

# EMPLOYMENT MATTERS

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## Fixed term contracts: a clean break or a dismissal?

"The trouble with unemployment is that the minute you wake up in the morning, you are on the job." - *Lena Horne, singer.*

Did the employment relationship between David Sindane and Prestige Cleaning Services (Prestige) terminate because a Fixed Term Contract expired, or was he dismissed when the cleaning contract of Prestige was terminated by its client?

Prestige employed Mr Sindane on a "Fixed Term Eventuality Contract of Employment" in terms of which Prestige placed Mr Sindane with a particular client to render cleaning services. In terms of his contract his services would terminate in the event that the contract between Prestige and its client expired or was terminated.

Before the expiry of the agreement with the client, the client requested Prestige to remove Mr Sindane from the premises and Prestige placed him with the new client, Menlyn Piazza. Prestige and Mr Sindane signed a similar contract in respect of his employment at Menlyn Piazza, recording that the agreement between them would terminate if and when the agreement between Prestige and Menlyn Piazza expired or was terminated.

Menlyn Piazza terminated the agreement with Prestige in respect of these services. In the Court, Mr Sindane contended that he was

dismissed as contemplated in Section 186(1)(a) of the LRA in that Prestige had terminated his contract of employment with or without notice.

Prestige disputed the alleged dismissal saying that it was a fixed term contract that expired upon a future circumscribed or specific event, ie the termination of another contract, the one between Prestige and Menlyn Piazza.

The Court held that, apart from a resignation by an employee, an employment contract can be terminated in a number of ways, which do not constitute a dismissal as defined in Section 186(1). These circumstances include the death of the employee, the natural expiry of a fixed term employment contract entered into for a specific period, or upon the happening of a particular event, eg the conclusion of a project or contract between an employer and a third party.

The proximate cause of the termination of employment upon expiry of a fixed term contract is not an act by the employer and cannot constitute a dismissal. The Court held that it is quite common to

have a fixed term contract that will expire when the contract will be completed, such as a project or a building contract where it is not possible in advance to fix a date for the completion of the project.

The Court held that Prestige did not dismiss Mr Sindane and that his services terminated because the fixed term contract expired, when the contract between Menlyn Piazza and Prestige terminated.

The Court considered the *SA Post Office Limited v Manpeule (2009) 8 BLLR (LC) matter (SAPO)*, where the Court held that an automatic termination clause in the employment contract of Mr Manpeule was not permissible. SAPO dismissed him when it conveyed to him that his contract automatically terminated when he was removed as a Director. Prior to the expiry of the fixed term the Minister in terms of the Companies Act, removed him from

the Board pursuant to allegations of misconduct. His employment contract was for a five year fixed term. Relying on such removal by the Minister, SAPO informed him of the expiry of his contract, relying on the provision in the employment contract and the Articles of Association of SAPO providing that his contract terminates when he is removed as a director.

The Court held that the case was distinguishable on the basis that there was no fixed term linked to an event (such as his removal from the Board) and that the proximate cause of the termination of his employment was the Minister's conduct in removing him from the Board for misconduct. The case was distinguished as one with an automatic termination clause rather than a fixed term contract.

*Faan Coetzee*

## Employers to play nice or pay up

"It is a pity to shoot the piano player when the piano is out of tune." - French saying.

A recent judgment by the Labour Appeal Court (LAC) again confirmed that employers must exercise caution when dealing with employees who suffer from mental health problems. If not, they may face a compensation order of up to 24 months.

In *New Way Motors & Diesel Engineering (Pty) Limited v Marsland [2009] 12 BLLR 1181*, the LAC handed down a damning judgment in which it found that the employer's treatment of an employee was "cruel, inhuman and arbitrary". The LAC upheld the finding of the Labour Court (Court) in terms of which the employee was awarded the maximum compensation equivalent to 24 months salary.

Mr Marsland was employed as marketing manager by New Ways Motor & Diesel Engineering. He formed part of the management team and attended regular management meetings along with his senior colleagues.

He suffered a nervous breakdown after his wife of 24 years unexpectedly left him. On his return to work (following a month's hospitalisation) he observed a marked change in the way in which his colleagues and superiors interacted with him, so much so that he felt as if he had a contagious disease. His duties were also significantly reduced. His involvement in marketing exhibitions was terminated without explanation, he was denied access to

information pivotal to the performance of his duties and excluded from meetings which he had previously attended. He was also verbally abused and threatened by the managing director.

A month after his return to work, Marsland suffered a relapse. Despite providing his employer with medical reports, its managing director showed him little sympathy. Marsland was summonsed to a disciplinary hearing for alleged poor work performance. He was found guilty and issued with a final written warning. Marsland appealed the decision.

