

# EMPLOYMENT

## TERMINATION BY RESIGNATION BEFORE EXPIRY OF FIXED TERM CONTRACT CONSTITUTES A BREACH

**In the matter of *Air Traffic and Navigation Services v Esterhuizen (668/2013) [2014] ZASCA 138 (25 September 2014)*, the Supreme Court of Appeal (SCA) was faced with the question of whether the respondent, as a result of his premature resignation, was liable to the appellant for breach of contract.**

The appellant, Air Traffic and Navigation Services, had introduced a retention scheme to retain the services of specialist employees. The respondent subsequently entered into an agreement with the appellant in which it was agreed (among other things) that:

- the respondent would receive monthly retrenchment payments in addition to his remuneration as an incentive to remain in the employ of the appellant;
- the agreement was to be concluded for a fixed term of four years from 1 April 2007 to 31 March 2011; and
- the respondent's employment contract would be amended to incorporate the terms of the agreement: specifically, the notice period would be substituted with a clause preventing termination of employment for the duration of the fixed period.

In May 2008, the respondent tendered his resignation. As a consequence of this, the appellant instituted an action for the sum of R427,843, the monthly incentive amounts that the respondent would have received for the fixed period, had he not resigned.

In analysing the agreement, the SCA held that the intention of the parties is the determining factor in issues of contractual interpretation. Furthermore, in order to determine the intention of the parties, the nature, character and purpose of the contract must be established. The SCA found that it was common cause that the purpose of the agreement was to retain employees in certain job categories for a fixed period.

The respondent alleged that in terms of the agreement he was only liable to the appellant for the retention payments already paid to him. The SCA noted that the agreement contained conflicting and ambiguous provisions, particularly in relation to the repayment of the retention monies, but nevertheless concluded that "an examination of the entire contract, having regard to its purpose, yields a clear meaning".

The SCA held that when a contract is entered into for a fixed period, neither of the parties have the right to terminate the contract prior to the expiry of the fixed term. It ruled that the respondent waived his common law right to terminate the contract on notice when he agreed to delete the clause dealing with the notice period in the employment contract and replace it with a clause preventing termination. Furthermore, the SCA stated that the respondent's primary obligation was to remain in the employ of the appellant for a fixed period and that the premature termination of his employment was contractually impermissible and constituted a breach of his obligation under the agreement.

Accordingly, the appeal was upheld and the respondent was ordered to pay the appellant an amount of R427,843, together with interest.

When negotiating fixed term contracts of employment, it is imperative that employers carefully consider the consequences of the terms of the agreement. For instance, where an employer wants to retain the right to retrench a fixed term contract employee provision needs to be made in the agreement for such a dismissal. Should no such provision be made, the fixed term employee's retrenchment will constitute a breach of the agreement. Employers are well-advised to consider whether the fixed term agreement caters for all its needs.

*Lauren Salt and Christelle Wood*

## CONTACT US

For more information about our Employment practice and services, please contact:



**Aadil Patel**  
National Practice Head  
Director  
T +27 (0)11 562 1107  
E aadil.patel@dlacdh.com



**Gillian Lumb**  
Regional Practice Head  
Director  
T +27 (0)21 481 6315  
E gillian.lumb@dlacdh.com



**Johan Botes**  
Director  
T +27 (0)11 562 1124  
E johan.botes@dlacdh.com



**Mohsina Chenia**  
Director  
T +27 (0)11 562 1299  
E mohsina.chenia@dlacdh.com



**Fiona Leppan**  
Director  
T +27 (0)11 562 1152  
E fiona.leppan@dlacdh.com



**Hugo Pienaar**  
Director  
T +27 (0)11 562 1350  
E hugo.pienaar@dlacdh.com



**Gavin Stansfield**  
Director  
T +27 (0)21 481 6314  
E gavin.stansfield@dlacdh.com



**Michael Yeates**  
Director  
T +27 (0)11 562 1184  
E michael.yeates@dlacdh.com



**Faan Coetzee**  
Executive Consultant  
T +27 (0)11 562 1600  
E faan.coetzee@dlacdh.com

**Kirsten Caddy**  
Senior Associate  
T +27 (0)11 562 1412  
E kirsten.caddy@dlacdh.com

**Nicholas Preston**  
Senior Associate  
T +27 (0)11 562 1788  
E nicholas.preston@dlacdh.com

**Ndumiso Zwane**  
Senior Associate  
T +27 (0)11 562 1231  
E ndumiso.zwane@dlacdh.com

**Anli Bezuidenhout**  
Associate  
T +27 (0) 21 481 6351  
E anli.bezuidenhout@dlacdh.com

**Inez Moosa**  
Associate  
T +27 (0)11 562 1420  
E inez.moosa@dlacdh.com

**Lauren Salt**  
Associate  
T +27 (0)11 562 1378  
E lauren.salt@dlacdh.com



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## BBBEE STATUS: LEVEL THREE CONTRIBUTOR

### JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa  
Dx 154 Randburg and Dx 42 Johannesburg  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

### CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa  
Dx 5 Cape Town  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

[cliffedekkerhofmeyr.com](http://cliffedekkerhofmeyr.com)

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