

SOUTH AFRICA / JUDGMENT

November v Kele Mining Solutions and Others (JR217/23) [2024] ZALCJHB 281 (31 July 2024)

[2024] ZALCJHB 281

COURT

Labour Court Johannesburg

BEFORE

Fourie, AJ

CASE / FILE NUMBER

JR 217/23

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REPUBLIC
OF SOUTH AFRICA
THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Reportable
Case No: JR 217/23

In the matter between:

ZENZILE
STEVEN NOVEMBER
Applicant
and
KELE
MINING SOLUTIONS
First
Respondent
COMMISSIONER
LD MAHLANGU N.O
Second
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
Third
Respondent

Heard:

18 June 2024

Delivered: 31 July 2024
Summary: Automatic termination clauses in limited duration employment contracts – where dismissal contested – multi-faceted inquiry to be undertaken by arbitrator in the exercise of a value judgment as to whether to uphold the automatic termination clause – practical approach involves several stages of the inquiry, and the consideration of many relevant factors in order to properly exercise value judgment – may require a full hearing before determining whether a dismissal occurred.

JUDGMENT

Fourie, AJ

Introduction

[1] This is an unopposed review application, brought in terms of section 145 of the Labour Relations Act[1]. The applicant seeks to set aside an arbitration award by the second respondent (the arbitrator), in proceedings before the third respondent (the CCMA).

The facts

- [2] The applicant was employed by the first respondent (the employer), a temporary employment service provider, on a limited duration (otherwise known as a fixed-term) contract of employment.
- [3] The initial employment contract commenced on 1 July 2016, and was due to expire on either the third anniversary (i.e. 30 June 2019) or when the employer's client terminated the project for which he was employed.
- [4] During the course of his employment, the applicant was promoted to a supervisor position, and was transferred to a different project, but his employment contract was not amended or replaced.
- [5] It appears that the applicant continued working without interruption until November 2021, when he was informed that his contract would terminate on 30 November 2021, due to the fact that the client had instructed his employer to demobilise from site by that date.
- [6] The applicant referred an unfair dismissal dispute to the CCMA.

Proceedings before the CCMA

- [7] On 27 July 2022, the matter was scheduled for arbitration before Commissioner Xolisa Taba, and started in the afternoon. The applicant sought a postponement on the grounds that his representative was ill. This was opposed by the employer, and Commissioner Taba refused the postponement application. Thereafter Commissioner Taba guided the parties through a pre-arbitration process to ascertain and limit the issues in dispute. The parties then provided informal opening statements, with the applicant clearly struggling to properly articulate his case. He did make it clear that in his view he was dismissed for reasons unrelated to the termination of the project by his employer's client. He also asserted that he could have been transferred back to the project where he was initially employed. He stated that he intended calling two witnesses.
- [8] The employer's representative stated that dismissal was in dispute, as the employer alleged that the applicant's fixed term employment contract had expired.
- [9] Commissioner Taba informed the parties that as the end of the day was nearing, he would postpone the matter as a part-heard arbitration. He made arrangements with the parties to exchange bundles. The matter was then adjourned.
- [10] On 16 September 2022, the matter was scheduled for arbitration. However, a different commissioner, Commissioner Leon Joubert, was assigned the matter. The applicant's representative raised the issue that the matter was part-heard before Commissioner Taba, and that it should continue before him, and be postponed if necessary.
- [11] Commissioner Joubert interpreted this objection as an application for his recusal, and after citing authorities relevant to bias, refused to recuse himself, and directed that the matter should proceed. Commissioner Joubert never dealt with the real objection, being that the matter was part-heard before Commissioner Taba.
- [12] The applicant's representative, a trade union official, objected in strong terms to Commissioner Joubert presiding over the matter, and accused him of improper behaviour in other matters. The applicant's representative behaved poorly and was openly disrespectful to Commissioner Joubert.
- [13] Nonetheless, Commissioner Joubert indicated that he would allow the parties to call witnesses in support of their respective cases.
- [14] The employer's representative argued, with reference to the employment contract and a communication from the client, no dismissal had occurred because the fixed term contract had expired, Commissioner Joubert changed tack, and stated that he would decide the matter on the papers before him. The applicant's representative objected strongly, and reminded Commissioner Joubert that earlier he had stated that the parties would be allowed to lead evidence. Commissioner Joubert did not explain his change of mind, and simply confirmed that he would issue a ruling within 14 days.