Marsland's work station was emptied of his personal belongings without notice, his computer was removed, he was moved to a position sitting directly across from the managing director and he was denied access to a filing cabinet. He was also issued with a memo informing him of the removal of certain of his critical functions. During their final altercation, the managing director physically threatened Marsland who then resigned with immediate effect.

At the Court, Marsland claimed that his dismissal was automatically unfair in that he was arbitrarily discriminated against due to his depression. This was aggravated when he attempted to exercise his rights in terms of the Labour Relations Act (LRA) in respect of the issuing of the final written warning and the procedure followed during

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the disciplinary hearing. Alternatively, Marsland claimed, his dismissal constituted an automatically unfair constructive dismissal as the employer's conduct had made it intolerable for him to continue the employment relationship.

The employer led no evidence at the Court. Based on Marsland's evidence, the Court found that he had been constructively dismissed. The Court then examined whether his dismissal was automatically unfair. The key question was whether Marsland's mental health problems and his subsequent exercising of his rights in terms of the LRA were the dominant reason for Appellant to discriminate against him, causing an intolerable working environment and forcing him to terminate his employment.

The Court concurred that there appeared to be a deliberate strategy to exclude Marsland from work that he was previously involved in and he was ostracised and abused by members of senior management. The Court held that the conduct of the employer not only rendered the working environment intolerable, but also amounted to unfair discrimination against the employee on the grounds of mental illness, which had played a significant role in the dismissal.

At the LAC, the employer did not dispute that (1) the employee had been constructively dismissed and that (2) "*without reasonable or proper cause, [the employer] had conducted itself in a manner which was calculated or likely to destroy or seriously damage the relation of confidence and trust*" between the parties. However,

the employer persisted in its defence that the reason for the employee's dismissal was that he was useless in his employment after his illness and that the reason for his dismissal was not a prohibited ground. The LAC rejected this. In considering whether the facts supported a finding of automatically unfair dismissal, the LAC thought it unnecessary to consider whether the mental illness suffered by Marsland fell within the ambit of the concept of a "disability", but focused rather on whether the employer's conduct impaired the employee's dignity.

The LAC confirmed that the employer conduct resulted in a derogation of the employee's right to dignity. The LAC upheld the finding of an automatically unfair dismissal.

The employer argued that the award of maximum compensation was unreasonable given that it had offered to restore the employment relationship, which offer had been declined. The LAC rejected this argument. It found that maximum compensation was appropriate. When making this decision, the Court took into account the fact that following his dismissal, the employer's appalling treatment of the employee had continued.

The judgment sends a strong message to employers faced with employees suffering from mental illness: treat them like you would treat all your employees - with dignity.

*Gillian Lumb and Pranisha Maharaj*

## From Facebook rant to facing dismissal

"I'd really love to meet the guy I am supposed to be, I'd hire him in a second." - *Lee Iacocca*.

Does an employer have the right to take disciplinary action against an employee for creating a racist Facebook page?

The question of an employer's legal position concerning disciplinary action that should and can be taken against employees who publicly make racist remarks has once again surfaced following recent media reports on a racist Facebook page.

Its creator, Pieter Blaauw, was reported to have apologised, but internet and Facebook users were left enraged until Facebook shut the page down.

The Facebook incident follows on the heels of an incident where, at a staff function at Sun City, an employee allegedly played a derogatory song in which racist remarks were made against former Presidents Nelson Mandela and Thabo Mbeki. The employee faced disciplinary action at an internal enquiry, but was reportedly acquitted of the charges.

One would expect that such exhibitions of blatant racism should result in swift and harsh disciplinary action against the individuals in their capacity as employees. While employers might appreciate their right to take action against the misconduct of their employees

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at staff functions, many employers are less certain about their legal position where employees misbehave outside the work environment.

In creating a racist website in the public domain, the actions of the employee may negatively affect the business of his employer or the working relationship between him and his employer or colleagues.

The law holds that employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues (*Erasmus v BB Bread Ltd (1987) 8 ILJ 537 (IC)*). They owe a duty of good faith to their employers which duty includes the obligation to further their employer's business interests (*CSIR v Fijen (1996) 17 ILJ 19 (A)*; *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (C)*).

Can it reasonably be expected of any co-worker to have a harmonious working relationship with a colleague who expresses blatantly crude racist views?

Similarly, can an employer feel justifiably disgruntled when clients take away their business because of an employee's public rants?

A client could, after all, hardly be blamed for being unwilling to risk exposure to similar treatment when dealing with a business owner whose employee behaves in such a fashion in his private capacity.

An employer might also face public pressure to take action against the employee, as COSATU showed when the trade union federation marched to Sun City to demand disciplinary action be taken against the employee who allegedly played the racist song.

Employees may face dismissal where their private action negatively impacts on the relationship with their employer.

