IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA24/15

ENFORCE SECURITY GROUP **Appellant**

and

MWELASE FIKILE AND 46 OTHERS **First to 47 Respondents**

COMMISSIONER G GERTENBACH **48th Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **49th Respondent**

Date heard: 25 August 2015

Delivered: 25 January 2017

Contract of employment—Fixed-term contract- Service provider employer placing employees with client in terms of a fixed-term eventuality contract—such contract to terminate at termination of contract between the employer and the client.-the client terminating the contract with the service provider employer because the services rendered no longer required.- Employer giving notice to employees of termination of their employment contracts because the eventuality to terminate the fixed-term contract having taken place-Such termination not dismissal.

Termination of employment- automatic termination clause – interpretation thereof- whether the clause impermissible on the facts of this case. Factors to be considered to determine whether the contracting parties have contracted out the protection against unfair dismissal.

Coram: Tlaletsi DJP; Ndlovu JA *et* Hlophe AJA

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Judgment

Tlaletsi DJP

Introduction

[1] The issue to be determined in this appeal is whether the termination of the first to the 47th respondents' (the employees) contracts of employment with their employer (the appellant) which contained automatic termination clauses operative upon the termination of a contract for the provision of services which existed between the appellant and its client, having come into effect, constituted a dismissal. The 49th respondent (the commissioner) who arbitrated the dispute essentially found that the employees had not been dismissed and consequently dismissed the employees' claim of unfair dismissal referred to the Commission for Conciliation Mediation and Arbitration (the CCMA).

[2] In a review application brought by the employees, the Labour Court (per Cele J) found that the termination of the employees' employment contracts constituted a dismissal in terms of the Labour Relations Act[1] (LRA). The Labour Court then ordered the appellant to pay severance pay and compensation for what it found to be substantively and procedurally unfair dismissal of the employees by the appellant. The appeal lies against the findings that the employees had been dismissed, that such dismissal was unfair, and the relief ordered by the Labour Court. The appellant is in this Court with leave of the Labour Court.

Factual Background

[3] The background facts underlying the dispute are common cause. The appellant is a private security services provider and is registered as such in terms of the law regulating that sector. The appellant provides security officers to its various clients contracted to it. Boardwalk Inkwazi Shopping Centre (Boardwalk), Richards Bay, is one of such clients contracted to the appellant

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[1] Act 66 of 1995.

to provide security personnel. To honour the said contract the appellant employed the employees and placed them at Boardwalk.

[4] In terms of the contracts of employment with the employees the period of employment commenced on a specified date. Clause 3.2 of the contracts provides that:

> 'The period of the employment would endure until the termination of the contract which currently exists between BOARD WALK or its successors (hereinafter referred to as the CLIENT) and the COMPANY.
>
> 3.2.1 The Employee agrees that he/she fully understands that the Company's contract with the Client might be terminated by the Client at any time and for any cause or might terminate through [e]ffluxion of time and that in consequence hereof the nature of <u>the Employee's employment with the company and its duration is totally dependent upon the duration of the Company's contract with the Client/s and that the Employee's contract of employment shall automatically terminate. Such termination shall not be construed as a retrenchment but a completion of contract…</u>' [Emphasis provided].

Clause 23.3 provides that the employee specifically accepts that his/her employment with the appellant is dependent upon the retention by the appellant of the client's contract at whose premises the employee will be assigned his/her duty[2].

[5] On 30 September 2011, Boardwalk gave notice of termination of its contract with appellant with effect from 31 October 2011. As a result of the termination notice the appellant held meetings on 3 October 2011 with the shop stewards from NASUWU and SATAWU which are the trade unions representing the employees at appellant's workplace. The appellant offered the affected employees alternative employment in Durban. The offer was out rightly rejected by the employees' representatives. According to the minute of that meeting the employees held the view that a retrenchment process in terms of

[2] The appellant has only attached the three pages of the written agreement it is relying on. The employees have attached a complete written agreement to their Replying affidavit.

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section 189 of the LRA and subsequent payment of severance pay would be the only solution acceptable to them.

[6] A further meeting was held with the employees at Richards Bay on 4 October 2011. The employees were once again offered alternative employment by the appellant in Durban. The offer was rejected by the employees. At the same meeting all the employees were handed letters notifying them of the cancellation of the contract by Boardwalk Inkwazi Shopping Centre, offering them alternative employment in Durban, and that their respective contracts of employment would terminate on 31 October 2011 if they did not take up the offer of alternative employment. Pursuant to clause 3.2 above, the appellant terminated the employees' contracts of employment with effect from 31 October 2011.