The jurisdictional

ruling

- [15] In his ruling, Commissioner Joubert held: “The applicant did not testify, although he was repeatedly invited to testify to prove the existence of a dismissal. Only oral submissions were made by his representative”. This statement contradicted by what transpired at the hearing, as set out above, and as reflected in the transcript of the arbitration proceedings.
- [16] Commissioner Joubert found that the applicant had failed to discharge the onus of proving the existence of a dismissal, and found that the CCMA accordingly lacked jurisdiction in the dispute. This effectively brought an end to the applicant’s unfair dismissal referral.

The review application – condonation

- [17] On 13 February 2023, the applicant brought review proceedings in the Labour Court. The review application was brought 67 days out of time, and the applicant applied for condonation for the late referral. He explained that the delay was caused by his difficulties in obtaining documents from the CCMA and in securing legal assistance, funded by Legalwise. The December holiday period also contributed to the delay by his attorneys in preparing the review application.
- [18] The employer filed an affidavit in opposition to the condonation application but did not oppose the main review application.
- [19] Having considered the papers in the condonation application, I am satisfied that the applicant has provided a satisfactory explanation for the delay, that the delay is not excessively long, that the prospects of success are good, and that the balance of prejudice weighs in favour of granting condonation. I therefore exercise my discretion in favour of granting condonation for the late filing of the review application.

The merits

- [20] The applicant launched a wide-ranging attack on the arbitration process, the conduct of Commissioner Joubert, and the jurisdictional ruling. I deal only with issues I perceive as relevant to this judgment.
- [21] Firstly, it is unusual that the commissioner initially seized with the matter, having specifically stated that the matter is part-heard before him, is not allocated the matter on the following date. This was the essence of the objection raised at the commencement of the hearing before Commissioner Joubert, and it should have been investigated by him, instead of being treated as a recusal application based on his conduct. At the very least, Commissioner Joubert should have ascertained what had transpired at the previous hearing, to determine whether it was in fact a part-heard, and, crucially, whether the parties had commenced with evidence under oath. If they had, it would not have been appropriate to commence with the hearing de novo, absent a good reason for the first commissioner’s unavailability.

[22] It is not necessary to say anything further about this issue, as the judgment does not turn on it.

[23] Commissioner Joubert considered the fixed term contract and the letter from the client terminating the project, as sufficient proof that no dismissal had occurred. He held that the applicant was obliged to prove the existence of a dismissal, but failed to do so. However, his finding was based on an incomplete picture, and was vitiated by his conduct in the proceedings, in particular his unilateral decision (despite objection) not to allow the parties to present evidence in support of their case, but rather to determine the existence of a dismissal on the documents before him, absent even a signed pre-arbitration minute where common cause

facts were agreed, or the submission by the parties of a stated case with a request to determine the matter on the papers, is in my view highly irregular, and amounts to a gross irregularity in the conduct of the proceedings, which had the effect of depriving the parties of a fair hearing.

[24] The courts have warned on several occasions that it is improper to determine such matters without hearing oral evidence, even in circumstances where the parties have prepared a stated case and requested a ruling on the papers. In this matter, the commissioner determined the issue of whether a dismissal occurred with no pleadings, and simply relied on the documents placed before him. On this ground alone, the award is reviewable.

[25] Given recent developments in the case law, it seems prudent to deal with how a proper inquiry into the existence of a dismissal should be conducted in a subsequent hearing.

Is the client's mere instruction sufficient to trigger an automatic termination clause?

[26] What should a commissioner do when faced with a dispute about whether a dismissal occurred, in circumstances where the termination of a fixed term arises from the exercise of a discretion or will by the employer or its client?

