

PREMATURE TERMINATION OF FIXED-TERM CONTRACTS: EMPLOYERS BEWARE

While all eyes are focused on the proposed amendments to the LRA and how they will impact on the use of fixed-term contracts, employers should bear in mind that apart from possible claims based on unfair dismissal (based on an employee's "reasonable expectation of renewal") the premature termination of a fixed-term contract can have even graver consequences.

In *SAFA (South African Football Association) v Mongope (Labour Appeal Court, JA13/11 unreported, 7 September 2012)*, the LAC dealt with SAFA's decision to dismiss its chief of security for the 2010 Soccer World Cup, Mongope, more than 2 years before the expiry of the period of his 3-year contract. Mongope did not base his application on his right not to be unfairly dismissed in terms of the LRA but relied on a common law claim based on SAFA's repudiation (unlawful unilateral termination) of the fixed term contract. He claimed damages equal to the unexpired portion of the contract period, i.e. much more than he would have been able to claim as compensation for unfair dismissal.

Background

Mongope's contract was supposed to run from 1 August 2009 to 31 July 2012. The contract contained a three month probation period, which was extended to accommodate for the sick leave Mongope took during the probation period. SAFA was not satisfied with Mongope's work performance at the expiry of the extended probation period. A certain Koopman, a member of Executive Committee of SAFA, drafted a memorandum setting out the complaints about Mongope's work performance ('the Koopman memorandum') on 17 November 2009. The Koopman memorandum appeared to have led to Mongope's dismissal on 23 November 2009: on that date Mongope was simply called into the CEO's office and handed a letter of termination. Mongope was not at any time prior to his dismissal asked to comment on the allegations contained in the Koopman memorandum. Mongope, averred in his initial application to the Labour Court that the issues raised by Koopman fell outside of his KPA's and that given a proper opportunity, he would have demonstrated that the allegations made were largely baseless and without substance. In any event, Mongope indicated that SAFA failed to properly evaluate his work performance as required in terms of the contract. SAFA, fatally, did not deny this, nor were the allegations contained in Koopman's memorandum ever confirmed under oath.

Common law approach to damages

The principal enquiry before the Labour Court was whether Mongope had repudiated (i.e. breached) the contract by reason of his alleged incompetence. SAFA failed to prove that Mongope had breached the contract through his alleged unsatisfactory performance or

incompetence. The inescapable conclusion was that SAFA had repudiated the contract, permitting Mongope to accept the repudiation and to claim damages. The Labour Court awarded damages equal to the amount of remuneration Mangope would have earned during the unexpired period of his contract.

The LAC, while agreeing that he was entitled to damages, noted that the Labour Court's calculation of damages was wrong. The court held that the lower court's decision rested upon an uncritical application of the standard enunciated 60 years ago by the Cape Provincial Division in *Myers v Abramson 1952 (3) SA 121 (C)* which in relation to damages for breach of a fixed term contract of employment (as opposed to an indefinite term contract terminable on notice) held as follows:

'The measure of damages accorded such employee is, both in our law and in the English law, the *actual* loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment.'

The LAC held that it is not competent for a court to embark upon conjecture or guesswork in assessing damages when there is an inadequate factual basis laid in evidence for a more accurate calculation. Moreover, he held that allowance has to be made for the contingency or probability that the anticipated future loss may not in fact eventuate, because the dismissed employee may obtain another job or source of income. Therefore, any amount awarded as damages for future loss has to be discounted to current value. The balance of the unexpired period of the fixed term contract will in all cases be the maximum payable as damages. The maximum therefore does not axiomatically follow upon breach. Section 77(A) of the BCEA – which empowers the court to deal with claims based on breach of contract – requires a reasonable award in the circumstances, which would be the amount of the actual damages proved by Mongope. In the result Mongope was awarded contractual damages of R669 903 due to SAFA's repudiation of his fixed term contract.

Conclusion

Employers should ensure that they include appropriate clauses in their fixed-term contracts to allow for premature termination on recognised grounds. Otherwise they might end up dismissing for reasons that might be valid to fend off a claim of unfair dismissal but not one based on unlawful dismissal.

Authors: Barney Jordaan & Andrea de Jongh

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Maserumule Consulting Learning Organisational Growth (Pty) Ltd

Reg no: 2001/004653/07

PO Box 3272, Tyger Valley 7536

Tel: +27 21 914 3321

Fax: +27 21 914 8513

E-mail: info@masconsulting.co.za

www.masconsulting.co.za