REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Reportable

Case no: JS 879 / 10

In the matter between:

SATAWU obo DUBE AND 2 OTHERS **Applicant**

and

FIDELITY SUPERCARE CLEANING SERVICES GROUP (PTY) LTD **Respondent**

Heard: **5 February 2015**

Delivered: **17 April 2015**

Summary: **Labour Brokers – Automatic Dismissal Clauses – validity thereof – unfair, unlawful and invalid in certain circumstances**

Amendments to LRA – section 198(4) (c) considered.

JUDGEMENT

MOSIME AJ

Introduction and facts that are common cause

[1] The respondent is a cleaning contractor and, at the time of this dispute, was in a cleaning Service Level Agreement (SLA) with the University of the Witwatersrand (Wits University), the respondent's customer. The three applicants were all employed by the respondent and placed at Wits University. The applicants were all members of the South African Transport and Allied Workers Union ("SATAWU"), which appeared in this matter on their behalf.

[2] Two of the applicants, namely Ms Patricia Duduzile Golele and Ms Amina De Lange, did not appear at court during the hearing of this matter, and after hearing submissions from both representatives on the application for dismissal of their cases, I made a ruling to that affect. Consequently, this judgement is only in respect of Ms Agnes Dube ("Dube").

[3] The Applicants were represented by Mr Vusi Shongwe, a trade union official from SATAWU, and the Respondent by Mr Sean Snyman, from SNYMAN Attorneys, Johannesburg. I am indebted to Mr Snyman for his detailed heads of arguments, from which I have relied for some valuable authorities. I had not received Mr Shongwe's written heads at this stage.

[4] The respondent's business is based on cleaning contracts the respondent concludes with its clients. The respondent then employs cleaners who are then placed to render cleaning service at the premises of the customers. Dube was employed by the respondent as a supervisor on the Wits SLA referred to above, and concluded a written Contract of Employment ("COE") on 15 January 2009. The salient terms of this contract were:

> '2. Period of Employment
>
> 2.1 The employee's employment will commence on the date appearing on the schedule ("the schedule") to which this agreement is attached and terminate on the date appearing on the schedule or the date upon which the contract which exists between the company and the customer terminated or on the retirement date, whichever date occurs first'[1]. (Emphasis supplied)

[5] And also:

> *'2.2.* The employee specifically acknowledges that:

[1] Clause 2.1 of Dube's Contract of Employment (COE)

> 2.2.1 he/she fully understands that the company's contract with the customer might be terminated by the customer and for any cause or might terminate through the effluxion of time and that in consequence thereof the nature of the employee's employment with the company and its duration is totally dependent upon the duration of the company's contract with the customer and that the employee's contract will terminate when any of the events predicated in 2.1 occur and the employee fully understands that there will be no entitlement of severance pay'.[2] (Emphasis supplied)

[6] On the 27 November 2009, Wits University gave notice to the respondent of the termination of the service level agreement with effect from 31 December 2009. On 01 December 2009, the respondent issued all employees with letters[3] of that date advising them that the respondent's SLA with Wits University was to come to an end on the 31 December 2009[4]. This letter also recorded that the employment of the employees would consequently terminate (in terms of provisions of Clause 2.1 in their employment contract) on the 31 December 2009. It is common cause that none of the employees was consulted by the respondent in terms of section 189 of the Labour Relations Act 66 of 1995, as amended (the LRA).

[7] Before the termination of the service level agreement, the respondent entered into a new one-year extended SLA with Wits University[5], which envisaged a vastly reduced staff complement and service, for a period of one year ending 31 December 2010. Thus, on the 03 December 2009, the respondent issued notices[6] to the employees advising that the respondent had positions available at Wits University from 01 January 2009, and invited its employees to make applications for those vacant positions available at Wits by Friday 04 December 2009. There were 7 (seven) vacant positions at the level of supervisors, and 162 (one hundred and sixty two) cleaner positions.