Proceedings in the CCMA

[7] Dissatisfied with their dismissal, the employees referred an unfair dismissal dispute to the CCMA. The commissioner reasoned that: the nature of the contracts were neither '*fixed term*' contracts as there was no definite commencement and termination dates, nor were they '*temporary employment*' contracts intended to assist with the completion of a special project; they are '*indefinite (period)*' contracts entered *into where the period of employment cannot be determined with certainty. That 'such contracts can be cancelled by the employer giving the required or reasonable notice of termination when the employee's services are no longer required or on completion of the project for which the employee had been engaged or on fulfilment or coming into being of a condition of employment*'.

[8] The commissioner concluded that the client's termination of the agreement with the appellant led to the automatic termination of the employees' employment contracts and therefore the employees were not entitled to any form of compensation. The application was consequently dismissed with no award as to costs.

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The Court *a quo*

[9] The grounds of review on which the award was challenged as captured in the founding affidavit are that the commissioner failed to apply his mind to what constituted the rights of employees engaged on indefinite contracts of employment. The contention in this regard was that the commissioner erred in finding that the indefinite contracts of employment can be cancelled by the appellant by giving the required or reasonable notice of termination and that he should have found that the appellant had an obligation to negotiate with the employees' unions and follow s189 of the LRA. Lastly, that the award stand to be reviewed and set aside as no reasonable arbitrator would have come to the conclusion that the employees' dismissal was fair.

[10] The court *a quo* referred to the decisions of the Labour Court and this Court respectively in *South African Post Office v Mampeule*[3] and *South African Post Office v Mampeule*[4] (*SA Post office*) as well as *Mahlamu v CCMA & others*[5]. The nub of the court *a quo's* reasoning is captured as follows at paragraph 11:

> "*Therefore, it follows from the authority in South African Post Office v Mampeule that any contractual provision that infringes on the rights conferred by the LRA or Constitution is not valid, and even though the employee might be deemed to have waived his or her rights, such waiver is not valid or enforceable. In this matter, it follows that by finding that the cancellation of the contract between Boardwalk and the [appellant] led to the automatic termination of the employees 'contracts of employment, the [commissioner] committed a material error of law by failing to apply his mind to the relevant provisions of the LRA, namely, sections 5(2)(b), 5(4) and 185. The [commissioner] found that the [employees] were employed on indefinite contracts of employment. This finding is not assailed in this review application. He then came to the conclusion that the employees' contracts were automatically terminated and that the employees were not entitled to compensation. In the premises, the award of the [commissioner] stands to be*

[3] [2010] BLLR 1052 (LAC).
[4] [2009] 8 BLLR 792 (LC).
[5] (2011) 4 BLLR 381 (LC).

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reviewed and set aside as a decision which a reasonable decision maker could not have reached."

[11] The court *a quo* found further that there was an obligation on the appellant to have embarked on a retrenchment exercise and refused to do so. Regarding alternative offers of employment the court held that Durban and Richards Bay are two places far apart to commute daily. In conclusion the court a quo ordered as hereunder:

'1*. The arbitration award of the [commissioner] in this matter is reviewed and set aside. The termination of the [employees'] employment constituted a dismissal for the purposes of the LRA.*

2. The dismissal of each [employee] by the [appellant] was substantively and procedurally unfair.

3. The [appellant] is ordered to compensate each [employee] in an amount of money equivalent to six months' remuneration, calculated at the [employees] rate of remuneration on the date of dismissal.

4. Further, the [appellant] is ordered to pay so much of severance pay as each [employee] is entitled in terms of the contract of employment or in terms of the law.

5. The payment of compensation and severance pay is to be made within 21 days from the date of this order, but not later than August 2015.

6. In the event that the parties are in dispute about any payment to be made under 1 and 2 hereinabove, that dispute is to be referred to the [CCMA] which is to appoint a commissioner, other than the [commissioner who arbitrated this dispute]'to hear such evidence and to issue an award in relation thereto.

