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EMPLOYMENT

Terminating an employment contract and dismissing an employee – how are they interrelated?

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A recent case decided by the South African High Court has examined the curious interplay of an employee's rights as they arise from both the written contract of employment and, at the same time, labour legislation. Although the judgment may at first seem confusing, a careful analysis of its outcome sheds light on how these parallel sources of the parties rights and obligations operate in conjunction.

After a public and convoluted legal battle on the issues, in the matter of *Old Mutual Limited and Others v Moyo and Another (2020)*, on 15 January 2020 a 3 panel bench of the High Court in Johannesburg delivered a finding that Moyo, the former Chief Executive of one of South Africa's oldest insurance providers, Old Mutual, had not been unlawfully terminated and was not entitled to any relief, whether by means of damages for breach of contract or reinstatement to his positions, as had been claimed by him.

The decision of the High Court revolved around Moyo's contention that, despite a provision in his contract of employment that Old Mutual was entitled to terminate his employment merely by notifying him of such termination on six months' notice, that Old Mutual was contractually obliged to hold an internal disciplinary enquiry or a pre-dismissal arbitration before doing so. The High Court correctly held that the contractual entitlement to terminate on six months' notice was unconditional, and although the agreement did in fact provide for circumstances in which an internal disciplinary enquiry or a pre-dismissal arbitration was required to be held, this was not required in the present case. As such, Old Mutual had not breached any of the provisions of the contract of employment when it notified Moyo of the termination of his employment, and the termination was *contractually lawful*.

However, the above judgment says nothing about whether the termination of Moyo's employment was a *fair dismissal*. This aspect of the employment relationship which exists in parallel to contractual concerns, cannot be ignored as, regardless of the content of an employment agreement, an employee always remains entitled to the protections set out in the Labour Relations Act, 66 of 1995 ("**LRA**"), which provides that an employee may not be unfairly dismissed. In order to avoid a claim of unfair dismissal, an employer always needs to demonstrate that (i) it had a fair reason to dismiss the employee and (ii) that it followed a fair procedure, allowing the employee an opportunity to respond to the proposal that he/she be dismissed, before taking a decision.

In Moyo's case, since he elected to pursue his claim in the High Court by challenging the lawfulness of the termination (which involves an analysis of the rights of the parties in terms of the contract) and not as an unfair dismissal in the Labour Courts (which would have involved an analysis of whether Old Mutual had a fair reason to dismiss him, and whether it followed a fair procedure to do so), the judgement centred solely around whether Old Mutual had an unconditional contractual right to terminate on notice, and was correctly decided.

It is critical that employers do not assume from the manner in which Old Mutual terminated Moyo's employment, that it is acceptable to merely provide an employee with notice of termination, and without ensuring that the termination is also a fair dismissal in terms of the Labour Relations Act. Should the employer act in this way, although the termination of employment may be contractually lawful, it would almost inevitably, and indefensibly, be an unfair dismissal. Since it is always the election of the employee as to which forum, he/she wishes to pursue their claim, any termination of employment should always be both a lawful termination and a fair dismissal.

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