Beware of the Allure of an Automatic Termination Clause

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The Labour Court has repeatedly demonstrated its willingness to hold as invalid a provision in an employment contract which purports to limit the protection afforded to employees by legislation. In general, the Labour Court has declared clauses in a contract which gives an employer the right to dismiss employees at will invalid, as these clauses are in contravention of the Labour Relations Act, 1995 which protects employees against unfair dismissal.

The Labour Court was recently tasked with determining whether the position is altered in circumstances where employees are employed under fixed term contracts stating that their contract would endure for the duration of "the skills requirement of the project". This issue was determined in the case of *National Union of Mineworkers obo Milisa and others v WBHO Construction (Pty) Ltd* [2016] 6 BLLR 642 (LC).

In this case, WBHO was involved in the construction of Hemingways Hotel and Casino. The employees were employed on fixed term contracts in 2012 as general workers for, as set out in their employment contract, the duration of their skills requirement in the project. In December 2012, before completion of the project, the employees were issued with notices of termination of their employment. WBHO retained a group of about 20 to 30 employees to assist with the additional functions to complete construction of the project.

NUM challenged the termination of the employees' employment in the Labour Court on the basis that the employees' dismissals constituted an unlawful premature repudiation of their fixed-term contracts of employment as WHBO was by law not entitled to terminate the contracts before the completion of the project. NUM also claimed that their employees' dismissals were unfair and in violation of section 189 of the LRA.

WBHO denied having dismissed the employees unlawfully, unfairly or for its operational requirements. It argued that the employees had been employed on fixed-term contracts which entitled it to terminate their services when the project reached the stage when their services were no longer required, and that the project had reached that stage. WBHO relied on the automatic termination clause of the contract of employment which provides that the contract would endure for the duration of the *employees' skills requirement on the project*.

In relation to WBHO's argument based on the automatic termination clause, the Labour

Court had to determine whether such a clause as contained in the employees' fixed term contract of employment, permitted its automatic termination, alternatively whether the employees' termination of employment constituted a dismissal.

In determining the matter, the Labour Court considered a number of prevailing authorities, including the decision of *SA Post Office Ltd v Mampeule* (2010) 10 BLLR 1052 (LAC), where the Labour Appeal Court found that parties to an employment relationship cannot contract out of the protection against unfair dismissal, whether or not they do so by means of an automatic termination clause or otherwise, as the LRA was promulgated in the public interest. Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed.

The Labour Court found that the automatic termination provision in the employees' contracts involved a unilateral and subjective assessment by WBHO, which granted it an unfettered discretion to decide when the employees' skills were no longer required. Given the nature of the employees' duties as general workers, the decision whether their skills were no longer required was subjective.

The Labour Court concluded that the employees had been dismissed for reasons relating to WBHO's operational requirements and held that:

> *The automatic termination provision in the applicants' contracts of employment is invalid as it is in flagrant disregard of provisions of the LRA which preclude employers from terminating employees' contracts at will and in violation of the provisions of the LRA which protect employees against unfair dismissal.*

In the circumstances, when WBHO contemplated dismissing the employees based on its operational requirements, it was required to comply with the mandatory provisions of section 189 of the LRA and ensure that the employees' dismissal was both substantively and procedurally fair. The Labour Court found that WBHO had failed to comply with its duty in terms of section 189 which rendered the employees' dismissal substantively and procedurally unfair. While the employees claimed maximum compensation of 12 months, the Labour Court only awarded them compensation equivalent to three months remuneration. This was because the employment contract of those employees who had been retained by WBHO when the other employees were dismissed had been terminated only two months later.

This decision demonstrates once again the strict approach the Labour Court is taking when interpreting contractual termination clauses and its willingness to find them invalid. Any employer concluding a fixed term contract must ensure that termination of a fixed term contract is clearly justified and not merely based on the provision of the contract. Should the employer need to terminate employees' fixed term contracts earlier than as anticipated, the employer must comply with the procedure for dismissal based on the employer's operational requirements.