[8] Neither Dube nor any of the other applicants applied for placement in the vacancies they were notified of on the 03 December 2009. As a result, their

[2] Clause 2.2 of Dube's COE
[3] See pages 18, 19 and 20 of the court bundle.
[4] See the Pre-trial minute (clause 3.7) in the Pleadings Bundle, page 29.
[5] See Clause 6.2, page 21 of the Pleadings Bundle.
[6] See page 21 of the Pleadings Bundle.

contracts were terminated on the 31 December 2009. SATAWU contends[7] that in terminating the employment of the applicants as it did, the respondent dismissed them on a reason based on operational requirements. In terms of section 189 (1) and (3) (a) to (j*)* of the LRA, the respondent was required to issue a written notice when it anticipated to retrench the employees and invite the union, especially since the respondent was aware that the employees were its members. This is the crux of the applicants' case.

[9] SATAWU submitted further that the dismissal of the applicants was for no reason[8] as, despite the respondent indicating that its contract with the university had terminated, the respondent nevertheless continued to employ other supervisors and placed them at Wits after it had dismissed the applicants. In their view, the union contended that the applicants were dismissed and their dismissal was unfair for the simple reason that the Wits contract did not terminate. The applicants were dismissed for other reasons than those known to them[9].

[10] The respondent did not pay severance pay to any of the applicants upon the termination of their employment contracts. It is also common cause that neither SATAWU nor any of the applicants were consulted as contemplated in section 189 of the Labour Relations Act 66 of 1995. The respondent contends that it did not dismiss the applicants (or any of the employees) at the end of December 2009. According to the respondent, the services of the employees automatically terminated at the end of December 2009 in terms of specific provisions of their contracts of employment.

[11] The parties concluded a Pre-Trial Minute records[10] and recorded succinctly the issues as that which the court needed to determine. Given my ruling on who the applicants are in this matter, the court will consider these questions as they apply only to Dube alone.

<u>Oral Evidence for Applicant</u>

[7] See page 6 of the Pleadings Bundle, Para 15 and 16 of the Statement of Case.
[8] See page 6 of the Pleadings Bundle.
[9] At paragraph 8 of the Statement of Case, under the heading <u>Legal Issues,</u> SATAWU submits: 'The Respondent's dismissal of the employees had no reason as the Respondent indicated that its contract with Wits had been terminated, but this is not the case, as it employed other supervisors at Wits'.
[10] Clause 5 of the Pre-Trial Minute in the Pleadings Bundle, page 32.

[12] SATAWU called Dube to testify and she confirmed most of the facts that are listed above as of common cause. Dube started working in the cleaning service since 1990 with Pritchard Cleaning. In 1993 she was promoted to a position of Team Leader, and in 1995, Supervisor. She was based at OK retailer at the Sandton City and in 2000, where she was retrenched, and later rehired. She was based at Wits University since 2005 until her dismissal in 2009. Dube had the view that the respondent had continued providing services to Wits University beyond the 31 December 2009, and that the contract between the respondent and Wits University did not terminate in December but terminated only during June 2013. About one hundred (100) employees, except her and the other two supervisors were employed by the respondent and placed at Wits until that time.

[13] Dube testified that she applied for a disability grant, instead of taking a new contract offered to her with Wits.

Application for Absolution from the Instance

[14] The basis to the application was the admissions and concessions made in her testimony by the applicant, and other material facts that are common cause. Firstly, the respondent contends that the applicant had admitted to have signed a contract of employment with the terms that provided that that contract would terminate automatically with the termination of the contract between the respondent and its client, Wits University. The witness admitted that she understood that when the contract with Wits terminates, so would be her employment contract.

[15] It is the court's view that the enquiry that is most likely to follow the finding in regard to the questions in the Pre-Trial minute[11], namely whether or not there was a dismissal, would be whether or not the employer followed the prescribed procedures in terminating the employment of the applicant for reasons based on what appears to be operational requirements.

[16] In the premises, the court found and ruled that the granting of absolution from the instance would be inappropriate under the circumstances.

[11] Clause 4.6 and 4.7 of the Pre-Trial Minute in the Pleadings Bundle, page 31; and Clause 5.3, page 32.

