

EMPLOYMENT

The validity of automatic termination clauses in contracts of employment

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ISSUE(S)

Whether the employee was unfairly dismissed after his appointment letter was automatically terminated because of a provision stating that his offer of employment was conditional on a positive outcome of a vetting process.

SUMMARY

COURT'S DECISION

In the case of *Nogcantsi v Mquma Local Municipality and others (2017) 26 LAC 8.34.3* the Court had to, among others, consider whether an employee had been unfairly dismissed when his letter of appointment was terminated because he failed to meet a condition contained therein. The letter stated that the offer of employment was conditional upon a positive outcome from a vetting exercise of the employee which was to be conducted after he accepted the offer of employment.

In this case, the employee, after completing an interview with the Mquma Local Municipality (the "Municipality"), Mr Nogcantsi ("the employee") was handed a written offer of employment which he accepted. The employee was appointed to the position of a 'protection officer' for a fixed period of three years. Clause 1.1 of the employment agreement stated, however, that the offer of employment was subject to a "vetting and screening process" having been completed by the Municipality. If the outcome of the vetting process was negative, the contract of employment would be terminated automatically.

The vetting process delivered a negative result, in particular, negative feedback from the South African Police Services ("SAPS") and the employee's previous employer. The feedback suggested that the employee was deceptive. As a result of the feedback the employment agreement was terminated. The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA") and, thereafter, the Labour Court. He was unsuccessful in both forums. He then appealed to the Labour Appeal Court.

In the Labour Appeal Court the employee contended that his dismissal was unfair because the contract of employment allowed the Municipality to by-pass the protection provided for in the Labour Relations Act 66 of 1995 ("LRA") by allowing for an automatic termination. He alleged that therefore, the contract was unlawful as it attempted to contract out of the provisions and protection of the LRA.

The Labour Appeal Court dismissed the employee's claim. It rejected his arguments that the Municipality was attempting to contract out of the LRA because the 'trigger' event for the automatic termination of the offer was not the employee's conduct but rather that of a third party. It arose out of the outcome of a vetting process which relied on the provision of information from external parties; in this instance the SAPS. The vetting process was not in the hands or control of the Municipality.

This is different to the situation, for instance, where an employment contract has a provision stating that the termination of an employee's directorship will automatically result in the termination of his employment. This is because the termination of the employee's directorship is something within the control of the employer. An employer who terminates an employee's directorship in such circumstances inadvertently terminates his employment as well. The Labour Appeal Court therefore held that this conditional contract was a commercial reality and was not in conflict with the LRA.

IMPORTANCE OF THIS CASE

The use of automatic termination provisions may be permissible in certain limited circumstances.



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