

## RETRENCHMENT ON FIXED-TERM CONTRACT EMPLOYEES

The Employment and Labour Relations Act, 2004 under Section 14(i) (a)(b)(c) provides types of employment contract namely:

A contract for an unspecified period of time;  
A contract for a specified period of time for professionals and managerial cadre; and  
A contract for a specific task.

For the purpose of clear understanding, it is important to elaborate each type of employment contract.

Commencing with contract for an unspecified period of time, these are also regarded as permanent contracts, they have no end date other than the retirement date of the employee. However in reality, there is no permanent contract in the sense that employment may be ended by both parties giving notice as provided for under Section 41 of the Employment and Labour Relations Act, 2004.

Subsequent to permanent contracts, there is also specified period contract or fixed-term contract, these have an end-date other than the employee's retirement date. These kind of contracts are usually issued to professionals and the managerial cadre.

There is also the specific task contract, it is a contract which an employee is employed specifically to perform a specific job/task and once that job is complete then the contract comes to an end. These types of contracts clearly stipulates the task that the employee is expected to perform, they may not clearly state the end date of the contract, the completion of the task is the major determinant factor of the tenure of the contract.

### FIXED-TERM EMPLOYEE VS. RETRENCHMENT

Retrenchment is named to be one of the reasons for the termination of employment contracts. Most employers are forced to embark on this unfortunate route of terminating their employees on grounds of operational requirements. However, when it comes to fixed term employees, the process becomes horrible. Under common law fixed-term contracts may come to an end at the time stipulated in the contract or at the arrival of a certain event when the employee's services will be terminated.

The major issue amongst most labour law practitioners has always been

**“ WHETHER A FIXED TERM CONTRACT MAY BE TERMINATED FOR ANY OTHER REASON THAN MATERIAL BREACH FOR REPUDIATION OF THE CONTRACT BY THE EMPLOYEE. ”**

In other words the employee may resign before the date mentioned in the contract or if the employee is dismissed due to a serious misconduct which meant that the employee was in breach of the contract or breach of the set laws, regulations and policies.

The position is that in the specific period contract, the employer cannot terminate the employee for the retrenchment reason before the expiration of the contract; the parties bind themselves in the contract for a specific period as stipulated in the contract and the commitment should be honoured.

The Labour Appeal Court explored this issue in the case of *Buthelezi vs. Municipal Demarcation Board* (2005) 2 BLLR 115 (LAC) where the employee, had been retrenched one year into a five-year fixed term contract. The court held that

**“ THERE IS NO RIGHT TO TERMINATE SUCH CONTRACT EVEN ON NOTICE UNLESS ITS TERMS PROVIDE FOR SUCH TERMINATION. THE RATIONALE FOR THIS IS CLEAR. WHEN PARTIES AGREE THAT THEIR CONTRACT WILL ENDURE FOR A CERTAIN PERIOD AS OPPOSED TO A CONTRACT FOR AN INDEFINITE PERIOD, THEY BIND THEMSELVES TO HONOUR AND PERFORM THEIR RESPECTIVE OBLIGATIONS IN TERMS OF THAT CONTRACT FOR THE DURATION OF THE CONTRACT AND THEY PLAN, AS THEY ARE ENTITLED TO IN THE LIGHT OF THEIR AGREEMENT, THEIR LIVES ON THE BASIS THAT THE OBLIGATION OF THE CONTRACT WILL BE PERFORMED FOR THE DURATION OF THAT CONTRACT IN THE ABSENCE OF A MATERIAL BREACH OF THE CONTRACT. ”**

The court concluded that the onset of true operation requirements justifying a retrenchment did not give the employer the contractual right to terminate the fixed-term contract. The termination was therefore found to be unlawful and unfair. In so doing the court made clear that the Labour Relations Act does not over rule the common law principles of contract.

Reliance is also made in the case of *Mkopane & Others vs. Independent Electoral Commission* (2007) 28 ILJ 670 (LC) the IEC had to retrench a number of employees as there were no work for them. The employees' letters of appointment stated that they were employed on contract for "two to three years". Later the parties agreed upon termination dates. The Court found that these were fixed-term contracts and that the IEC could not terminate them before the end of the term. The Court upheld the common law rule.

Furthermore, in the *National Union of Metal Workers of South Africa & Others vs. SA FIVE Engineering (PTY) Limited & Others* (2007) 281 LJ 1290 (LC), the employees were contracted to re-construct and refit a ship. The project had specific stages and was by nature, of a limited duration. The employees were employed for limited periods. The contracts of employment were vague as it had no specific dates of termination, but the time of termination was linked to a specific event. The employees argued that all their contracts should have been terminated at the completion of the project.

The employer argued that their tasks for which they were employed were completed and therefore the employees had to be retrenched. The Court found that the termination of these fixed task contracts were not unfair because the tasks were completed and there was no further work for them.

One would question as to why the court came up with different findings in the two cases. The answer is crystal clear that in the IEC case there were no specific dates to which the parties committed themselves to. If the employer in IEC had no further work for employees the best option would be to pay out the remainder of the contracts and not to retrench them. In the case of NUMSA there was no commitment to a specific date but rather that the contracts stipulated clearly that the contract would automatically come to an end upon the completion of each employees task for which they were appointed to perform.

It should be borne in the minds of the employers that as much as the labour laws including the Employment and Labour Relations Act, 2004 which is mutatis mutandis to Labour Relations Act of South Africa provides for employment contracts to be terminated on operational grounds that is retrenchment, the common law rule of contract would supercede the ELRA 2004 when it comes the retrenchment of employees with fixed- term contracts.

### CONCLUSION

Sequel to the foregoing, in the absence of a clause in the fixed-term contract stipulating that the contract may be terminated on operational requirements among other reasons, the other best option for the employers intending to terminate their employees under fixed-term contracts would be for them to pay out the remaining contract time. Once the employment contract states that the contract may be terminated due to operational requirements the employer will be well protected to be able to terminate the employee on operational grounds provided that he is inline with the provisions of Section 38 of the Employment and Labour Relations Act, 2004..

#### FURTHER INFORMATION:

This editorial is intended to give you a general over view of the Law. If you would like further information on any issue raised in this column, please contact.

**Patrick Sanga**  
Partner  
E: p.sanga@vemmaatorneys.co.tz  
M: +255 686 999 993

**Haika-Belinda Macha**  
Partner  
hb.macha@vemmaatorneys.co.tz  
M: +255 688 305 999