Oral Evidence by the respondent's witnesses

[17] Marion Croukamp ('Croukamp'), is the Regional Manager of the respondent specifically in charge of the SLA with Wits, and had provided about 200 (two hundred) cleaners employed by the respondent to Wits, under the contract. On site, the respondent's management compliment consists of a Project Manager and Supervisors; and there are about 7 or 8 shop stewards representing all the cleaners. She confirmed that Wits had then, during 2009, presented the respondent and the other contract cleaning service providers on site with a new contract "spec" and invited them to tender. Croukamp specifically testified that the respondent was never assured of being awarded the tender, and if it did not get the tender, it was certain that the employment of all the employees on the Wits contract would terminate in terms of the notice given on 1 December 2009.

[18] But, and fortunately, the respondent was successful in the awarding of the tender by Wits although based on a different and reduced "job spec". The new contract required the re-engaged service providers to reduce the costs of cleaning contracts by R500 000.00. It was common cause that the respondent and Wits then concluded a new service level agreement, although with a reduced staff compliment and service, for the period from 1 January 2010 to 31 December 2010.[12]

[19] Croukamp testified further that, because the respondent managed to secure a new cleaning contract with Wits, the respondent had then a number of vacancies that could be filled by those employees that received notice of termination on 1 December 2009, on new contracts of employment. On 3 December 2009, the respondent issued notices to all the employees that the respondent had positions available at Wits effective from 01 January 2010 until December 2010. These positions were 7 supervisor positions and 162 cleaner positions. Employees had to indicate whether they were interested in any of these vacancies by completing and submitting the indication of interest section reflected at the foot of the same notice, to the office of a certain Raymond Khoza on site, by 4 December 2009, and thereafter submitting a proper written application for employment by 11 December 2009. It is no

[12] Pleadings Bundle (Pre-trial minute) page 29 para 3.7

longer an issue that Dube did in fact receive this notice[13]. It is common cause also that Dube never applied for any of these vacancies.[14] Croukamp in fact testified that Dube was considered by her to be a good employee, and that if Dube had applied for a supervisor position, Croukamp would most certainly have favourably considered accommodating her and placed her. This evidence by Croukamp is unchallenged.

[20] What had however, happened prior to all the events in this matter in December 2009, is that Dube was experiencing difficulties in attending work because of an earlier motor vehicle accident she was involved in during 2007 (unrelated to her work). Dube had continued to suffer health problems that caused her to be frequently absent from work as she had to regularly attend sessions for physiotherapy. She also needed medical treatment.

[21] Croukamp testified that Dube came to her in October / November 2009 and asked to be assisted with an application for a disability grant. Croukamp said that as a result of this request, incapacity consultations were held with Dube, and a decision was actually implemented to reduce her work load and to assist her in discharging her duties. Dube confirmed this. Croukamp stated that she noticed that Dube had not applied for a position. She then met with Dube to discuss this with her. Dube was adamant that she did not want a position and wanted to rather pursue the application for a disability benefit. Croukamp undertook that the respondent would assist her in this regard, and referred Dube to the proper persons in HR. The facts do show that Dube did not apply for a position on the new Wits contract, despite there being supervisor positions available, but actually persisted with the pursuit for a disability benefit[15].

[22] According to Croukamp there was no general notification sent to all employees, but management ensured that each received a unique notification relating to and addressing his or her particular circumstances[16]. With regard to Dube, her notice[17] of 18 December 2009 specifically recorded that she had

[13] Court's Bundle page 21; Pleadings Bundle (Pre-trial minute) page 30 para 3.10; page 4 (statement of case) paras 11 – 12
[14] Pleadings Bundle (Pre-trial minute) page 30 para 3.11
[15] See Court's Bundle page 29 – 36
[16] See Pleadings Bundle, page 23 – 24 for examples of the notices of 18 December 2009 sent to De Lange and Golele.
[17] See page 25 of the Pleadings Bundle.

requested to apply for a disability pension grant and that all the paperwork in this regard had been completed. She was informed who she could deal with concerning the processing of this application, and she was thanked for her service and wished well for the future[18]. Dube confirmed in her evidence that she received this notice and never took issue with it in any way.

[23] On 21 December 2009, the respondent sent notice to all employees that did not receive the 18 December 2009 notification (as referred to above) to collect new employment contract by 22 December 2009 and sign and submit them by 4 January 2010.[19] Croukamp testified that these were completely new employment contracts signed by the employees, which were also directly linked to the new Wits contract. Dube's last working day was then indeed on 31 December 2009, in terms of the notice of 1 December 2009.