7. No costs order is made.'

The Appeal

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[12] Ms Naidoo, for the appellant, contended that the termination of the employees' contracts of employment does not constitute a dismissal as defined in s186 (1) (a) of the LRA as the proximate cause of the termination of employment is not an act by the employer, but by Boardwalk and that in the circumstances, the automatic termination provision in the contracts does not offend against s5 of the LRA. In the circumstances, counsel submitted, the court *a quo* erred in finding that the termination of the contracts constituted a dismissal.

[13] Ms Allen, for the employees, defended the judgment of the court *a quo* particularly the finding that the automatic termination clauses in the employees' respective contracts of employment were invalid and as a result they have been dismissed.

[14] It must be recalled that the case that the employees pursued in the CCMA was that they were in fact permanent employees and not employed subject to a fixed term contract and as such were entitled to a retrenchment process upon termination of the contract between their employer and Boardwalk. This perhaps explains why the commissioner spent some time to investigate the nature of their employment arrangement with the appellant. Having found that they were employed in what he termed "*indefinite (period) contracts*", he proceeded to find that there had not been a dismissal. It is therefore not surprising that the commissioner did not consider the validity of such contracts with regard to s5 of the LRA and the decisions referred to in the judgment of the court *a quo*. It does not appear to be an issue he was called upon to consider by the employees. Be that as it may, it is clear from the judgment of the court *a quo* that the issue whether or not the employees were in permanent employment relationship with the appellant was no longer pursued by the employees in the Labour Court. One need therefore not say anything further about it and let it enjoy its eternal sleep.

[15] There are therefore in my view, four issues that require determination on appeal. Firstly is the test on review; secondly, whether there was a dismissal; thirdly, the effect of the termination clause vis-à-vis s5 of the LRA (the lawfulness of the automatic termination clause), and fourthly, the relief

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awarded by the court *a quo*. I will deal with these issues in the order I have referred to them.

The Review test

[16] The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding[6]. To the extent that the court *a quo f*ound that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.

The Dismissal issue

[17] Dismissal of an employee for the purposes of the LRA is defined in s 186 which provides that:

'(1) —Dismissal means that:

(a) an employer has terminated employment with or without notice;

(b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer-

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

[6] SARPA v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU [2008] 9 BLLR845 (LAC) at paragraph [41].

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(c) an employer refused to allow an employee to resume work after she -

(i) took maternity leave in terms of any law, collective agreement or her contract of employment;

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or

(f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.'

[18] It is clear from the wording of s186 (1) above that there are specifically defined instances that bring about the termination of employment which would be regarded as dismissal. This means therefore that an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA. One such instance would be a fixed –term employment contract entered into for a specific period or upon the happening of a particular event[7]. An event that comes to mind would include a conclusion

[7] In SA Transport and Allied Workers Union on behalf of Dube and Others v Fidelity Supercare Cleaning Services Group (Pty) (2015) 36 ILJ 1923 (LC), the Labour Court held: "[29] A view has already been posited, approved and upheld in the labour courts holding effectively that a current contract of employment can terminate by operation of its terms (de jure), as a natural consequence of the termination of another contract, to which the current contract intensively relies for its own subsistence. This is possible in all instances where there is a contractual arrangement in terms of which a person, the employee, agrees that his or her services have been procured for and will be provided to a client, a third party, by a temporary employment service ("the employer"). When in such circumstances, there is a clause in the current contract to the effect that when a certain "event" occurs, such as the client terminating the SLA contract with the employer, the current contract will also terminate. There can be no question, save where there is an attack on the lawfulness or validity of the contract itself, that when such an event comes to pass, the current contract will also validly and/or lawfully terminate.
[30] To the extent that this termination is triggered by the "occurrence of an event" and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing nor, as it would be the case with the public sector employees, is the termination subject to judicial review (Nkopo v Public Health and Welfare Bargaining Council and Others and MEC, Public Works, Northern Province v CCMA and Others). The conundrum arises when a school of events occur and it is incumbent to decide which of those are capable

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of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. It has been the position in common law that the expiry of the fixed term-contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal.[8] In *Sindane v Prestige Cleaning Services*[9] Basson J correctly explains the position thus:

> *"[16] It is accepted that apart from a resignation by an employee (unless constructive dismissal is claimed consequent to resignation), an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in section 186(1) of the LRA, and more particularly, in terms of section 186(1)(a). These circumstances include the following: (i) The death of the employee; (ii) The natural expiry of a fixed term employment contract entered into for a specific period, or upon the happening of a particular event, e.g. the conclusion of a project or contract between an employer and a third party. In the first instance, if the fixed term employment contract is, for example, entered into for a period of six months with a contractual stipulation that the contract will automatically terminate on the expiry date, the fixed term employment contract will naturally terminate on such expiry date, and the termination thereof will not (necessarily) (subject to what is stated below in respect of the remedies provided for by the LRA to an employee who has signed such a contract) constitute a "dismissal", as the termination thereof has not been occasioned by an act of the employer. In other words, the proximate cause of the termination of employment is not an act by the employer. The same holds true for a fixed term employment contract linked to the completion of a project or building contract. These fixed term employment contracts are typical in circumstances where it is not possible to agree on a fixed time period of employment, i.e. a definitive start and end date, as it is not certain on what*

of terminating a contract of employment validly without it being said that there was a dismissal" [footnotes omitted.]

[8] Air Traffic and Navigation Services Company v Esterhuizen [2014] JOL (SCA) at para 17.

[9] (2010) 31 ILJ 733 (LC) at para16.

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exact date the project or building contract will be completed, and hence, the termination date is stipulated to be the completion date of the project or building contract. Similarly as in a fixed term employment contract with a stipulated time period, when a fixed term employment contract linked to the completion of a project or building contract terminates, such termination will not (necessarily) be construed to be a dismissal as contemplated in section 186(1)(a). Thus, the contract terminates automatically when the termination date arrives, otherwise, it is no longer a fixed term contract (SA Rugby (Pty) Ltd v CCMA & Others (2006) 27 ILJ 1041 (LC) at 1044 par 6)3. It must, however, be pointed out that the LRA does provide a remedy to an employee who have entered into fixed term employment contracts as referred to in section 186(1) (b) of the LRA in terms whereof an employee, who reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it, can claim a dismissal occasioned thereby. In such a case the "act" of the employer which is the failure or refusal to renew the fixed term employment contract on the same or similar terms, or to renew it at all is the proximate cause of the dismissal. Furthermore, an employee who has entered into a fixed term employment contract is not without remedy in terms of the LRA or the common law, if the employer unfairly or unlawfully terminates the employment contract of the employee for reasons related to misconduct, incapacity or operational reasons, prior to the natural expiry of the fixed term employment contract."

[19] In *Mahlamu v CCMA*[10], Van Niekerk J had the following to say in agreement with what is said in the *Sindane* decision, perhaps on this aspect only:

"[23] This is not to say that there is a 'dismissal' for the purposes of s 186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. This is what I understand the ratio of Sindane (supra) to be - that ordinarily, there is no dismissal when the agreed and anticipated event materialises (to use the example in Sindane, the completion of a project or building project), subject to the employee's right in

[10] [2011] 4 BLLR 381 (LC) at para 23.

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terms of s186 (1) (b) to contend that a dismissal has occurred where the employer fails or refuses to renew a fixed term contract and an employee reasonably expected the employer to renew the contract. In other words, if parties to an employment contract agree that the employee will be engaged for a fixed term, the end of the term being defined by the happening of a specified event, there is no conversion of a right not to be unfairly dismissed into a conditional right. Without wishing to identify all of the events the occurrence of which might have the effect of unacceptably converting a substantive right into a conditional one, it seems to me that these might include, for example, a defined act of misconduct or incapacity, or, as in the present instance, a decision by a third party that has the consequence of a termination of employment."

[20] There is no express or implied intention by the legislature in enacting s 186(1) to amend or change the common law in this regard. In *Fedlife Assurance Ltd v Wolfaardt*[11] the Supreme Court of Appeal held that:

"[17] The 1995 Act does not expressly abrogate an employee's common law entitlement to enforce contractual rights and nor do I think that it does so by necessary implication. On the contrary there are clear indications in the 1995 Act that the legislature had no intention of doing so.

[18] The clearest indication that it had no such intention is s 186(b) which extends the meaning of "dismissal" to include the following circumstances:

"(A) n employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

It is significant that although the legislature dealt specifically with fixed-term contracts in this definition it did not include the premature termination of such a contract notwithstanding that such a termination would be manifestly unfair. The reason for that is plain: The common law right to enforce such a term remained intact and it was thus not necessary to declare a premature

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[11] (2001) 22 ILJ 2407 (SCA) at para 17-18. See also Buthelezi v Municipal Demarcation Board (2001) 25 ILJ 2317 (LAC) at para 12.