[27] Recently, this Court (per Lagrange J) dealt with a similar matter. In NUMSA and Another v Metal and Engineering Bargaining Council (MEIBC) and Others[2] (NUMSA), the employee had been employed on a series of limited duration contracts, in terms whereof they would terminate automatically when the employer's client indicated that it no longer required the maintenance services performed by the employer. The employment

contract also allowed for automatic termination in the event that the client required a reduction in the number of employees assigned to its site.

[28] When the client informed the employer that it was in the process of systematically closing its plant and that the employer should immediately reduce the headcount of maintenance workers on site by 78 employees, the employee was one of the 78 workers notified by the employer that due to the client's instruction to reduce the headcount on site, his employment would terminate automatically at the end of the month.

- [29] The employee referred an unfair dismissal dispute to the bargaining council, and the employer disputed the existence of a dismissal, claiming that the employment contract had terminated automatically upon the occurrence of the event defined in the employment contract.
- [30] The parties exchanged pleadings, and requested the arbitrator to determine the matter as a stated case. The arbitrator held that no dismissal was established on the facts before her.[3] NUMSA challenged the arbitrator's jurisdictional ruling.
- [31] On review, Lagrange J conducted a comprehensive analysis of the authorities on the termination of fixed term contracts, with the focus on circumstances where the trigger event is the instruction by the client that the work for which the particular employee was engaged, has either been completed or is terminated. The learned Judge described this as termination at the 'will' of the client, and held that the client's instruction to reduce headcount on site, and that the selection of Mr Hadebe as one of the affected employees, was reasonable.
- [32] Lagrange J proceeded as follows:
- '[38] Does that end the inquiry into whether Hadebe was dismissed? The arbitrator thought it did. This approach assumes that provided it can be shown that it was the exercise of a third party's discretion about its staff requirements which determined that particular staff were no longer needed, that can be a sufficient basis in law for the labour broker to terminate the services of those staff on the grounds that it automatic, or termination by consent. In Enforce the LAC endorsed the reasoning of the Labour Court in *Mahlamu v CCMA & others* (2011) 32 ILJ 1122 (LC), stating:
- "[26] In Mahlamu, Van Niekerk J correctly, in my view, summarised the effect of the above provisions as follows:*
- '[21] These passages are clear authority for the fact that the parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to the employee whether through the device of "automatic termination" provisions or otherwise.
- [22] In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s 188 of the LRA, is precisely the mischief that s 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in s 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.'

[27] It is logical that parties to a contract of employment cannot be permitted to agree that what is proved to be a dismissal should be regarded as not being a dismissal. Further, it is impermissible for parties to conclude a contract in terms whereof an employee agrees not to challenge the fairness or otherwise of his or her dismissal. As to whether there has been a dismissal in a particular case is a value judgment which should be made on the facts of that particular case.” (emphasis added)

[39] It is instructive in this regard to consider the first clause of Hadebe’s contract with Kaefer. It reads:

“1.

Introduction

The Company is a contractor to its client. The Company’s contract work is the maintenance, extension and/or refurbishment of the client’s plant or facilities as determined by the client from time to time.

In terms of the contract the client can require the Company to increase or decrease the number of employees of the Company engaged in the contract work insofar as the client in its reasonable opinion believes that it is necessary to complete the contract work or a specific part thereof.” (emphasis added)

In principle, it is difficult to identify a material difference between the provision in Hadebe’s contract that it could terminate automatically if Sapref decided it no longer needed him on the site, and the provision in Mahlamu’s employment contract, which stated that the employment contract would automatically terminate if the service contract between the employer and the client expired, or where the client did not require the services of the employee ‘for whatsoever reason’. In that case the client had decided it no longer needed armed escorts on certain Gautrain sites where the employee worked and accordingly the employer had reasoned that Mahlamu’s service with it had terminated automatically because the client no longer required his services.

[40] The court in Mahlamu embarked on a detailed analysis of the policy considerations inimical to permitting automatic terminations of employment by virtue of contractual provisions, of the kind under consideration here. It suffices to cite the conclusion the court reached:

“[22] In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of s 188 of the LRA, is precisely the mischief that s 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in s 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act.

