

EMPLOYMENT

Navigating the termination of conditional offers of employment: What employers need to know

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Introduction

In today's highly competitive employment market, securing the most suitable candidates is of paramount importance to the success of a business. Employers must however be careful to vet prospective employees so as to protect the interests of the business. Offers of employment are therefore increasingly subject to conditions and requirements which if not met may lead to the termination or cancellation of employment or an offer of employment.

In *Makakaba v APT Engineering JV* [2024] 4 BALR 385 (CCMA), the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") decided on a dispute where a prospective employee claimed to have been unfairly dismissed without a disciplinary hearing, following a background check conducted by APT Power Engineering JV ("**the Company**") which indicated a prior criminal conviction.

Facts

Mpho Makakaba ("the Employee") was provisionally employed as a Mechanical Fitter, pending the outcome of certain background checks. Upon receipt of the applicant's police clearance results, his provisional contract of employment was terminated. He referred a dispute to the CCMA in terms of section 191(1) of the Labour Relations Act 66 of 1995 ("**LRA**").

At arbitration, The Employee stated that he had given the Company permission to conduct a background check on him and had incurred the costs for doing so. He also stated that he had notified the Company that he had once paid a fine but failed to produce evidence to this effect. Although the Employee denied having been made aware of some parts of his employment contract, he conceded that his signature appeared on same. One of the clauses in the employment contract provided that:

"The employee is expected to provide police clearance at his/ her cost. If one is not provided, APT will acquire the necessary criminal clearance on behalf of the employee, and the cost will be deducted from the employee's salary. In cases where the employee fails to submit the required police criminal clearance, the company has a right to terminate the agreement."

The Employee submitted that he was aware of the provisions of this clause but that, according to his understanding, if an employee did not meet the requirements, they would be issued with a notice of termination and removed from the work site pending the outcome of a disciplinary hearing.

In response, the Company's Human Resources Manager testified that an induction meeting was held where all prospective employees were made aware of the provisional nature of the employment contracts, the criminal and other background check requirements and the possible consequences of not meeting the Company's requirements. She further submitted that a disciplinary hearing was not necessary because the applicant was employed under a conditional contract and therefore could be released without neither prior notice nor a hearing.

Findings of the CCMA

The CCMA had to decide, amongst other things, whether the Employee had established the existence of a dismissal and if so, if such dismissal was fair. The CCMA found that the Employee was aware of the Company's requirements for employment and of his duty to disclose all criminal convictions but had failed to do so. Further that, the Employee was a prospective employee pending the outcome of all checks and was therefore not entitled to a disciplinary hearing. The CCMA commissioner considered *Bayat v Durban Institute of Technology* (2006) 27 ILJ 188 (CCMA) where it was held that where a conditional offer of employment is made, an employment relationship only comes into being when the condition is fulfilled. Accordingly, the Employee was found to have failed to discharge the onus of establishing the existence of a dismissal.

Importance of the case

If employers wish to make employment offers subject to the fulfilment of conditions, then these must be clearly stipulated in the contract of employment. These conditions might be that employment is subject to: (1) positive background checks and (2) the verification of the candidate's personal, professional and criminal history.



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