

## Employment & Labour - South Africa

### When Employees Fail to Give Proper Notice

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#### Background

#### Facts

#### What Did the Contract Mean?

#### Was the Employer Entitled to Damages?

#### Comment

### Background

South African employers frequently face the situation where an employee resigns with immediate effect, even though the contract of employment requires him or her to give notice. The Basic Conditions of Employment Act (75/1997) provides that an employee's employment may be terminated only on notice of not less than four weeks where the employee has been employed for one year or more. Employer and employee may also agree to a longer notice period. This is often the case with senior employees where notice periods of longer than one month are common. Notice periods also often refer to calendar months.

Two important questions which arise in this context are what the employee's obligations are when giving notice in terms of his or her contract and what the employer can do if the employee breaches those obligations.

### Facts

In the recent Labour Court case of *South African Music Rights Organization (SAMRO) Limited v Mphatsoe*,<sup>(1)</sup> Mr Mphatsoe was employed under a contract which required him to give written notice of one calendar month to terminate his employment. He gave notice on January 8 2008 when he returned from leave. SAMRO contended that he could not leave at the end of January (as he initially wished to do), or on February 8 2008 (when he conceded that he must give a month's notice). Instead, SAMRO argued that his month's notice would start running from February 1 2008 and end on February 29 2008 because he was required to give a calendar month's notice.

SAMRO applied to the Labour Court for an order declaring that:

- the notice given by Mphatsoe on January 8 2008 was ineffective to terminate his employment;
- the contract terminated on February 29 2008; and
- Mphatsoe was in breach of contract when he left on February 8 2008 and, as a result, SAMRO was entitled to damages.

The court had to consider what is meant by a 'calendar month's notice' and what damages an employer can claim from an employee who does not give proper notice as required by his or her contract.

### What Did the Contract Mean?

The court stated that a month, or a calendar month, does not necessarily begin on the first day of the month and end on the last day of the month, as contended by SAMRO. It depends on the intention of the parties when they concluded the employment contract. The rules for interpreting contracts (not the rules for interpreting statutes) must be applied. Words used in a contract should be interpreted not in isolation, but in the light of the contract as a whole. This means that where a word has been used elsewhere in the contract by the parties, the same meaning will be attributed to it throughout the contract. Where a word has been qualified in one context, but used unqualified in other contexts, one must assume that the qualifier should be given significance.

Applying these principles to the *SAMRO Case*, the court found that the unqualified word 'month' appeared throughout the contract other than in the termination clause, whereas the words 'calendar month' appeared only in the context of the notice period. The judge concluded that the parties had obviously intended to qualify the word 'month' in the context of giving notice. By using the words 'calendar month' the parties had intended that notice should be given on the first day of the month to run until the last day of the month. In light of this finding, the court held that the employee had breached his

employment contract.

### Was the Employer Entitled to Damages?

The second question that the court had to consider was whether SAMRO was entitled to damages, consequent to the breach of contract. SAMRO claimed damages equal to the value of the services that it alleged that Mphatsoe would have provided over the period, which it equated to the remuneration which he would have earned for the period that he was in breach.

The court held that SAMRO had failed to prove that it had suffered any damages as a result of Mphatsoe having ceased work prematurely. There was no logical reason simply to assume that damages equated to the remuneration he would have earned over the notice period. The employer could have suffered damages exceeding that amount or, depending on the facts, could have suffered no loss at all. In some circumstances it might even have been to the employer's benefit to be relieved of having to pay the employee's salary. As SAMRO had failed to establish any factual foundation on which a claim for damages could be based or any loss consequent to the employee's breach of contract, its claim for damages was dismissed.

Thus, although SAMRO was successful in that the court found that the employee had breached his contract of employment, it received no tangible relief as no damages were awarded to it.

### Comment

Two issues of practical importance to employers arise from this case. First, employers should clearly stipulate what they mean by a 'calendar month's notice' if that term is used when formulating employment contracts. In the event that an employee is required to give notice on the first day of the month to take effect on the last day of the month, it is advisable that this be stipulated in the employee's contract of employment. Second, before considering going to court to claim breach of contract, employers should be sure that they have suffered a loss and can prove the extent of the loss. Otherwise, the case will be an expensive exercise with no tangible reward.

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### Endnotes

(1) [2009] JOL 23476 (LC).

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