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termination to be an unfair dismissal. The very reference to fixed-term contracts makes it clear that the legislature recognized their continued enforceability and any other construction would render the definition absurd. By enacting s 186(b) the legislature intended to bestow upon an employee whose fixed-term contract has run its course a new remedy designed to provide, in addition to the full performance of the employer's contractual obligations, compensation (albeit of an arbitrary amount) if the employer refuses to agree to renew the contract where there was a reasonable expectation that such would occur. That being so, it would be strange indeed, and bereft of any rationality, for the legislature to deny to the employee whose fixed term contract of five years has been unlawfully terminated within days of appointment the benefit of either specific performance of the contract or damages for its premature termination and to confine the employee to the limited and entirely arbitrary compensation yielded by the application of the formula in s 194 of the 1995 Act."

[21] The definition of dismissal requires that there must be an act by the employer that terminates the contract. This is made clear by the legislature's employment of the words "*an employer has terminated a contract of employment with or without notice*". 'That encompasses the ordinary situation of the employer giving notice under the contract of employment and a summary dismissal'.[12] In *National Union of Leather Workers v Barnard NO and Another*[13] this Court had the following to say about 186(1) (a):

"The key issue in the interpretation of the phrase 'an employer has terminated the contract with or without notice 'is whether the employer has engaged in an act which brings the contract of employment to an end in a manner recognised as valid by the law".

In *SA Post Office v Mampeule* this Court remarked:

"…The subsection defines 'dismissal 'as follows:…an employer has terminated 'a contract of employment with or without notice…' I am in

[12] Steenkamp and Others v Edcon Ltd 2016 (3) SA 251 (CC) at para 107.

[13] (2001) 22 ILJ 2290 (LAC) at para 22 – 23. National Union of Metalworkers of SA and Others v SA Five Engineering (Pty) Ltd AND Others (2007) 28 ILJ 1290 (LC) at para 41- 422.

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agreement with the court a quo that 'dismissal 'means any act by an employer which results, directly or indirectly, in the termination of an employment contract…"[14]

[22] The evaluation of the evidence by the court *a quo* turned primarily on whether the automatic termination clause contained in the employees' contracts of employment offends against s5 of the LRA[15]. An evaluation of the nature of the contracts of employment and the meaning and implication of its terms were not considered. The court a quo seems to have moved from the premise that since the commissioner found that the nature of the employment contracts were "indefinite contracts" of employment *'and that such a finding has not been assailed on review'* it should stand. A finding that the employment contracts were "indefinite contracts" is an erroneous finding by the commissioner. Such a finding constitutes an error of law and cannot stand despite it not being challenged. As pointed out already, the test is whether the finding is a correct one and not strictly whether it falls within a bend of reasonable decisions.

[23] The factual matrix in this case supports the view that the employees' contracts of employment were fixed-term contracts where the end of the fixed term was defined by the completion of a specified task or project, that is, the termination of the Boardwalk contract. The continued existence of these contracts depended on the continued existence of the contract between the appellant and Boardwalk. The employees were employed specifically for the contract between the appellant and Boardwalk. The termination of that contract is a legitimate event that would by agreement, give rise to automatic termination of the employment contracts. It is Boardwalk that cancelled the contract and not the appellant. There was no direct or indirect act by the appellant to cancel the contracts. There is no evidence to suggest that cancellation by Boardwalk was a device to rid the appellant of the employees. Neither is there evidence to suggest that it was a clandestine move by the appellant to dismiss the individual employees. On the facts of this case the cancellation of the service

[14] Supra at para 12.

[15] The provisions of s 5 of the LRA are referred to in para 22 of the Judgment.

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contract by Boardwalk is the proximate cause for the termination of the employees' contracts of employment.

[24] The fact that the appellant had an option to retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. Put differently, one cannot simply use the considerations of the fairness or otherwise of a dismissal to determine whether an employee has been dismissed.

Lawfulness of the automatic termination clause

[25] The relevant provisions of s5 (2) (b) under the heading 'Protection of employees and persons seeking employment' provides that:

"(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(a)…

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act from participating in any proceedings in terms of this Act,.."

Section 5(4) decrees that a provision in any contract, whether entered into before or after the commencement of the LRA, that directly or indirectly contradicts or limits any provision of s4, or s5, is invalid, unless the contractual provision is permitted by this LRA.