The Issue to be determined

[24] This court has to determine the nature *and terms of the employees' contracts of employment with the respondent*[20] and establish whether these can validly terminate employment *automatically* following the termination of the service level agreement between their employer and the employer's client. This question entails, in essence, whether or not there was a dismissal.

[25] Should it be found that the employees' contracts did not terminate automatically but that they were indeed dismissed by the Respondent, the Court will be required to determine whether their dismissal was substantively and procedurally fair or not, taking into account the facts of this case[21].

[26] In the event the Court should find that the dismissal of the employees was substantively and/or procedurally unfair, the Court will be required to determine the relief to be afforded to the employees[22].

[27] It was submitted by the respondent in the heads[23] that the 'only issue the Court has to determine is whether the Wits contract indeed terminated*'*. If it did, the term of the fixed term contract of Dube had been "fulfilled", and her

[18] Court's Bundle page 25.
[19] Court's Bundle page 37.
[20] Pleadings Bundle (pre-trial minute) page 32 para 5.2.
[21] Pleadings Bundle (pre-trial minute) page 32 para 5.3.
[22] Pleadings Bundle (pre-trial minute) page 32 para 5.4.
[23] At paragraph 2.14, page 11 of the Respondent's Heads.

employment terminated in terms of the agreed terms in such contract. In my view, this question cannot be determined without also asking whether or not that "fulfilment" – herein meaning termination - of Dube's contract of employment follows naturally, or *"*automatically*",* after the termination of the SLA between the respondent and client, (as appears in paragraph 42 above). I do not therefore agree with Mr Snyman, for the respondent, that this matter can simply be disposed by means of his proposition.

[28] In his opening statement, Shongwe contended that there were only 3 issues to be determined by this court, namely (i) whether the dismissal of the applicants for operational requirements was fair; (ii) whether contracting out of the right not to be unfairly dismissed [automatic dismissal] is permissible in our law; and (iii) whether the reasons advanced by the respondent for dismissal were true reasons. From my view, these questions are answered when those in [24], [25] and [26] above, are.

<u>When is automatic termination of a contract of employment permissible?</u>

[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[24].

[24] A useful insight into this topic will be found in an article by Tamara Cohen, in the <u>*ELRC Labour Bulletin*</u>, July 2013. *(Published through Obiter, Faculty of Law,* Nelson Mandela Metropolitan University .

[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*[25] and *MEC, Public Works, Northern Province v CCMA and Others*[26]). The conundrum arises when a school of events occur and it is incumbent to decide which of those are capable of terminating a contract of employment validly without it being said that there was a dismissal.

[31] Thus, Basson J, in *Sindane v Prestige Cleaning Services*[27], holding that:

> '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...'[28] (Emphasis supplied)

[32] In the *Sindane* case, the employee's contract had been terminated as a result of the client scaling down its own contract with the employer, a labour broker, by cancelling an agreement 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. The court held, in this regard:

> '…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

[25] (2002) 23 *ILJ* 520 (LC
[26] [2003] 10 BLLR 1027 (LC)
[27] (2010) 31 *ILJ* 733 (LC)
[28] Ibid, at para16.

> termination thereof will not (necessarily) … 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 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)…*'[29].

[33] The court thus posits that, in circumstances where *an act* of the employer is not the proximate cause of the termination of the employment contract, it does not constitute a dismissal. This proximate cause theory, as I understand, holds that the act that directly or indirectly actuates termination, is the one determining whether or not there was a dismissal. An act by a third party, as for instance a decision by the Vice Principal of Wits, terminating a service level contract with the labour broker, cannot be a *proximate cause*, and therefore cannot result in a dismissal of the employee of the labour broker. Also, where the client of the labour broker demands that an employee be dismissed by the labour broker, such cannot be regarded as

[29] The court pointed out, however, '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' at paragraph [16].

proximate cause, whether in time or distance, of the actual termination; nor would it be where there is a galvanisation of a clause in the contract of employment in terms of which the employee binds him/herself to an arrangement that entails an automatic termination thereof. The reason these are not dismissals is simply that they are not envisaged in the provisions of section 186 (1) of the Labour Relations Act. According to this section, a "dismissal" can only be legally present where it is triggered by the act of the employer[30] or the employee[31].