[23] This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of Sindane to be - that ordinarily, there is no dismissal when the agreed and anticipated event materializes (to use the example in

Sindane, the completion of a project or building project), subject to the employee's right in terms of s 186(1)(b) to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed-term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed-term, the end of the term being defined by the happening of a specified event, there is no conversion of a right not to be unfairly dismissed into a conditional right.”

[41] As in Mahlamu, the provision relied on by Kaefer was Sapref’s notification it required less staff, which was a decision entirely within its power to make, save that it was limited only by a requirement that it be exercised reasonably. Thus, the duration of the contract and termination of the contract on this ground was not linked to the attainment of a particular goal or to serve an identified temporary purpose, the existence of which can be objectively identified. Instead, it was linked purely to whether the third party decided it did not need the employee or employees in question and was terminated in consequence of the exercise of its will. It is wholly artificial to equate this exercise of will with other types of event that may bring a contract to an end because the occurrence of the event shows the employment contract has demonstrably served its inherently temporary purpose. Examples of the type of circumstances that might justify the termination of employment on the happening of an event are those listed in s 198B(3) and (4) of the LRA. While the legal considerations for the policy against permitting automatic termination of employment are set out in detail in Mahlamu, it is a difficult test to apply in practice. In my view, the analysis of the application of the principle in particular cases, can be approached by considering if the automatic termination provision will be triggered by an objectively demonstrable event, which is not merely a function of the contracting party’s will and that the purpose of having such a clause is a justifiable limitation on the employee’s right to challenge the fairness of the termination.

[42] As mentioned already, the sub-clause relied on by Kaefer to automatically terminate Hadebe’s employment is substantively

indistinguishable from the similar provision in Mahlamu’s contract. By parity of reasoning with that case, it too cannot be relied on to establish the existence of an automatic termination.

[43] In light of the considerations above, the decision by Sapref to instruct Kaefer to reduce the staff complement engaged at its sites and deciding to identify Hadebe as one of those not required, was not an event that could lawfully result in the automatic termination of Hadebe’s service with Kaefer. What the arbitrator failed to appreciate is that the lawfulness of an automatic termination provision, does not simply concern a determination of whether an event falling under the automatic termination clause took place, but whether attributing legal consequences to that event would undermine the employee’s right to pursue an unfair dismissal claim because of the nature of the event in question. It is not a process of mechanical reasoning to determine if a termination of employment in compliance with an automatic termination provision will be recognised as such.

- [44] A situation where employment is deemed to end on a pre-determined date, or on the occurrence of a well defined event that can be objectively determined, and which is not merely a product of a third party's view, will generally be less susceptible to being disputed for the reasons stated, but it will always depend on the particular facts of a case." (Underlining in the original judgment)
- [33] The present matter seems to me to be substantively indistinguishable from the automatic termination clauses applicable in NUMSA and Mahlamu. These authorities are binding – In *Enforce Security Group v Fikile and others*[4] (*Enforce Security*), discussed below, the Labour Appeal Court expressly endorsed the reasoning in Mahlamu, which was applied in NUMSA.
- [34] It follows that the arbitrator was wrong in finding that the automatic termination clause in the employee's contract resulted, without more, in the automatic termination by law of his employment. The test on review of jurisdictional findings is correctness, not reasonableness. [5]
- [35] As a result, the arbitration award must be set aside.

Replace or refer back to the CCMA?

- [36] In NUMSA, Lagrange J held that the court was in a position to find that a dismissal occurred, but could not determine whether the dismissal was fair, because evidence on this issue had not been presented at arbitration, given the jurisdictional issue.
- [37] The learned Judge therefore set aside the award, replaced it with a ruling to the effect that a dismissal had been established, and referred the issue of the fairness of the dismissal back to the CCMA.
- [38] In the present matter, I am not in a position to properly determine the issue of whether a dismissal occurred or not. The review record is fairly sparse, and does not provide a full picture of the events leading up to the termination of the applicant's contract. This is primarily because Commissioner Joubert prevented the parties from presenting any evidence. There is mention in the respondent's opening address of a second fixed term contract, but the contract itself is not in the review record.
- [39] In my view, it would be inappropriate to attempt to determine the existence of a dismissal on the incomplete record before me, and I intend referring the entire dispute back to the CCMA for arbitration de novo.