[26] In *Mahlamu* supra, Van Niekerk J correctly, in my view, summarised the effect of the above provisions as follows:

"[21] These passages are clear authority for the fact that the parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to the employee whether through the device of 'automatic termination' provisions or otherwise.

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[22] In short: a contractual device that renders a termination of a contract of employment to be something other than a dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the Act prohibits. Secondly, a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the Act."

[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.

[28] There has been reference to and reliance in *SA Post Office v Mampeule* by the parties and the Labour Court in its other recent judgments which appears to have been differently understood. Mampeule was appointed Chief Executive Officer (CEO) of SA Post Office (SAPO), a state owned entity on a five-year fixed term contract. He became an executive director of the Board of SAPO by virtue of his appointment as the CEO. Article 8 of SAPO's articles of association provided that if an executive director ceases to hold office for any reason whatsoever, including removal by the shareholder, his contract terminated automatically and simultaneously with the cessation of office. Clause 9 of Mampeule's contract of employment stipulated that his employment could be terminated on account of incapacity, as a result of poor work performance or ill health, misconduct or operational requirements, and that such termination had to be done with due regard to fair labour practices and in conjunction with SAPO's articles of association. The Minister of Communications suspended Mampeule pending a forensic audit into his conduct. Subsequent thereto, Mampeule was removed as a director by a resolution tabled by the Minister of Communications to that effect. The following day the chairperson of the Board formally informed the Mampeule in

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writing that following his removal from the Board, his employment contract had terminated automatically and simultaneously with his removal as a director.

[29] SAPO approached the Labour Court seeking a declaratory order that the termination of Mampeule's employment, due to his removal from the Board of directors on 21 May 2007, did not constitute a dismissal. In order to decide whether dismissal occurred, the court had to, firstly, determine the proximate cause that led to the termination of the Mampeule's contract of employment. In its view, the removal of the Mampeule as a director triggered, proximately or effectively, the termination of his employment. The effective cause of termination of the employee's contract of employment was clearly the Minister's removal of him from the Board. Had the Minister of Communications not removed Mampeule from the Board, his employment would not have terminated.

[30] Consequent to finding that the Minister of Communications was the proximate cause of the termination of the contract, the court found that SAPO dismissed the employee. The court was also of the view that any act by an employer which results, directly or indirectly, in the termination of an employee's contract of employment constitutes a dismissal within the meaning of section 186(1)(a) of the LRA. Although the court agreed with SAPO that the employee's employment contract permitted automatic termination, it found that the automatic termination clause was impermissible and cannot rightly be invoked to stave off the clear and unambiguous effect of the Minister's overt act. It concluded that the termination of the employee's contract of employment pursuant to a contractual term in his employment contract read together with the Articles of Association are impermissible in their truncation of the provisions of Chapter 8 of the LRA, and possibly even, the concomitant constitutional right to fair labour practices. Provisions of this sort, militate as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so conferred.

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[31] On appeal, this Court followed the same line of thought as the Labour Court by enquiring into the proximate cause of the termination of the employment contract. The LAC enquired whether in the present matter, it could be said that the shareholder's resolution to remove the employee was not the cause of the termination of the employment contract. Alternatively, whether the automatic termination provision intervened and became the proximate cause of the termination of employment; Or, should the question be asked as to what led the automatic termination provision to 'kick in' in order to determine what the proximate cause was? Having set these questions, the LAC observed that in labour law jurisprudence, lawfulness could not be equated with fairness. The LAC reiterated that the right not to be unfairly dismissed is one of the most important manifestations of the constitutional right to fair labour practice which forms the foundation upon which the relevant sections of the LRA are founded. This Court reiterated further that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of automatic termination provisions or otherwise because the LRA had been promulgated not only to cater for an individual's interest but the public's interest. The LAC held that a heavier onus rests on a party which contends that, in a particular case, it is permissible to contract out of the right not to be unfairly dismissed in terms of the LRA.

[32] This Court held, in conclusion, that in the absence of an explanation by SAPO as to why the employee was suspended and why it used the automatic termination clause, the inference is overwhelming that SAPO's conduct was designed to avoid its obligation under the LRA. The Court was therefore satisfied that the court *a quo* came to a correct conclusion. The LAC however declined to consider the constitutionality of the automatic termination clause.