[34] This question arose in *South African Post Offices (Pty) Ltd v Mampeule*[32]. In this case, the court said the following about the proximate cause test[33]:

> '[43] The proximate cause test … is sometimes referred to as the effective cause test or the actual cause test. It has been held by the Courts that the cause that latest in time may not necessarily be the effective cause of the result. Conversely, an act that may on the face of it seem remote to the result may in fact be the effective cause. When a fishing trawler is lost after being arrested when the owners failed to pay the fine to release it, the proximate or effective cause of the loss is not confiscation of the trawler but a failure to pay the fine even though confiscation is nearer in time to the loss than failure to pay a fine *(Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at 862C-863B)'.
>
> '[44] So, too, in this case the fact that operation of the contractual term may seem closer in time to the termination of the employment contract does not make the term of the employment contract the proximate or effective cause of termination of employment...In *Commercial Union Assurance Co of South Africa Ltd v Kwazulu Finance and Investment Corporation and Another* 1995 (3) SA 751 (A) the Court said:
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> 'The proximate cause is not merely the one which was latest in time, but the one which is proximate in efficiency.. '.

[35] In the *Mampeule* case, this court had to deal with an the interlocutory application for a declaratory order that the termination of the respondent's employment, as a direct result of his removal from the applicant's board of

[30] Subsection (1) (a), (c) and (d).
[31] Subsection (1) (b), (e) and (f).
[32] (2009 8 BLLR 792 (LC)
[33] At paragraph [43] and [44].

directors, does not constitute dismissal for purposes of section 186(1) (a) of the Labour Relations Act, 66 of 1995 ("the LRA"). This proposition, the court noted, was founded on a term of the respondent's contract of employment with the applicant, read together with the applicant's Articles of Association, to the effect that his removal from the applicant's board gives rise unavoidably to the automatic and simultaneous termination of his employment contract with the applicant.

[36] The court held that the purposive interpretation of "dismissal" will include any act by an employer that directly or indirectly results in the termination of a contract of employment. As the employer had actually 'terminated the respondent's contract of employment by severing the umbilical cord that ties the respondent's employment contract to his membership of the applicant's board of trustees' (*SA Post Office Ltd v Mampeule supra* 793**)** the act of severance constituted a dismissal. In considering the legitimacy of automatic termination clauses, the court held that such clauses 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, militating 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"[34].

[37] Section 37 of the Basic Conditions of Employment Act[35] ("the BCEA"), provides that a contract of employment (for an employee working more than 24 hours for an employer) can only be terminable at the instance of a party to that contract, and only on notice. The LRA requires that, whether or not there was a notice, the employer must follow a fair procedure and provide the employee with valid reasons. This requirement for procedural and substantive fairness is a fundamental right in terms of section 185 of the LRA, and the employee cannot contract it out through automatic termination clauses.

[34] At page 803.
[35] Act 75 of 1997.

[38] The Labour Appeal Court subsequently reconsidered on appeal the finding of the court in *SA Post Office Ltd v Mampeule*[36] and upheld the finding of the court *a quo* albeit on a different basis. In reaching its decision the court relied upon section 5(2) (b) and 5(4) of the LRA[37]. The court also posited that parties to an employment contract cannot contract out of the protection against unfair dismissal, whether or not they do so by means of an automatic termination clause, as the LRA is promulgated in the public interest and not only to cater for the interests of the individuals concerned[38]. The court was satisfied that the employer had failed to offer a clear explanation as to why the automatic termination clause had been independently triggered. On this score, the court concluded that there was an overwhelming inference that SAPO's conduct was designed to avoid its obligations under the LRA and that the only explicable motive appeared to be to circumvent the unfair dismissal provisions of the LRA. Section 5 of the LRA therefore trumped the 'automatic termination' provision of the contract.

[39] There followed after this, a Labour Court decision in *Mahlamu v CCMA*[39] in which this court noted the trite statutory injunction 'that the LRA must be purposively construed in order to give effect to the Constitution (see section 3(b) of the LRA). Accordingly, section 5 (and the other sections of the LRA …) must be interpreted in favour of protecting employees against unfair dismissal, as this is one of the objects of the Constitution'[40]. This injunctive statutory protection against unfair dismissal is a fundamental component of the constitutional right to fair labour practices that serves to protect the vulnerable by infusing fairness into the contractual relationship, and that the LRA must be purposively construed to give effect to this.