Relevant factors when exercising a value judgment on the issue of dismissal

- [40] In *Enforce Security*, the Labour Appeal Court, per Tlaletsi DJP (as he then was), writing for the Full Court, said:

[27] It is logical that parties to a contract of employment cannot be permitted to agree that what is proved to be a dismissal should be regarded as not being a dismissal. Further, it is impermissible for parties to conclude a contract in terms whereof an employee agrees not to challenge the fairness or otherwise of his or her dismissal. As to whether there has been a dismissal in a particular case is a value judgment which should be made on the facts of that particular case.

...

[41] In my view, it does not necessarily follow that in all cases an automatic termination clause based on an event contained in a fixed-term contract of employment will be visited with invalidity. It would be necessary to determine whether in the circumstances of a particular case the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA and the Constitution. Some of the relevant considerations, in my view, would include the precise wording of the automatic termination clause and the context of the entire agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose and pick who is to render the services under the service agreement; whether the clause is used to unfairly target a particular employee by either the client or the employer; whether the event is based on proper economic and commercial considerations; the list is not exhaustive. Each case must be decided on its circumstances.'

[41] The list of factors set out by the Labour Appeal Court should be applied by an arbitrator when exercising a value judgment as to whether, on the facts of a particular case, the automatic termination clause should be applied, i.e. whether there was a 'dismissal' or not.

[42] In NUMSA, Lagrange J also said that "Examples of the type of circumstances that might justify the termination of employment on the happening of an event are those listed in s 198B(3) and (4) of the LRA".[6] These sections state:

'(3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—

- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
 - (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
- (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee—
- (a) is replacing another employee who is temporarily absent from work;
 - (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

- (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
- (d) is employed to work exclusively on a specific project that has a limited or defined duration;
- (e) is a non-citizen who has been granted a work permit for a defined period;
- (f) is employed to perform seasonal work;
- (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
- (h) is employed in a position which is funded by an external source for a limited period; or
- (i) has reached the normal or agreed retirement age applicable in the employer's business.'

[43] These statutory factors are not a closed list of relevant factors, but are, in addition to the factors set out in Enforce Security potentially of relevance when a commissioner performs the difficult task of deciding whether, on the facts of a particular case, the automatic termination clause can be upheld without unfairly infringing on the employee's constitutional and LRA rights to fair labour practices.

Steps to be followed by a commissioner in a dispute about whether the termination of a fixed term contract amounts to a dismissal

[44] Based on the authorities set out above, it seems to me that where the employer disputes the existence of a dismissal, based on an alleged automatic termination of a limited duration employment contract, a commissioner seized with determining whether a dismissal occurred (which is a jurisdictional matter) would need to conduct a multi-faceted analysis in order to properly exercise his or her value judgment as to whether the automatic termination amounts to a dismissal or not. This is not simply a mechanical assessment of whether the trigger event for automatic termination occurred. This is only the first phase of the inquiry. Where the conditions for automatic termination are met, a commissioner would then need to consider whether, on the facts of the matter, enforcing the automatic termination clause (i.e. finding that no dismissal occurred), would unfairly deprive the employee of the right not to be unfairly dismissed, and the right to challenge the fairness of a dismissal.

[45] I propose that the second phase of the inquiry could be sensibly conducted in separate steps, along the following lines.

Step 1 – consider the employment contract

[46] The wording and nature of the employment contract should be tested against the following questions.

46.1 Is the duration for a specified period?

46.2 Is the duration and termination of employment linked to the attainment of a particular goal, or the happening of a particular event, which can be objectively verified?

46.3 Is the employment contract, read as a whole, intended to or does it have the effect of seeking to bypass the statutory protections against unfair dismissal, and/or the right to challenge the fairness of a dismissal?

46.4 Is the termination clause triggered by the exercise of the client's will, or at the client's discretion? (In other words, does the client determine when the trigger event occurs?)

