]esignation brings the contract (of employment) to an end if it is accepted by the employer" (para 33).

In 2009 the Labour Court in *Uthingo Management (Pty) Ltd v Shear* (2009) 30 *ILJ* 2152 (LC) adopted an approach similar to that accepted by the LAC in *Glass and Aluminum*. Molahlehi J considered an application to review and set aside an arbitration award that provided that employees had been unfairly dismissed. The employees had resigned and indicated that they would serve notice of more than four weeks, but the employer notified them that since they were only employed by him for 52 weeks, they only needed to serve four weeks' notice. Molahlehi J remarked:

> The basic principle, which the commissioner with due respect in the present case failed to appreciate, is that once the resignation is accepted the employer has an election either to let the employee continue to render services for the remainder of the notice period or to terminate the contract and pay the employee in lieu of the notice period … For the acceptance of the notice to give effect to the termination as envisaged in the resignation, the notice must in the same way as the notice of dismissal be clear and unequivocal … The intention of the employer in accepting the notice must also be clear and unconditional (para 14).

As discussed in the part that follows, there is, however, no consensus about the fact that a resignation should be treated as an offer. As mentioned above, the decision in *Moroka Municipality* did not follow this approach. In paragraph 10 of the judgment, Moshoana J stated that resignation was a unilateral voluntary act "that ends the employment relationship. Resignation takes effect once communicated to an employer and it is incapable of being withdrawn unless an employer consents thereto."

4 1 2 Resignation is a unilateral action

As far back as 1969, the former Transvaal Division of the Supreme Court in *Rosebank Television and App Co v Orbit Sales Corp Ltd* 1969 1 SA 300 (T) formulated the principle that an employer does not need to accept a resignation for it to be valid, nor is such employer entitled to refuse a resignation. In 2010 Van Niekerk J of the Labour Court endorsed this principle in *Mafika v South African Broadcasting Corporation Ltd* 2010 5 BLLR 542 (LC). In this case, an employee was suspended pending disciplinary action and the employee resigned with immediate effect via SMS before facing the disciplinary action. The employee subsequently decided to retract the resignation. The Court held:

> A resignation is a unilateral termination of a contract of employment by the employee … If a resignation is 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 (para 11).

Van Niekerk J in *Mafika* criticises Nicholson JA's decision in *Glass and Aluminum* that stated that a resignation must be accepted by an employer. Van Niekerk J stated that it is incorrect in law and that there was no authority cited to support that finding (para 19).

This principle was also confirmed in *Lottering v Stellenbosch Municipality* 2010 31 *ILJ* 2923 (LC) where the court held that "a resignation in the form of a cancellation is unilateral in the sense that one party can bring the contract to an end without the consent of the other" (para 12).

This was also confirmed in 2016 by the minority judgment of the Constitutional Court in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 *ILJ* 313 (CC) (*Toyota SA*). Although the main issue of the case dealt with delays in review proceedings, and the majority did not entertain the issue of resignations, the minority Constitutional Court judges (Zondo J, Cameron J, and Van der Westhuizen J) comprehensively considered these principles. In this instance, an employee resigned after having been charged by the employer for being absent from work without leave. The employer refused to accept his resignation and convened a disciplinary hearing which resulted in his dismissed.

Zondo J in his minority judgment noted that

> [i]f an employee communicates to the employer a decision to resign from the employer's employ, our law is clear. It is that whether the resignation takes effect or not does not depend on the employer's acceptance or rejection of the employee's resignation. Not only is there a long line of cases which supports this view both before and after the advent of democracy but also this view is supported by a number of academic writers (para 178).

Although the minority judgment and *obiter dicta* of judges and justices do not create precedent they are persuasive authority. The principle is also supported by a number of authors whose views are not law but can be useful commentary. (See, for example, Manamela "'To meet is to part': resignation by SMS constitutes notice in writing as required by the Basic Conditions of Employment Act: *Mafika v SABC*" 2011 *SA Merc LJ* 525; Smit "Resignation — an act that is not as straightforward as it seems" 2011 *JSAL* 107; Van Niekerk and Smit *Law@work* (2019) 348-349).

It is submitted that the court in *Moroka Municipality* correctly reaffirmed the plethora of case law and other persuasive authority supporting the overarching principle that a resignation is a voluntary act, and not a reciprocal agreement, that terminates an employment relationship (para 10). Viewed from the perspective of an employee who is desirous to leave the employ of an employer, Zondo J makes the convincing point in *Toyota SA* that it would be untenable to allow for "a situation where an employer could force an employee to work for him against his will is difficult to reconcile with this country's current constitutional values" (para 184).