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[36] (2010) 10 BLLR 1052 (LAC)

[37] Section 5(2) provides that 'no person may prevent an employee from exercising any right conferred by this Act'. Section 5(4) provides further that "[a] provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act'. The court noted that the *onus* rested on the employer in such circumstances to establish that the automatic termination clause prevailed over the relevant provisions in the LRA.

[38] See also *Chillibush v Johnston* [2010] 6 BLLR 607 (LC**)** in which the court held that it is not permissible in the labour-law context to allow an employer to negotiate contractually the terms of a dismissal in advance.

[39] [2011] 4 BLLR 381 (LC)

[40] At paragraph [13].

[40] The court noted as well that, as the automatic termination provisions in the contract clearly falls within the section 5(2)(b) injunction, the key consideration is whether such provisions are permitted by the LRA and whether it is permissible in certain circumstances to contract out of the right not to be unfairly dismissed[41].

[41] The facts in *Mahlamu* in summary are that *Gubevu Security Group* ("the employer") had employed the applicant as a security officer during June 2008. Clause 2.1 of the contract reads:

> 'Employment period
>
> This employment contract will commence on 2008/10/23, and will automatically terminate on:
>
> - expiry of the contract between the Employer and the Client alternatively
> - In the event where the Client does not require the services of the Employee for whatsoever reason'.

[42] During January and February 2009, the employer's client ("Bombela") advised *Gubevu* that the armed escort services at the Park, Marlboro Portal and Benrose sites would end, with immediate effect. On 6 March 2009, the third respondent wrote the applicant a letter stating that the Bombela contract had been cancelled and that in the absence of alternative positions, the applicant's services were no longer required. The letter refers specifically to clause 2.1 (B) of the contract, intimating that the contract had terminated automatically on account of the fact that Bombela no longer required the applicant's services.

[43] The arbitrator held that the applicant's employment contract specified that the applicant's employment would terminate automatically if for any reason the client no longer required the services of the employee. Since the client had stated that the applicant's services were no longer required, the applicant's employment had terminated automatically and there was therefore no

[41] In answering this question the court relied upon the finding of the UK Court of Appeal in *Igbo v Johnson Mathery Chemicals Ltd 1986 IRLR 215 (CA)*.

'dismissal' for the purposes of s 192 of the LRA. On that basis, the arbitrator dismissed the applicant's claim.

[44] In my view, it was very commendable that, in ruling on this matter, the court (per Van Niekerk J) had also spotted that mischievous contraption according to which, as 'a rule of thumb employers can make an agreement varying or waiving their rights under the Act but employees cannot do so by means of individual consent'[42], as the right serves both the interests of other employees and the public interest. The court concluded that, at 389:

> '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'.

[45] In that regard, the court echoed the position adopted in the *Mampeule* case (*supra)*, where it was held[43]:

> '[46] In the result, the automatic termination provisions of article 8.3, which regulates the termination of the contract of employment and is thus incorporated by reference therein, are impermissible in their truncation of provisions of chapter 8 of the LRA and, possibly even, the concomitant constitutional right to fair labour practices **(**cf *Igbo v Johnson Matthey Chemicals Ltd* [1986] IRLR 215 (CA)**)**. Provisions of this sort, militating 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'.

[46] Then the court hastily took this position, lest misunderstood: that 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

[42] *Mahlamu* 388 referring to Brassey, *Commentary on the Labour Relations Act* RS 2 of 2006 A9-6
[43] At paragraph [46].

particular event (see below). In that regard, the court understood, as universally should be, 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 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'.