[47] Positive answers to the first two questions would indicate the presence of factors that weigh in favour of enforcing the terms of the employment contract, while negative answers would have the opposite effect.

[48] Positive answers to the third and fourth questions would weigh against upholding the automatic termination clause, and vice versa.

[49] In a TES scenario, where the employer contracts with a third party client to provide its employees to perform work for the client, the contract between the employer and its client may also need to be considered, particularly if it provides for termination or reduction of services at the instruction of the client.

Step 2 – consider whether section 198 applies

[50] Does the matter fall within the scope of Section 198, 198A and/or 198B of the LRA? If so, the factors and requirements listed in the relevant sections of these statutory provisions should be taken into account.

Step 3 – consider the events giving rise to the termination of employment

[51] What event or events triggered the termination of the employment contract?

[52] Are these events justified by objective and proper economic and commercial considerations?

52.1 The closer the trigger event for the contractual automatic termination is linked to the occurrence of an objective (and objectively

determinable) event (such as an agreed termination date, or completion of the project to which an employee was assigned), the more likely it is that the enforcement of the automatic termination clause will not result in an unfair infringement of the employee's

right not to be unfairly dismissed.[7]

52.2 At the other end of the spectrum are the cases where the trigger event lies in the sole judgment or discretion of the client. A commissioner will need to assess the extent whether the event relied upon by the client to terminate the work to which an employee has been assigned, is objective, or whether it is closer to the will or whim of the client. Termination of a particular employee's contract at the mere say-so of a client is likely not to pass muster as a valid automatic termination of employment, and is more likely to constitute a dismissal.[8]

52.3 In the mid-range of the spectrum would be the cases where the client or employer has the discretion to trigger the automatic termination clause at a time of its choosing. As demonstrated in Mahlamu and NUMSA, termination at the will of the client, where the client's discretion is exercised on reasonable grounds, and where the intention is not to target particular employees, may still result in a dismissal occurring. These types of cases will be more difficult to determine.

Step 4 – consider effect of enforcement on the employee's statutory rights

[53] Having considered the above factors, and any other relevant factors in a particular case, the next consideration in the exercise of a value judgment by a commissioner is to consider the effect of upholding the automatic clause on an employee's statutory

rights.

[54] The commissioner should consider whether enforcing the termination clause, in the circumstances of the case, and on the application of the above factors, would unfairly restrict the employees' right to fair labour practices, the right not to be unfairly dismissed, or the right to challenge the fairness of a dismissal.

Step 5 – consider other issues that may affect the final determination of whether a dismissal occurred

[55] Issues that may affect a finding on whether a dismissal occurred, are, for example:

55.1 Whether the employee claims a reasonable expectation of renewal of the fixed term contract. This is a self-standing ground of dismissal in the LRA, and requires evidence to be presented before a determination can be made. Even if the employment contract is held to have validly terminated, a hearing would still be required to determine if a dismissal occurred on grounds of a reasonable expectation of renewal or extension.

55.2 Whether the employee claims that the decision to terminate was tainted by bias (eg, the client demanding that a particular employee be removed from its premises) or other improper motive.

55.3 Whether the employee claims that there were alternative positions available to him, or that he was unfairly selected for termination, or that the employer engaged others to perform similar work after termination of his contract.

[56] The presence of confounding or complicating factors such as these, may complicate the final determination of whether to uphold an automatic termination clause, and might require that a full hearing on all the issues be held before a proper determination on whether a dismissal occurred, can be made.

The onus is not decisive when balancing competing fundamental rights in the exercise of a value judgment

[57] While the LRA places the onus of proving the existence of a dismissal on an employee, given that a value judgment (entailing the consideration of many different factors) must be exercised when determining the existence of a dismissal, the issue of onus is unlikely to play an important role in most cases. This is because, at its heart, the exercise of the value judgment involves a balancing act between competing fundamental rights, being the strict enforcement of a contract on its terms, and the right to fair labour practices. In Reddy[9], the Supreme Court of Appeal, dealing with the enforcement of a restraint of trade agreement, explained:

[14] ... Where the onus lies in a particular case is a consequence of the substantive law on the issue. I have pointed out that the substantive law as laid down in *Magna Alloys* is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it. But if the rule were to be reversed - to provide that a restraint is not enforceable unless it is shown that it is reasonable - which would necessarily cast an onus on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.

