



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case no: JS439/22

In the matter between:

MAFENYA REINET NGOBENI

Applicant

and

BIDVEST PROTEA COIN

Respondent

Heard: 26 May 2025

Delivered: 27 May 2025

JUDGMENT

DANIELS J:

Jurisdictional issue

[1] The applicant contends that he was dismissed and his dismissal was automatically unfair, in accordance with section 187(1)(f) of the Labour Relations Act No. 66 of 1995 (the “LRA”). The applicant contends that he was unfairly

discriminated against, and dismissed, based on his age. The respondent contends that there was no dismissal, and the court therefore has no jurisdiction to determine the dispute between the parties.

Material facts

[2] Though not a sophisticated litigant, the applicant represented himself. His statement of claim was drafted, in very broad terms, by the practitioners of the SASLAW Pro Bono Clinic, who declined to represent him at the trial. The applicant was asked whether he wished to proceed, despite the absence of representation, and he elected to do so.

[3] The respondent pleaded that there was no dismissal because the applicant had been employed on a fixed term contract, which had expired.

[4] The applicant testified as follows:

4.1 The applicant was employed, as a security guard, by the respondent during 2013 and posted to a site 105 N. Sandton.

4.2 During 2015, he was dismissed for sleeping on duty. He challenged his dismissal, and the CCMA found in his favor. The CCMA ordered the respondent to re-employ him. The CCMA process led to the further deterioration of his relationship with his manager, Mr. Mahlangu.

4.3 When the applicant was re-employed, during 2016, he was asked to sign a fixed term employment contract, which he did. In his testimony, the applicant attempted to avoid the consequences of signing the contract by stating that it was completed by others, and he simply attached his signature to it.

4.4 The employment contract states, in clause 1, that his employment commences on 25 August 2016 and continues for the duration of the project

or contract between the respondent and the Bombela Operating Company ("BOC").

4.5 Clause 7.4 of his employment contract states: *"In the event of the contract between the employer and client expiring or being terminated by either party for whatsoever reason, this agreement shall simultaneously terminate. Such termination shall not be construed as a dismissal or retrenchment but shall terminate on the basis of expiry of the fixed term specific purpose contract."*

4.6 Despite signing the employment contract, indicating that his site was the BOC (which operates the Gautrain) he was posted to Nedbank's Rivonia branch, where he worked for almost one year. Thereafter, he was transferred to the Gautrain, where he worked for the next four to five years until he was dismissed during March 2022.

4.7 He was informed, during October 2021, that the BOC contract had been terminated and this would be implemented in phases. The respondent made efforts to transfer the affected security guards to other positions.

4.8 Ultimately, the BOC contract was extended until the end of February 2022. The applicant alleges that he was informed by management, specifically Mr. Dion Manenze, that he was unsuitable for an alternative position at Shoprite Checkers because he was too old for that position. It was put to him, in cross examination, that Mr. Manenze could not have done this because he had left the respondents' employment in 2019.

4.9 He accepted that the BOC contract had, in fact, been terminated.

4.10 During cross examination, it was put to the applicant that he was offered an alternative placement, at NEXON, which he refused. The applicant denied this.

4.11 After his dismissal, he signed a benefits withdrawal form indicating that he had not been dismissed but instead his services terminated because it was the “end of [his] contract”. When he returned his uniform, he signed another form indicating that he was not dismissed but that he had reached the end of his contract. During the cross examination, when asked why he had not indicated that he had been dismissed, he said that he could not read the document properly because of a problem with his vision. He alleged someone else completed the documents for him and he simply signed it.

[5] Following the applicant's testimony, the respondent indicated that it wished to address the court on jurisdiction because it believed that there was no dismissal. The respondent argued that his employment terminated automatically, at the end of the term of his contract. The respondent submitted that the applicant's version was improbable and must be rejected. The applicant's position was not assisted by his statement of claim, which provided little detail.

Legal analysis

[6] Fixed term employment contracts provides flexibility to employers. They are used where employment is contingent on the occurrence of a specified event, on the completion of a specified task or project, or a fixed date. At common law, if the contract expires on the occurrence of the specified date or event, and the parties agreed the contract would terminate in those circumstances, then there is no dismissal. However, this was not intended to grant a third party to the right, effectively, to terminate the contract at its own whim. With the incorporation of the constitutional right against unfair dismissal, our courts have expressed a general reluctance to uphold automatic termination clauses, frequently designed by the employer to avoid the unfair dismissal protections of the LRA.

