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Business Law & Tax Review

Dismissal can be a legal minefield

An employer has to consider carefully whether to end an employee's contract

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CAN a dismissed employee sue his or her employer not only for unfair dismissal, but for breach of contract; or more?

That was the issue considered by the Supreme Court of Appeal in the recently decided appeal matter of Edward Mbuyiselo Makhanya and the University of Zululand.

Makhanya, a professor, sued the University of Zululand for unfair dismissal by referring an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). His claim failed at arbitration. He then applied to the Labour Court for the review of the award. Before the matter was heard by the Labour Court, he instituted an action against the university in the High Court, in which he alleged that he was employed by the university under a contract of employment, which the university had purported to cancel. This conduct, he alleged, amounted to a breach of the contract's terms. Despite this, he tendered his services to the university. The university did not pay him his remuneration and other money to which the contract entitled him. He asked the High Court to order the university to do so.

The university challenged the High Court's jurisdiction, arguing that because Makhanya had elected to pursue a claim for unfair dismissal in the CCMA, the High Court had no power to consider his claim for enforcement of his contractual claim. In essence, what the university was saying was that, because he had elected to proceed in the CCMA and the Labour Court, the High Court had no jurisdiction to consider the claim. The High Court upheld the university's argument. Makhanya appealed against the ruling to the Supreme Court of Appeal.

The appeal court held that his claim in the CCMA was a claim that he should not be dismissed unfairly, which was not the same as the claim he had brought to the High Court, namely a claim for the enforcement of a right emanating from the common law for specific performance of a contract, in this case, an employment contract.

> **Employers will therefore have to consider carefully whether or not to terminate an employee's employment**

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The appeal court disagreed with the High Court and ruled that an employee may pursue a claim for the infringement of his or her rights under the Labour Relations Act in the labour courts, but may also pursue a claim for infringement of common law contractual rights in the High Court and the Labour Court, and, depending on the circumstances, may pursue a claim for infringement of his or her constitutional rights in the labour and high courts.

Employers will therefore have to consider carefully whether or not to terminate an employee's employment, not only taking into account the provisions of the Labour Relations Act, but the principles of the common law of contract. Employers may also need to review their contracts of employment to ensure they set out under what circumstances they can be cancelled and to what degree they regulate, contractually, the process to be followed when they are cancelled. A failure to comply with the terms of the contract when dismissing an employee could lead to a claim for breach of contract (and damages) even if the dismissal might be fair under the legislation.

COMPETITIVE EDGE

Making sense of merger proceedings and their impact

Mark Garden & Wiri Gumbie

Competition authorities in SA take a dim view of companies who use the laws for opportunistic gain

SECTION 53 of the Competition Act, 89 of 1998, permits a party to intervene in merger proceedings where that party has a material interest in the proceedings, subject to the discretion of the Competition Tribunal.

For policy reasons, however, the intervenor is not deemed to be sufficiently affected by merger proceedings and may review but not appeal their outcome. In order to contextualise the role which intervenors are expected to play in merger proceedings, it is useful to discuss two recent cases on this matter.

Altech brought an application to intervene in the large merger between MTN and Verizon SA. Altech alleged that the proposed merger should be prohibited as it would result in substantial competition law concerns in the telecommunications market.

The grounds on which Altech sought to establish its material interest in the merger proceedings were that the merger would result in the removal of a potential entrant into the market and would also result in input and customer foreclosure. In considering this intervention application, the tribunal decided to grant Altech intervenor status but curtailed the open-ended basis of such intervention in the merger proceedings.

In the exchanges between the parties prior to the merger hearing, however, it became apparent that Altech sought to expand its grounds of intervention to include considerations extraneous to those set out in its application. This approach imposed on the merging parties the burden to prepare submissions on additional grounds for ventilation in the merger hearing. Further, it transpired during the subsequent merger proceedings that Altech's primary concern arose from the possibility that post the merger, Altech would be subjected to discrimination as regards pricing and incentives in respect of products and services offered by MTN.

According to the tribunal, this concern was made all the more apparent because Altech withdrew its intervention application the day before the merger hearing after it had received a letter from MTN giving assurances to allay this concern.

The tribunal held that Altech's approach was "open ended" and "without limitation", with the result that the merging parties had been inconvenienced and the implementation of their merger delayed. Consequently, the tribunal ordered Altech to pay the merging parties' legal costs incurred as a result of the intervention application.

The tribunal indicated its disapproval of Altech's conduct by saying that had its jurisdiction to award costs not been limited by the provisions of the act, it would have been appropriate to award more punitive costs against Altech.

In *African Media Entertainment (AME) v David Lewis NO and Others*, the intervenor, AME, requested the Competition Appeal Court to review for a second time the tribunal's decision to unconditionally approve the merger between Primedia Ltd (Primedia) and New Africa Investments Ltd (NAIL). AME had been successful in a prior review of this merger. However, once the matter was remitted to the tribunal for reconsideration, the tribunal again unconditionally approved the merger according to directives given by the court in the first review proceedings. It is this second tribunal decision which AME then sought to be reviewed.

In the second review, the court noted that, traditionally, the grounds on which proceedings may be reviewed "are generally narrow and often deal with procedural aspects or irregularities". The court emphasised the Promotion of Administrative Justice Act, 2000, dealt with instances where the courts would have to consider the merits of the proceedings in question to determine whether the decision reached therein is rationally justifiable and not require the courts to determine the correctness of the decision. The court noted that in review proceedings that it was obliged to exercise deference to the tribunal's decision-making powers and expertise in analysing mergers and a failure to do so would "paralyse the exercise of [the tribunal's] merger control functions and undermine the policies of the act".

The court found in the matter before it two main grounds of review fell to be decided: first, whether it was procedurally sound for the tribunal to have taken into account certain documentary evidence in considering the market relevant to the merger; and second, whether the tribunal had failed to define the relevant market properly.

As regards the first ground, the court found the tribunal's acceptance and use of the documentary evidence was not vulnerable to procedural irregularities and was therefore not reviewable. Regarding the second, the court concluded the tribunal had "provided a justifiable, carefully reasoned approach" to the definition of the market and its decision in this regard was also not reviewable.

In reaching its conclusion, the court emphasised that the purpose of review proceedings (as opposed to appeal proceedings) is to review the process by which the tribunal came to its decision and not the correctness of the decision itself.

The lessons to be drawn here are the competition authorities in SA are becoming increasingly vigilant against intervention based on opportunistic and strategic commercial imperatives as opposed to genuine competition law concerns. Therefore, an attempt on the part of an intervenor to abuse its status as such is likely to attract both ire and condemnation from the body adjudicating the merger proceedings. Care must be taken to ensure that applications for intervention are well formulated and precise. Further, participation by an intervenor in merger proceedings ought to extend no further than the grounds set out in its intervention application and accepted by the tribunal.

Finally, the competition authorities have made it clear that review proceedings differ fundamentally from appeals, and the former should not be utilised by disgruntled intervenors as a means to achieve the latter, albeit through the back door.

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