EMPLOYMENT LAW
ALERT

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IN THIS ISSUE

Employment contract automatically terminated? Not so fast...

In *Mashabela v Octaves Security Services* [2022] 31 CCMA 7.1.9, also reported as [2022] 4 BALR 393 (CCMA), Mr Motshele Lawrence Mashabela (applicant), who was employed as a security supervisor – without a written contract of employment – by Octaves Security Services (respondent), referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration when his contract was terminated.

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BACKGROUND

The applicant was stationed at the site of the respondent's client, the Department of Agriculture and Rural Development (Department), in Potchefstroom. Early in 2021, the respondent's employees embarked on an unprotected strike, whereafter the Department terminated its contract with the respondent.

Consequently, even though the applicant did not participate in the strike, he received a letter from the respondent notifying him that his contract had "*come to an end with the respondent's Potchefstroom contract*". The applicant deemed the termination of his contract to be unfair and sought compensation. The respondent, however, denied that the applicant had been dismissed; it argued that the termination of the applicant's services had been fair.

The issues that had to be decided were:

- Had the applicant indeed been dismissed?
- Was the applicant's alleged dismissal substantively and/or procedurally unfair?
- What was the appropriate remedy?

ANALYSIS OF EVIDENCE AND LEGAL ARGUMENTS

The Commissioner noted that the respondent's case was essentially that it had had no option but to terminate the applicant's employment when the Department terminated its Potchefstroom contract on 22 January 2021 as "*this was how things worked in the security industry*".

The applicant disputed the above and, more particularly, denied that the (verbal) contract of employment had been linked to the respondent's contract with its client, the Department.

The Commissioner referred to section 198B of the Labour Relations Act 66 of 1995 (Act), which applies to fixed-term contracts with employees earning below a set earnings threshold. Accordingly, since the applicant earned below the earnings threshold and his contract of employment constituted a fixed-term contract because it terminated on the occurrence of a specific event (the termination of the respondent's contract with its client), section 198B of the Act was applicable.

An employee can only be employed on a fixed-term contract or successive fixed-term contracts for longer than three months in circumstances contemplated in subsections 198B(3) and (4) of the Act, otherwise the employment is deemed to be indefinite. The respondent did not, however, make any attempt during the arbitration to justify the fact that the applicant had been employed on a fixed-term contract for longer than three months.

Employment contract automatically terminated? Not so fast...

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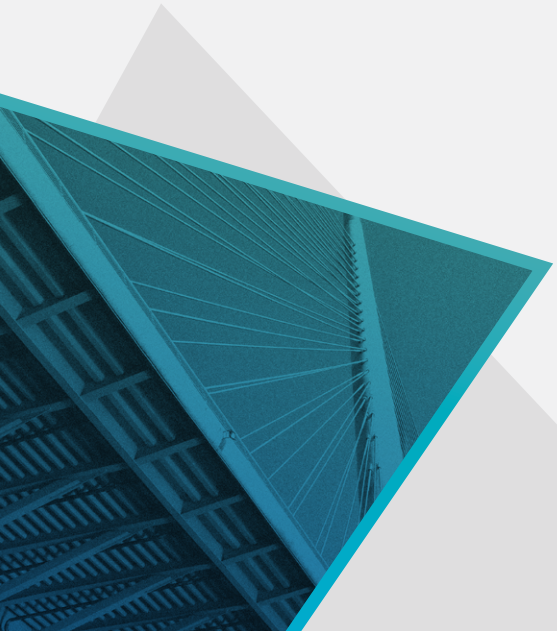

The applicant, in any event, did not rely on section 198B. He insisted that he had not been appointed on a fixed-term contract and denied that his employment had been subject to, or linked to, the respondent's contract with its client.

HAD THE APPLICANT REALLY BEEN DISMISSED?

The respondent could not produce a written contract of employment or evidence of a verbal agreement to support its claim that the applicant's contract terminated automatically when its client cancelled the service agreement.

In this regard, the Commissioner referred to the case of *Khum MK Investments and BIE Joint Venture (Pty) Ltd v CCMA and Others* [2020] 41 ILJ 1129 (LAC), where the employer had also argued that it had not dismissed its employees because their fixed-term contracts had terminated on the occurrence of a specific event; namely, the cancellation of certain orders by its only client.

The court found that the employees' written contracts of employment did not provide for automatic termination in such an event. Consequently, it held that the termination of the employees' contracts of employment constituted dismissal in terms of section 186(1)(a) of the Act.

In light of the court's decision in the *Khum* case, the Commissioner found that the termination of the applicant's employment constituted a dismissal as defined in section 186(1)(a) of the Act.

WAS THE APPLICANT'S DISMISSAL SUBSTANTIVELY AND/OR PROCEDURALLY UNFAIR?

In this case, the respondent could not provide evidence of any so-called automatic termination clause or verbal agreement to that effect. Accordingly, it failed to prove that it had a fair reason to dismiss the applicant.

The Commissioner further held that the respondent's mistaken belief that the applicant's contract had terminated automatically also made it impossible to claim that his dismissal had been preceded by a fair procedure.

The applicant's dismissal was thus both substantively and procedurally unfair.

WHAT WAS THE APPROPRIATE REMEDY?

The applicant did not want to be reinstated or reemployed but asked to be compensated. He earned a monthly salary of R8,000 at the time of his dismissal.

Accordingly, the Commissioner awarded compensation equal to six months' remuneration.

CONCLUSION

This case once again demonstrates the importance of employment contracts when considering unfair dismissal disputes. Attention to detail when drafting these contracts is crucial. An employer will only be able to rely on an automatic cancellation clause to terminate an employee's employment on the occurrence of a specific event, if such a clause was included in the employment contract. Furthermore, in order to avoid any uncertainties, an employment contract ought to be in written form.

HEDDA SCHENSEMA AND
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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