[7] In *Mahlamu v Commission for Conciliation, Mediation & Arbitration & others*¹ Van Niekerk J (as he then was) considered the automatic termination provisions

¹ (2011) 32 ILJ 1122 (LC) at paras 7 to 24

routinely incorporated into employment contracts of security guards, where a decision of a third party (the client of the security company) effectively terminates the contract. Ultimately, after considering the policy issues, and sections 5(2)(b) and 5(4) of the LRA, the learned judge found that the automatic termination provisions were an attempt to contract out of the unfair dismissal provisions of the LRA, and were impermissible. The facts of that matter were similar to those in this matter. There too, the employee was employed by a security company, providing armed escort services to the Bombela Joint Venture, at sites related to the Gautrain. Bombela notified the security company its services were no longer required, and the security company, in turn, notified its employee that his services were terminated as a result of the “automatic termination” clause in his employment contract.

[8] In *Enforce Security v Fikile & others*² the Labour Appeal Court endorsed the reasoning in *Mahlamu*, finding as follows:

“[27] It is logical that parties to a contract of employment cannot be permitted to agree that what is proved to be a dismissal should be regarded as not being a dismissal. Further, it is impermissible for parties to conclude a contract in terms whereof an employee agrees not to challenge the fairness or otherwise of his or her dismissal. As to whether there has been a dismissal in a particular case is a value judgment which should be made on the facts of that particular case. . . .” (own emphasis)

[9] However, the LAC continued: *“[41] In my view, it does not necessarily follow that in all cases an automatic termination clause based on an event contained in a fixed-term contract of employment will be visited with invalidity. It would be necessary to determine whether in the circumstances of a particular case the clause was intended to circumvent the fair dismissal obligations imposed on the employer by the LRA and the Constitution. Some of the relevant considerations, in my view, would include the precise wording of the automatic termination clause and the context of the entire agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose*

² [\(2017\) 38 ILJ 1041 \(LAC\)](#)

and pick who is to render the services under the service agreement; whether the clause is used to unfairly target a particular employee by either the client or the employer; whether the event is based on proper economic and commercial considerations; the list is not exhaustive. Each case must be decided on its circumstances." (own emphasis)

[10] Ultimately, on the facts, the LAC held, in *Enforce*, that there had been an automatic termination of the employment contracts.

[11] In *Piet Wes Civils CC & another v AMCU*³ the LAC held:

"[25] A contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a 'specified event', 'the completion of a specified task or project' or 'a fixed date', as contemplated by s 198B(1). This is so in that a 'specified event', 'the completion of a specified task or project' or a 'fixed date' does not constitute a possibility that future contracts may not be supplied in future by an employer's clients. This remains a possibility and nothing more than that. It is by no means a specified event which in future will arise, nor is it related to the completion of a task or project or a fixed date, but is an operational risk which may occur, one under which the business operates." (own emphasis)

[12] The burden lies with the respondent, who raises the automatic termination clause as a defense, to show that the clause does not limit the right against unfair dismissal, or that the limitation is permissible. Here, the respondent has merely pointed to the clause and asked the court to draw the necessary conclusions.

[13] Clause 7.4 of the contract is clearly designed to limit the right of the applicant to argue that his employment was terminated unfairly. The language and grammar used in the clause, as well as the contract, also acts as a guide to the purpose. The clause was designed to avoid the need for an operational requirements consultation process. Furthermore, effectively, the termination occurs at the instance of the third

³ (2019) 40 ILJ 130 (LAC)

party who is not a party to the employment relationship. As indicated in *Piet Wes Civils*, the event is not a specified event as one expects of true fixed term contracts, but an operational risk that may, or may not, come to pass. If the event occurs, the respondent, as employer, would be permitted to avoid engaging in a consultation process, which is required by our legislation, relating to its operational requirements. This approach to fixed term contracts is underscored by the two interrelated, and core values, of our labour dispensation namely - security of employment⁴ and recognition that employers enjoy greater social and economic power than individual workers.⁵

Conclusion

[14] In the result, the following order is made:

1. The applicant was dismissed by the respondent, and this court has jurisdiction to hear and determine the dispute concerning the alleged automatically unfair dismissal.
2. There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms S Lancaster

Lancaster Kungoane Attorneys

⁴ *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) at para [42]

⁵ *Ex Parte Chairperson of the Constitutional Assembly : In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at para [66]