## Employment law update

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### Automatic termination provisions in contracts of employment

In *South African Transport and Allied Workers Union obo Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* [2015] 8 BLLR 837 (LC), Mosime AJ was required to consider the employment consequences of a service provider terminating the employment of certain employees on the cancellation of a service level agreement at the request of the client.

In this case, the employees were employed by a cleaning company, Fidelity Supercare, who had entered into a service level agreement with the University of Witwatersrand (Wits University). The employees were assigned to perform the services for Wits University in terms of an employment contract with Fidelity Supercare, which provided that the employees' employment would terminate on the date on which Wits University terminated its service level agreement with Fidelity Supercare and the employee would have no entitlement to severance pay. Upon Wits University giving notice of its intention to terminate the contract, the employer informed all the employees, who were assigned to perform cleaning services for Wits University, that their employment would automatically terminate at the end of the month. The employees were not consulted with as the employer was of the view that this did not constitute a dismissal but instead was an automatic termination of employment by virtue of the contractual provisions in the employment contracts.

Thereafter, Wits University informed Fidelity Supercare that it required it to continue to perform cleaning services but on a significantly reduced basis. A new service level agreement was consequently entered into. The employer then invited all the employees to apply for available positions in terms of the new service level agreement, which the majority of the employees did. The applicants who did not apply for these positions consequently had their employment terminated and they were not paid severance pay.

The applicants alleged that they were dismissed for operational requirements and were accordingly entitled to severance pay. The applicants further argued that their dismissals were unfair as there was no valid reason for the dismissal. This was because the contract with Wits University continued and a number of the other employees continued to be assigned to the Wits University contract after the termination of the applicants' employment.

Mosime AJ considered whether the employer was entitled to rely on the contractual provisions in the employment contract to bring the employment relationship to an end. He held that where an employment contract provides that it will automatically terminate on the occurrence of an event, the employer may rely on that event to bring the employment relationship to an end. What is more complicated is where that event is triggered by a decision of a third party and thus Mosime AJ was required to consider how broadly an occurrence of an event should be interpreted.

There has been a body of case law, which has held that where the event is triggered by a third party it is not a dismissal because the employer is not the proximate cause of the termination of employment. In this regard, reference was made to the case of *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC) in which a client scaled down its contract with a labour broker and the labour broker in turn terminated the employment of one of its employees on the basis that the labour broker's contract with the client insofar as it related to that employee was terminated by the client. The employee had contractually agreed that his employment would automatically terminate on the termination of the labour broker's contract with the client. This was found to not constitute a dismissal by the employer.

However, recent case law has held that automatic termination provisions in an employment contract do not trump the Labour Relations Act 66 of 1995 (the Act) and are accordingly unenforceable if they are unfair and against public policy. For example, in *SA Post Office Ltd v Mampeule* [2010] 10 BLLR 1052 (LAC), it was held by the Labour Appeal Court that an employee cannot contract out of the right to a fair dismissal even when the employment contract provides for automatic termination of employment. Subsequent cases also held that automatic termination provisions must be interpreted purposively to determine whether it is permissible in the circumstances to contract out of the right not to be unfairly dismissed.

The recent amendments to the Act expressly provide the circumstances in which it is permissible for a fixed-term contract to provide for automatic termination, which are as follows –

- on the occurrence of a specified event;
- on the completion of a specified task or project; or
- on a fixed date.

While fixed-term contracts may automatically expire on the occurrence of an event, Mosime AJ held that the term ‘event’ must be given a narrow interpretation to maximise protection of job security and the Constitutional right to fair labour practices. Mosime AJ held further that a contractual provision that provides for automatic termination at the behest of a third party undermines the employee’s right to fair labour practices and is contrary to public policy and unenforceable. Thus, labour brokers may no longer simply let their employees’ employment ‘expire’ in the event that the client terminates its contract with the labour broker.
It was held that in this case the employees were dismissed for operational requirements. However, it was found that procedural fairness did not need to be considered because the employees were offered alternative employment and thus could have avoided their retrenchment, as did the majority of the employees. Furthermore, the employees were not entitled to severance pay because they unreasonably refused an offer of reasonable alternative employment.