[33] There are several factors that distinguish the SAPO matter from the matter under consideration. Firstly, the termination of Mampeule's employment contract was due to an act by the employer. The Minister who tabled the resolution for Mampeule's removal from the board and the subsequent termination of his contract of employment was the employer. The Minister's

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act of removal of Mampeule from the board was the proximate cause of the termination of employment. Secondly, the termination of Mampeule's contract was directly related to allegations of misconduct. In his referral to the labour court to challenge his dismissal he made allegations that his suspension was triggered by the protected disclosures he had made. In response to the said allegation SAPO was found by the LAC to have made a bare denial of the allegations and did not "*pin its colours to the mast* "as to why he was suspended. Through the actions of the employer Mampeule was being denied the opportunity to contest the fairness of the termination of his employment contract. Thirdly, the termination of employment in the SAPO case was not linked to the expiry of a fixed -term contract.[16]

Sindane v Prestige Cleaning Services [supra]

[34] The facts in this case are closer to the facts in the matter under consideration. The court considered whether the applicant, formerly employed as a cleaner by the respondent in terms of a "fixed-term eventuality contract of employment had been dismissed within the meaning of section 186(1) (a) of the LRA. The employee's contract of employment had been terminated as a result of the client downsizing its contract with the employer brokers, by cancelling a contract in terms of which an extra cleaner had been provided to them. The contract stipulated that, upon termination of the broker's contract with the client to whom the employee rendered services, the employee's employment contract with the employer broker would automatically terminate.

[35] The Respondent employer argued that there was no dismissal as his contract of employment was terminated when the cleaning contract with the client Menlyn Piazza was reduced. In reaching its decision, the Labour Court considered the finding of the Labour Court in *SA Post Office* which considered the automatic termination of an employment contract as a result of an act of a third party. The court then distinguished the finding of the court in *SA Post Office* to that of the case at hand. It found that in *SA Post Office*, the termination was based on the employer's decision to remove the employee from the Board of directors following allegations of misconduct. In such

[16] For a full discussion of the distinguishing features see Sindane (supra) at para [17].

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instances, the court held, because the employee was suspended for alleged misconduct and the termination was misconduct related, fairness dictates and in light of the *audi alteram partem* rule that he ought to have been given an opportunity to dispute the fairness of his termination. The Labour Court was satisfied that the applicant had not been dismissed as the termination of his employment contract was triggered by the termination of the employer's contract with its client. The court relied on the wording of section 186 of the LRA which defines dismissal as the termination of the contract of employment "by the employer". In finding that the contract terminated as a result of a specified event as opposed to an overt act on the part of the employer, the Labour Court was satisfied that the termination did not fall within the ambit of section 186. This conclusion by the Labour Court can, in my view, not be faulted.

Mahlamu v Commission for Conciliation, Mediation and Arbitration and others

[36] In this matter, the employer entered into an agreement with its client, Bombela Joint Venture, to provide security escort services at various sites related to the Gautrain project. The employee was employed as a security officer on these sites. During January and February 2009 Bombela advised the employer that the armed escort services at the Park, Marlboro Portal and Benrose sites, would end with immediate effect. The employer notified the employee that, as a result of the cancellation and in the absence of any alternative positions, his services were no longer required. The employer relied on clause 2.1 of the employee's contract of employment which states *inter alia*, that the employment contract will commence on 23 October 2008 and will automatically terminate in the event where the client does not require the services of the employee for whatsoever reason.

[37] At the arbitration the employer presented evidence that the employee was offered alternative positions at a reduced remuneration but were rejected by the employee. The arbitrator upheld the employer's contention that there was no dismissal for the purposes of s 192 of the LRA and dismissed the employee's claim. In considering the matter on review, the Labour Court had regard to the *Sindane* and *SA Post office decisions*. It concluded that the facts

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of the case at hand were materially similar to those in *SA Post Office* because in both instances, a third party triggered the automatic termination provisions.

[38] The Labour Court held that since the automatic termination provisions in the contract fall within the section 5(2) (b) injunction, the remaining question is whether it is permissible to contract out of the right not to be unfairly dismissed. In answering this question, the court relied on its interpretation of the *SA Post Office* and the UK Court of Appeal dictum in *Igbo v Johnson Mathery Chemicals* Ltd 1986 IRLR 215 (CA). It noted that the parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to the employee whether through the device of automatic termination provisions or otherwise. The court held that a contractual term to this effect does not fall within the exclusion in section 5(4), because contracting out of the right not to be unfairly dismissed is not permitted by the LRA. The Labour Court then concluded that the arbitrator committed a material error of law by finding that the employee's contract terminated automatically when the employer's contract with its client was cancelled.