[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen... the right to choose their trade, occupation or profession freely' reflecting

the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as

contemplated by the Constitution.’

[58] A commissioner, having considered all relevant evidence and factors, and having exercised the required value judgment, will either reach the conclusion that the employee has successfully discharged the onus of proving the existence of a dismissal, or has failed to do so. But the exercise of the balancing act itself does not involve questions of onus.

[59] In all but the most clear-cut cases, it may be prudent for the commissioner to direct that evidence and argument on all issues,

including the fairness of the alleged dismissal, must be presented and finalised before a determination is made as to whether a

dismissal occurred. It would be for the commissioner to decide, in the exercise of a broad statutory discretion on the conduct of arbitration proceedings, the sequence of evidence, i.e. which party should begin. It is usually practical to have a party begin and conclude its case before the other party commences. As to whether the employee or employer should commence with evidence, this is a matter for agreement between the parties, or for direction at the discretion of the commissioner.

Conclusion

[60] The above steps and factors are intended to provide practical guidelines to commissioners when undertaking the difficult and

complex inquiry as to whether a dismissal has been established. They are not to be construed as a closed list or definitive statement of what exactly a commissioner must do when determining whether a dismissal occurred. The case law is clear that each matter must be determined on its own particular facts and circumstances.

[61] For the reasons set out above, I intend reviewing and setting aside Commissioner Joubert’s jurisdictional ruling, and then referring the entire dispute, including the question of whether a dismissal occurred, to the CCMA for arbitration afresh before a different commissioner.

[62] The practice in labour matters is not to award costs. In the circumstances of this case, I am of the view that there is no reason to depart from the norm.

[63] I make the following order:

Order

1. The jurisdictional ruling issued by the Second Respondent under case number NC159-22, is reviewed and set aside in its entirety.

2. The unfair dismissal dispute, including the issue of whether a dismissal occurred, is referred back to the CCMA, for arbitration afresh before a different commissioner.
3. A copy of this judgment is to be provided to the new presiding commissioner, who should take the judgment into account when determining whether a dismissal occurred.
4. There is no order as to costs.

Acting Judge of the Labour Court of South Africa

Appearances: For the applicant: Advocate K Ramcharethar Instructed by: Nishan Moodley
Attorneys No appearances for the respondents

[1] Act 66 of 1995, as amended.

[2] [2023] ZALCD 21; [2023] JOL 63506 (LC).

[3] The arbitrator's jurisdictional ruling is published - National Union of Metalworkers of SA on behalf of Hadebe and Kaefer Thermal

(2022) 43 ILJ 476; [2023] ZALCD 21 (MEIBC).

[4] (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC).

[5] SA Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby Pty Ltd v SARPU & another

[2008] ZALAC 3; [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC).

[6] NUMSA at para 41.

[7] In Enforce Security, the termination of the employer's contract to provide security services at the Boardwalk Mall was held to have validly triggered the automatic termination clause in the employees' contract, which was expressly linked to the duration of the Boardwalk contract.

[8] See for example the decision of Boda AJ in Nape v INTCS Corporate Solutions (Pty) Ltd (2010) 31 ILJ 2120 (LC); [2010] 8 BLLR 852 (LC), where the client insisted that the employee be removed from site for alleged misconduct, the employer held a hearing and was of the view that a written warning would suffice, but the client refused to allow the employee back onto its premises to work. The employer then dismissed the employee by virtue of its operational requirements. Boda AJ held that neither the client nor the employer were entitled to limit the employee's right not to be unfairly dismissed. The learned Acting Judge held

that labour brokers and their clients were not entitled to "... structure their contractual relationship in a way that would undermine the employee's constitutionally guaranteed right to fair labour practices", and that such a contract would be contrary to public policy.

[9] Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA).

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