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**One employee serving two employers**

*Assign Services (Pty) Ltd v CCMSA and Others* (LC) (unreported case no JR1230/15, 18-9-2015) (Brassey AJ).

Section 198A was introduced into the Labour Relations Act 66 of 1995 (LRA) in January 2015 and governs the relationship between an employee, earning below the prescribed threshold, a labour broker (referred to as a temporary employment service or TES) and the labour broker’s client.

Section 198A(3) reads:
‘(3) For the purposes of this Act, an employee –

(*a*) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or
(*b*) not performing such temporary service for the client is –
(i) deemed to be the employee of that client and the client is deemed to be the employer; and
(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.'

Once the deeming provision, that being s 198A(3)(*b*)(i), is triggered, does the employee relinquish its employment relationship with the TES and become the sole employee of the client or does the employee have a concurrent employment relationship with both the TES and client?

A dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) asking it to pronounce on the relationship between the third respondent's members National Union of Metalworkers of South Africa (NUMSA), the applicant, the TES and its client.

The TES argued that pursuant to the operation of the deeming provision, the workers remain employees of the TES for all intents and purposes and are also deemed employees of the client for purposes of the LRA. Thus, according to the TES the legal position is one of dual employment – while the workers are deemed to be the employees of the client, the employment contract between the worker and the TES nevertheless remains in force. NUMSA argued that in accordance with the deeming provision, the client of the TES becomes the sole employer for purposes of the LRA.

On the commissioner's interpretation of the deeming provision, NUMSA's argument found favour and he held that the client was deemed the sole employer of the workers.

On review, the parties advanced the same arguments made before the commissioner but made certain concessions.

NUMSA conceded that the deeming provision did not bring to an end the contractual relationship between the TES and worker and as a result thereof, neither party was deprived of their respective rights and obligations embodied in the employment contract concluded between the TES and worker.

The TES conceded that the provision does not mean the client, on being deemed the employer, shares the same contractual rights and obligations that the TES has with the worker in terms of their contractual relationship.

Having clarified the parties arguments, in particular the fact that it was not in dispute that the contractual relationship between the TES and worker remained alive after the deeming provision came into effect; the court held that the only issue to determine was whether the TES continued to be the employer of the workers, post application of the provision and if so, whether it (the TES) was concurrently vested with the ‘statutory rights/obligations and powers/duties’ assigned to an employer in terms of the LRA.

On this question, the court per Brassey AJ, held:

‘There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA’s transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES.’

The court further held that its construction supported the ‘general architecture of the new provisions’ in particular the new sections which sought to ‘upgrade’ the joint and severable liability between TES and its client. This included s 198(4A)(*b*) which enabled the Basic Conditions of Employment Act 75 of 1997 to be enforced against the TES or the client as if it were the employer.

In arriving at his conclusion Brassey AJ found the commissioner, who held the client to be the sole employer, erred in law. The question, thereafter was, whether the error rendered the award reviewable. In adopting the ‘but for’ test (ie, but for the error committed would the outcome be different?), the court held that the commissioner’s error was a material one and as such set aside the award with no order as to costs.

The court declined to substitute the commissioner’s award with a finding that the placed employees are ‘employed dually’ for purposes of the LRA, as prayed for by the TES. Brassey AJ found this expression to be a source of confusion set out in too broad a term.

**Question:**

What recourse do employees earning below threshold have in dismissal cases? Where should their case be referred to?

**Answer:**

Any dismissed employee, irrespective whether they earned above or below the prescribed threshold should refer their dismissal disputes either to the CCMA or the relevant bargaining council. Their dispute will always be conciliated and depending on the employee's claim, either be referred to arbitration or to the Labour Court for adjudication. Put differently, the recourse available to an employee described above would be the same recourse open to an employee earning above the threshold.

There had been a proposal that employees earning over a certain amount per annum be prevented from referring their dismissal disputes to the CCMA or bargaining councils but this proposal was not included in the final amendments.

Do you have a labour law-related question that you would like answered?
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