Added to this, and considering section 37(1) of the BCEA, which makes it clear that any contract of employment is terminable at the instance of any party to the agreement provided that the prescribed notification periods are adhered to, the authors of this contribution agree that a resignation constitutes a unilateral action that is not subject to the acceptance thereof. Nonetheless, this does not preclude an employer from continuing with a disciplinary hearing against an employee during the time when an employee is still serving the notification period. This much was confirmed in *Standard Bank of South Africa Limited v Chiloane* 2021 42 *ILJ* 863 (LAC) paras 22 and 23.

Despite the confirmation of the existing principles in *Moroka Municipality*, the question remains whether this approach should also apply in instances where an employee may not be desirous of terminating employment for whatever reason after resigning. In such circumstances, the argument of an employer forcing an employee to remain in service falls away. One should never forget that employers generally are in a stronger social and bargaining position than employees and, hence, the constitutional right to fair labour practices overrides general contractual terms (see Van Niekerk and Smit *Law@work* 4 and 10-11). It is against this background that the authors argue that decision-makers should adopt a more nuanced approach to determine whether resignations should always lead to the automatic termination of contracts of employment.

4 2 "Heat of the moment resignations" versus "normal resignations"

The best-known example of when a resignation may be retracted occurs when an employee leaves his or her employment in the "heat of the moment". These resignations have generally been treated differently by the courts. "Heat of the moment" resignations refer to resignations made impulsively by employees because of how they feel about something at that particular time, but once they have returned to their senses and realise that they have made a mistake and acted based on emotion, they change their mind. The courts have largely held that "heat of the moment" resignations may be withdrawn without the consent of the employer (see *Nashwa v Unisel v Goldmine* 1995 9 BLLR 132 (IC)). In *Glass and Aluminum*, the LAC held:

> If the second appellant did resign, which is not entirely clear, he did so in the heat of the moment and as such the above authorities should not be held to be effective. That he returned the next day to get his job back is indicative that he made such a decision as a result of the circumstances under which he was acting at the time (para 407).

The court in *Moroka Municipality* mentions that the employee did not resign in the heat of the moment as he gave reasons for his resignation, being that he was ill (para 21). The court merely mentions this in passing and does not use the opportunity to further outline the position in the case of employees who resign at the spur of the moment, or under circumstances where they may have acted under false pretences. Even though it is understandable that the "heat of the moment" argument was not one of the main issues before the court, it is submitted that the court could have adopted a more sympathetic and more balanced approach rather than merely brushing aside the employee's reasoning. As mentioned above, it is argued that the principle of "resignation with no option of return" should not be elevated to a hard and fast rule without looking into the particulars of each instance on a case-by-case basis.

4 3 Consensus to withdraw a resignation

The general principle is that once a resignation is communicated to an employer, it cannot be withdrawn without agreement by the employer (*Rustenburg Town Council v Minister of Labour* 1942 TPD 220; *Lottering v Stellenbosch Municipality*; Van Niekerk and Smit *Law@work* 348-349). This means that a resignation may be withdrawn provided that the employer consents to such withdrawal. In cases where it is a "normal resignation" (that is, not a "heat of the moment" resignation) the courts have generally held that once a resignation has been accepted by an employer it cannot be withdrawn (see *Council for Scientific and Industrial Research (CSIR) v Fijen* 1996 17 *ILJ* 18 (AD); *Du Toit v Sasko (Pty) Ltd* 1999 20 *ILJ* 1253 (LAC)). As discussed above, in the case of a "heat of the moment" resignation, it may be withdrawn and an employer's refusal to allow the employee to withdraw such resignation may constitute a

dismissal (*Glass and Aluminum* paras 33-34). The court in *Moroka Municipality* correctly affirms the general principle that an employee cannot withdraw a resignation unless the employer consents to such withdrawal.

4 4 The date on which an employment contract terminates

Section 37(1) of the BCEA provides that an employment agreement may be terminated upon giving the required notice to the other party. An employee who tenders a resignation is required to still serve notice either in terms of their employment contract or in terms of the BCEA or the common law (Whitear-Nel and Shadia "Is a resignation vitiated by the failure to give proper notice? A discussion of *Lottering & Others v Stellenbosch Municipality* 2013 130 *SALJ*" 19). In *Lottering v Stellenbosch Municipality* (para 15.4) the court had to consider whether failure to give proper notice invalidated a resignation. In answering this question, the court held that

> [s]ubject 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 (para 15.4; see also *Salstaff obo Bezuidenhout v Metrorail* 2 2001 22 *ILJ* 2531 (BCA) para 6).