So even where the Facebook rant is not directed at the employer, employees should take great care in behaving in the public eye in a manner that will not be seen to destroy harmonious working relationships with their employer or colleagues. Employees who use social networking sites such as Facebook or Twitter as a forum for expressing their views should not say anything on those platforms that they would hesitate to say at the monthly staff meeting.

*Johan Botes*

## Victory for same sex partners, cohabitants and foreigners

"Respect your efforts, respect yourself. Self-respect leads to self discipline. When you have both firmly under your belt, that's real power." - *Clint Eastwood*.

When the Unemployment Insurance Act 62 of 2001 (the Act) was enacted, it did not provide cover to a life partner. The Minister of Labour has now issued Regulations in terms of section 54 of the Act that address this issue.

Regulation 1 has been amended by inserting the following definition: "*life partner means any major person who is a party to the opposite sex or same sex relationship with another major person, which relationship must be intended to be permanent, exclude any other person and involve cohabitation, an obligation of mutual emotional support between the parties and a reciprocal obligation to support one another financially in circumstances where the one has the means to do so and the other requires such support in order to maintain, without recourse to the public funds, his or her financial and social standing and standard of living.*"

This regulation came into operation, along with other amendments, on 5 October 2009.

The amendment of regulation 1 also provides that the definition of identity document means: a 13 digit bar coded Republic of South Africa and non Republic of South African identity card or document, a Republic of South African bar-coded passport, and includes valid foreign identity documents and passports.

The amendment to the definition of identity document is with retrospective effect, from 01 April 2002.

This extension means that same sex partners, cohabitants and foreigners, as defined in the regulations, retrospectively qualify as the beneficiaries of the UIF, that employers and employees contribute to and from which employees, who become unemployed or their beneficiaries, are entitled to benefits to alleviate the harmful economic and social effects of unemployment.

*Faan Coezee and Whitty Marwesh*

## Transfer of a business or service as a going concern: know the basics

"It is not the despair - I can stand despair, it's the hope." - John Cleese in *Clockwise*.

The economic crisis focused attention on transfers of a business or service as a going concern. Many businesses look favourably at outsourcing, as it is colloquially known, as a viable alternative to retrenchments during business restructuring.

In terms of the common law, where a business is sold as a going concern, the contracts of employment are terminated. Should the new owners wish to employ any of the old employees previously employed by the previous owner, it would have to conclude new contracts of employment with such employees.

Section 197 of the LRA has altered the common law. It now stipulates that where a business is sold as a going concern, all the rights and obligations between the old employer and each employee at the time of the transfer continue between the new employer and each employee. This transfer occurs automatically and takes place by operation of law. The employees' consent is not required.

Broadly speaking, these provisions apply where a business, trade or undertaking in whole or in part is transferred from the old employer to the new. Where the transfer involves an identifiable component or unit of a business, be it a division, a branch, a department, a store or a production unit, the transfer of that component or unit as an integral whole to another, brings Section 197 into play.

In order to understand the concept better, let us take the sale of a chemical plant as an example. If the plant is in full production and a sale occurs, it is clear that Section 197 applies. Where the plant has been mothballed and is being sold for scrap, Section 197 is clearly inapplicable even though the two sale agreements may be substantially similar. One can envisage a range of possibilities. If the plant has been closed for two months due to financial difficulties, and is sold in order to be reopened, Section 197 will apply again.

A sale with a view to re-erecting the plant on a site other than where the old employer did business, would again bring Section 197 into play.

Our Courts have consistently looked at substance rather than the form of the transfer. To dress up a sale of a business as a sale of assets would not be helpful, in that the Court would, substance over form, deal with it as a sale of business. There are many instances where asset stripping has occurred where our courts have held that Section 197 applies.

The words "as a going concern", are helpful in demarcating the transactions that fall within Section 197. Taking the example of the chemical plant, they assist in identifying to which transactions Section 197 would apply because of the need that this business be a going concern. Secondly, and importantly, in the light of the overriding purpose of security of employment, they convey the fact that the object of the transfer must have been a place where people were working before the transfer, and will continue to be a place where people are working after the transfer.

When such a transfer occurs, the employees must be employed by the new employer on terms no less onerous than what applied to them at the old employer. Given that their years of service are recognised there is no need for the old employer to pay severance to employees prior to transfer, and when retrenchments occur, the new employer will be liable to pick up such severance costs.

As a final word of caution, remember that the LRA prohibits the dismissal of an employee for a reason related to the transfer. Such a dismissal is deemed to be automatically unfair, which may result in compensation of up to two years' remuneration being awarded to the dismissed employee/s. Employers should proceed with caution where they intend dismissing employees shortly before or after a transfer.

*Danie Pretorius*

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