[47] And:

> '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'. (Emphasis supplied)

[48] The particular event or events that obviate the dismissal in circumstances where there is a fixed term contract are now succinct and doubtless, as provided for in the following provision of the new amendments to the LRA, with regard to employees earning below the regulated earnings threshold:

> 'Section 198B (1) for the purposes of this section, a 'fixed-term' contract of employment means a contract of employment that terminates on-
> (a) the occurrence of a specified event;
> (b) the completion of a specific task or project; or
> (c) a fixed date, other than an employee's normal or agreed retirement age, subject to sub-section (3)'

[49] So *Sindane* should be understood, in my view. The position should thus still be, with regard to higher earners, that they cannot commit in a contract of employment to an arrangement that defines an *'event'* in sub-section *198B (1) (a)* as including the fact that a where a client terminates its contract with the

employee's employer, or demands the removal of the employee from the client's workplace, that that should result in the automatic termination of the employee's contract of employment. The reasons for disallowing such terminations are that the arrangements, in addition to those already mentioned, are that they are against public policy (*Nape*), they seek to truncate the provisions of section 5 of the LRA and the fundamental right of the employee embodied in s185 of that Act (*Mampeule (LC)*). Also, they are not a direct act of the employer (or employee) but one galvanised by an external third party to the contract (*Mahlamu, Mapeule*). Of necessity, the interpretation of *'event'* must be taken on a narrow, than a wider, approach purposefully to maximise the protection of job security and other constitutionally recognised labour rights and practices.

[50] I was referred by Mr Snyman to a decision by this court in *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane and Others*[44], (per Snyman AJ), where the Court said the following, with specific reference to such automatic termination provisions in contracts of employment:

> '63.3 …and in the case where the whole service agreement between the client and the temporary employment service is terminated or is completed or otherwise comes to an end, then it is not an issue of individual employees being dealt with whilst the underlying service agreement still continues to exist. In such a case, the exercise by a client of a contractual right to terminate the whole service agreement is an event that could legitimately constitute an event substantiating automatic termination of a fixed-term contract. It is in my view exactly the same situation as the completion of a project or contract. In such a case, the termination of the entire underlying service agreement between the client and the temporary employment service would automatically terminate the contract of employment of the employees of the temporary employment service along with it, provided the employment contracts of the employees make specific provision for this and properly define this'.(Emphasis added)

[44] [2014] JOL 31668 (LC) at para 63.

[51] Given the expressions about the decisions by this court in *Mampeule, Nape* and *Mahlamu*, supra, the view expressed in the *Twoline Trading* above cannot be correct. A contractual provision that provides for the automatic termination of the employment contract at the behest of a third party or external circumstances beyond the rights conferred to the employee in our labour laws undermines an employee's rights to fair labour practices, is disallowed by labour market policies. It is contrary to public policy, unconstitutional and unenforceable *(Grogan "The Brokers Dilemma" 2010 Employment Law 6)*. This view is clear from all the decisions referred to above, and it is apparent from these that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. The freedom to contract cannot extend itself beyond the rights conferred in the constitution, as for instance, against slavery.

[52] Mr Snyman also referred this court to the decisions in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd*[45]; *LAD Brokers (Pty) Ltd v Mandla*[46] *and Malandoh v SA Broadcasting Corporation,*[47] for the proposition that it is a fundamental principle of our law of contract that Dube was voluntarily bound by the contract that she signed, and that the resulting document (in a contract) will be accepted as the sole evidence of the terms of the contract. It has already been decided by the Labour Appeal Court that a contract of employment, voluntarily and freely entered, cannot truncate the provisions of the LRA[48] and the regulatory framework that supports it execution.

[53] In the case of *Nape v INTCS Corporate Solutions (Pty) Ltd*[49] the employee's contract was terminated because the employer's client no longer required his services. The employer argued that the employment contract allowed for automatic termination on these very grounds and that the termination did not constitute a dismissal. The Court disagreed and struck down the employment contract's provision as it clashed with and was overruled by the provisions of

[45] 1941 AD 43 at 47.
[46] (2001) 22 *ILJ* 1813 (LAC) at para 15.
[47] (1997) 18 *ILJ* 544 (LC) at 547H-I.
[48] Mampeule (LAC), supra.
[49] [2010] 8 BLLR 852 (LC) at 868.

section 189 of the LRA that requires a retrenchment process in circumstances where employers are unable to provide work for the employee.