The LAC in *Standard Bank of South Africa Limited v Chiloane* had to determine whether an employee can terminate the employment relationship with immediate effect by a letter of resignation regardless of the contractual or statutory provisions that require notice to be given before termination can take effect. In this case, an employee had cashed a fraudulent cheque without following proper procedure and as such was issued with a notice to attend a disciplinary hearing. The employee subsequently resigned with immediate effect. The human resources division informed the employee that she would have to serve four months' notice as per her contract. The disciplinary hearing was set to continue during the notice period. At the disciplinary hearing, the employee claimed that she no longer was an employee, and as such the disciplinary hearing could not continue. The chairperson at the hearing refused to accept the claim and continued with the hearing in terms of which the employee was found guilty of misconduct and sanctioned. The court *a quo* held that a resignation with immediate effect instantly terminates the employment contract and as such the dismissal as per the disciplinary hearing was null. On appeal, the LAC, quite correctly, held that

> [i]t is common cause that the employer and employee had agreed that one would give the other four weeks' notice of termination of their employment contract. In these circumstances, for the employer or the employee to lawfully terminate their employment relationship, one had to give the other four weeks' notice. The party receiving the notice of termination which does not comply with the agreed notice period may, however, agree to forgo that term of the agreement. Where there is no agreement unless it is expressly stated

> that there is no need to serve the four weeks' notice, it has to be complied with in terms of the contract (para 14; see also paras 16, 22, and 23).

It is submitted that these principles also apply in the absence of such contractually agreed-upon terms. Sections 37(1)(a)-(c) of the BCEA make provision for notification of no less than one week's notice during the first six months of employment, two weeks for the remainder of the first year, and four weeks' notice if the employee has been employed for one or more years. Therefore, resignation with immediate effect does not immediately terminate the employment relationship. This allows an employer to discipline an employee despite the resignation with immediate effect during the notice period. This gives an employer the opportunity to proceed with a disciplinary hearing against an employee after resignation, but before the last day of the notification period. Nonetheless, there is nothing that precludes an employer from accepting an immediate resignation if he or she agrees to do so. This will terminate the employment relationship and an employer will be incompetent to go ahead with disciplinary action against an employee.

Even though the issue of a disciplinary hearing during a notice period was not canvassed in *Moroka Municipality*, Moshoana J emphasised that "resignation takes effect once communicated" (para 13) and that once the resignation has taken effect, consent to withdraw the resignation will constitute a re-employment or rehiring. In applying this to the current facts of *Moroka Municipality*, it is submitted that it is acceptable that the resignation with immediate effect was accepted by the employer, thus dispensing with the need for serving notice. Therefore, the employment was terminated immediately and withdrawal would not be possible without having to restart the employment process.

However, Moshoana J's remark, read in isolation as a principle, may be confusing. It seems to suggest that the employment relationship terminates upon receipt of the resignation by the employer. There can be no doubt that the employment relationship continues during the notice period subsequent to any resignation. A withdrawal of a resignation before the lapse of the notice period should be seen as an offer to the employer by the employee to continue with the employment contract and not an offer for a new employment contract. The consequences of the decision in *Moroka Municipality*, are that the withdrawal of a resignation that is accepted will result in re-employment and that "a contract of employment can only be brought back from the ashes in the same way it is conceived, namely offer and acceptance" would have the impractical consequences of the employment process being started from scratch, that is, the posting of the job advertisement and the selection process even though the current employment contract has not yet lapsed.

In light of the above principles, it is the authors' submission that a resignation is an intention of termination of the employment contract which, unless it is tendered, and accepted with immediate effect, does

not terminate the employment contract upon communication but the employment contract actually terminates at the end of the notice period. Accordingly, should an employer accept the withdrawal of a resignation at such a point (during the notice period) this should not be seen as a rehiring or re-employment but an agreement to continue with the existing employment relationship.

5 Conclusion

Moroka Municipality affirms the principle that has been endorsed in a long line of decisions that resignations are to be classified as unilateral actions that cannot be withdrawn without the consent of the employer in the hope of continuing the employment relationship. The court in *Moroka Municipality* correctly confirmed that a resignation terminates the employment relationship and does not have to be accepted by the employer in order for it to be effective.

It is comprehensible why the court did not traverse the issue of whether it would have reached the same conclusion had the resignation qualified as a "heat of the moment" resignation. This would have placed the spotlight on exceptions to the general rule in instances where the employee wishes to continue the relationship – rather than the scenario where the employer seeks to force the employee to continue against his or her will to do so. However, the authors wish to clarify that the principle laid down in *Moroka Municipality*, namely, that a resignation terminates the employment contract once communicated and as such a resignation cannot be withdrawn, should be limited to facts similar to those in the case, that is, where there is an acceptance of a resignation with immediate effect. Where the resignation is not with immediate effect and the employer has not agreed to waive the notice period, such principle would be incorrect.

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