[39] At paragraph 19 above I have indicated that Van Niekerk J, in agreeing with Basson J's remarks in *Sindane*, accepted, correctly, that there will not be a dismissal for the purposes of s186(1) of the LRA in those cases where the end of an agreed fixed term is defined by the occurrence of a particular event. However, as counsel for the appellant has submitted, the learned Judge seems to have moved from an erroneous interpretation of the *SA Post Office* when he held that:

"[9] In the present matter, the third respondent relies on the cancellation of the service agreement by Bombela as the specified event giving rise to the automatic termination of the applicant's contract. That being so, it seems to me that the facts of this case are not materially dissimilar to those in Mampuele - ***in both instances, the 'automatic termination' provisions were triggered by a third party - in Mampuele's case, the shareholder, in the present case, the client.*****"** [Emphasis provided]

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[40] The interpretation of the *SA Post Office* matter in *Mahlamu* is indeed erroneous because this Court found that the termination of the contract was an act of the employer (the sole shareholder) and not a third party, and that the overwhelming inference was that SAPO's conduct was designed to avoid its obligations under the LRA.

[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.[17] 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 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.

[42] In this case clause 3.2 (i) provides that "*the period of employment would endure until the termination of the contract with Boardwalk*". This clause is in my view sufficient on its own to convey that it is a fixed-term contract that will run until the contract with the client is terminated. The fact that clause 3.2 (ii) provides that "*the employee agrees that the contract of employment would terminate automatically upon termination of the Boardwalk contract and that such termination would not constitute a retrenchment but a completion of the contract*" does not in my view, render a termination of the contract of employment upon termination of the contract with Boardwalk to be something else. It may merely serve to amplify the consequences of the agreed terms. The clause itself does not constitute termination of the employment agreement. The affected employees are free to challenge the termination if it

[17] Constitution of the Republic of South Africa Act 1996.

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does fall within the exclusions in s 5(4) of the LRA. They may also challenge the termination of their employment in terms of s 186(1) (b). In any case once the employees have established that there has been a dismissal in terms of s186 (1) (b) the onus shifts to the appellant to justify the fairness of the dismissal. It does not follow that the inclusion in a contract of employment of a clause similar to the one in this case should automatically render a termination of that contract based solely on its legitimate terms, a dismissal. That would in my view defeat the whole purpose of concluding fixed-term contracts concluded for legitimate reasons.

The relief granted by the court *a quo*

[43] The award which was the subject of review only dealt with a preliminary issue relating to the question whether the employees have been dismissed. It is in essence a jurisdictional issue. Having found that there was no dismissal, the commissioner did not have to deal with the fairness or otherwise of the dismissal which was non-existent. No evidence was presented by the parties on the fairness or otherwise of the dismissal. The award that the commissioner could competently make was to find that the CCMA lacked jurisdiction because on the facts of the case the employees failed to establish the existence of a dismissal. It was not supposed to dismiss the employees claim since it lacked jurisdiction to entertain it.

[44] The court *a quo*, having found that there was a dismissal, concluded that the said "dismissal" was substantively and procedurally unfair. This was a misdirection on its part since it was enjoined to review a jurisdictional finding made by the commissioner without having not dealt with the merits of the dispute. At best the matter should have been left to the parties to pursue the fairness of their "dismissal" at the appropriate forum. The order in line with that made in the *Mahlamu* matter would have been appropriate. For these reasons the order of the court *a quo* on the relief granted should also be set aside as it was incompetently granted.

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[45] For the reasons discussed above the appeal should succeed. I am of the view that it will be in accordance with the requirements of the law and fairness that there be no order as to costs.

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

1. The appeal is upheld.

2. The order of the Labour Court is set aside and substituted with the following;

   "The application for review is dismissed."

3. There shall be no order as to costs both in the Labour Court and this Court.

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Tlaletsi DJP

Ndlovu JA *et* Hlophe AJA concur in the judgment of Tlaletsi DJP

<u>APPEARANCES</u>

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