

# YOU'RE FIRED!!!

## TERMINATION OF CONTRACTS OF EMPLOYMENT – A MURKY POOL

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Unfortunately, being an employer can be a challenge. One of the harder moments of being an employer is when it is necessary to fire an employee. In Botswana, that means exposure to "*re tla kopana ko labour*". In these series of articles, we explore this subject matter and provide a guideline that will help you avoid legal risk and to budget for the financial risk that is a natural part of termination of employment contracts.

Often, employment contracts contain termination clauses that allow each party to terminate the contract by giving notice or payment instead. This means that an employee can simply give notice of their resignation and is not required to give reasons for making that decision. In a fair universe, this would conversely mean that the employer can do the same. Indeed, section 18 of the Employment Act ("**the Act**") allows either party in a contract of employment for an unspecified period of time to terminate a contract by giving notice.

If only things were that easy... As usual, real life is infinitely more interesting than simple logic.

In ***Phuthego & Others v. Barclays Bank of Botswana Limited***, an appeal from a decision of the High Court, the Court of Appeal decided that section 18 does not require that just cause and reasons be given for a valid termination on notice. The court further held that if just cause is required, then termination in that event is not termination pursuant to notice, but something quite different i.e. termination for just cause.

Accordingly, no reasons need to be given for contractual termination on notice and no opportunity needs to be given to an employee to make representations against termination.

### Hold your horses!

In the subsequent case of ***Khoemacau Copper Mining***

***(Proprietary) Limited v. Wallace***, an appeal from the Industrial Court, the Court of Appeal made a distinction between the considerations before the High Court (a court of justice) and the Industrial Court (a court of equity).

The court concluded that the considerations are different depending on the forum, i.e. the High Court decides employment disputes on common law principles, as reflected in the Act, whereas the Industrial Court considers principles of equity. The court highlighted that before the Industrial Court, it does not suffice to rely on the absence of a requirement for just cause in section 18.

### So, what is an employer to do in these murky waters?

Follow the **#KoSpaneng** Series next week as we delve into risk-management strategies for employers electing to terminate employment contracts and the best approach to take in this regard.

Contact **Olebile Muzila** at [olebile@bookbinderlaw.co.bw](mailto:olebile@bookbinderlaw.co.bw) an expert in employment law in Botswana. She has experience acting for a number of local and international clients on employment matters before the courts. She also assisted in private engagements to manage employment risk both locally and internationally.

Our firm is your one-stop shop for all matters corporate and commercial and if you wish to schedule an appointment on any of our offerings you can reach us on **(+267) 391 2397**.