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Are automatic termination clauses valid or not?

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There are many instances in which an employee's continued employment is dependent upon the requirements of a client of the employer. In such cases, the employer links the duration of the employee's employment to the duration of the contract between it and its client. These automatic termination clauses raise questions as to whether or not reliance on them results in a dismissal, as well as uncertainty around the validity of the clauses. An automatic termination clause was the focus of the recent decision of the Labour Appeal Court in Enforce Security Group v Mwelase and others (DA24/15) [2017] ZALAC 9 (25 January 2017).

In this case, the employer employed security officers and placed them at the premises of its clients. The security officers' employment contracts included an automatic termination clause, which provided for the termination of the employee's contract of employment on termination of the contract between the employer and the client. A dispute arose when the employer's client gave notice of termination of its contract with the employer and the employer, relying on the automatic termination clause in the contracts of employment, issued the employees with notices of termination of their employment.

At the CCMA, the employees alleged that they had been dismissed and challenged the fairness of their dismissals. The employer argued that the termination of employment did not amount to a dismissal as the employer played no role in the client's decision to terminate its contract with the employer. The definition of dismissal in the Labour Relations Act, No. 66 of 1995 (LRA) requires that there must be an act by the employer that terminates the contract. The employer argued that there was no dismissal as the employer was not the "proximate cause" of the termination of the employees' employment – the client was.

The Labour Appeal Court reiterated that there are several terminations of employment that do not constitute a dismissal – one of these being termination on the occurrence of a specific event. In such instance, there is no dismissal, but rather the termination of the contract by operation of law. This will, however, always be subject to an employee's right to challenge the termination as an unfair dismissal if he or she had a reasonable expectation of renewal, or if the employer failed or refused to renew a fixed-term contract and the employee expected the employer to renew the fixed-term contract.

The Labour Appeal Court found that on the facts of the case, there was no dismissal. The employer was not the cause of the termination. The court then went on to consider automatic termination clauses and the lawfulness of these clauses. The court found that these clauses are not always invalid and that in making this determination, the court must consider whether the clause was intended to circumvent the fair dismissal obligations imposed on an employer by the LRA and the Constitution.

The following were identified by the court as relevant considerations in determining the validity of an automatic termination clause:

- The precise wording of the 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 pick and choose who is to tender the services under the service agreement.
- Whether the clause is used by either the client or the employer to unfairly target a particular employee.
- Whether the event is based on proper economic and commercial considerations.

The case highlights that an automatic termination clause does not necessarily give rise to a dismissal and that an automatic termination clause may or may not be invalid, depending on the facts of each case. When including an automatic termination clause in a contract of employment, an employer needs to bear in mind that our courts do not permit parties to contract out of the protections in the LRA against unfair dismissal through an automatic termination clause or otherwise.

ABOUT THE AUTHOR

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