[54] The decision in this case was far-reaching and offered a long view to the direction in law and policy regulation in the labour market. It criticised the finding of the court in *Sindane* as placing 'far too much emphasis on the rights of parties to contract out of the Act'[50]. In the *Nape* matter, the employee of a labour-broker, while placed at a client, was found guilty of sending an offensive e-mail to another employee using the client's computer. The court noted that, although the relationship between the broker and its client was lawful, it did not follow that all the terms of the contract which governed that relationship were also lawful. A contractual provision that enables a labour-broker to withdraw an employee placed with a client, the court held, is contrary to public policy and in breach of the employee's constitutional right to fair labour practices. The court noted that, in spite of legislative approval of labour broking services, labour-brokers and their clients are 'not at liberty to structure their contractual relationships in a way that would effectively treat employees as commodities to be passed on and traded at the whim and fancies of the client' (*Nape supra* 862). The client of a labour-broker has a legal duty to do nothing to undermine an employee's rights to fair labour practices, unless the limitation is justified by national legislation[51].

[55] The court added that, in applying the right not to be unfairly dismissed, it is not bound by contractual limitations created by the parties and may not 'perpetuate wrongs exercised by private parties who wield great bargaining power' (*Nape supra* 864). The court noted that it is not bound by contractual limitations created by parties through an agreement that conflicts with the fundamental rights of workers. It concluded that any clause in a contract

[50] At paragraph [92], Boda AJ stated, with reference to *Sindane (supra*): 'The respondent claimed that his services had terminated according to the terms of his fixed-term contract, which provided that it would last only while the client required his services, and denied that the applicant had been dismissed. The Court agreed with this submission. Although the facts of this case are distinguishable from the present case, because dismissal is not what is in issue, it seems to me that this approach gives far too much emphasis to the rights of parties to contract out of the Act. It seems to me that this approach violates section 5(2) of the Act because it prevented the employee from exercising the rights under section 189 of the Act'.

[51] See Tamara Cohen, in the ELRC Labour Bulletin, July 2013 (published through Obiter, Faculty of Law, University of KwaZulu-Natal).

between a labour-broker and a client which allows a client to undermine the right not to be unfairly dismissed is against public policy and unenforceable. The willingness of the court in Nape to move beyond its legislative mandate, by implying public-policy considerations into the contract so as to temper unfair contractual and legislative provisions, is to be applauded[52].

[56] It is noted, in passing, that those policy changes propounded in judicial decisions referred to above, have now come to pass, and the contractions by which unscrupulous labour brokers and their clients could use contracts to shield themselves from obligations to protect the security of employment have been jettisoned. The New Labour Relations Amendment Act (Act No 6 of 2014) stipulates new provisions for the regulation of non-standard employment, and effectively protects employees who would find themselves in the same situation as the applicant in this matter, henceforth.

[57] The new *sub-section 198 (4C)* of the LRA, as amended, provides as follows:

> 'An employee may not be employed by a temporary employment service on terms and conditions of employment which are not permitted by this Act, any employment law, sectoral determination or collective agreement concluded in a bargaining council applicable to a client to whom the employee renders services'.

[58] The Act also provides[53] that in any proceedings brought by an employee, the Labour Court or an arbitrator may determine whether a provision in an employment contract or a contract between the temporary employment service and a client complies with subsection 4C and make an appropriate order or award.

[59] It can no longer be debatable that, following this legislative directive, labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. A contractual provision that provides for the automatic termination of the employment

[52] Tamara Cohen *supra*.
[53] In subsection (4E).

contract and undermines the employee's rights to fair labour practices, or that clads slavery with a mink coat, is now prohibited and statutorily invalid.

[60] In the light of the view above, I find that Dube was indeed dismissed by the respondent and that her dismissal would be based on the respondent's operational requirements. Based on the evidence, the operational conditions were created by the cancellation of the Wits contract. When the respondent considered the alternatives, and an opportunity offered to her, Dube never applied for a position under the new Wits contract and instead sought and pursued a disability benefit. I find that Dube could have avoided her own dismissal by applying for a position as supervisor on the new Wits contract. In this regard, the undisputed evidence of Croukamp was that if Dube had applied for a position, Croukamp would have given her a position. In fact, Croukamp pursued Dube to enquire why Dube had not applied for a position, and it was then that Dube expressed her wish to seek a disability benefit. Because of these critical considerations, the issue of procedural fairness is actually of no consequence, as the respondent did not want to dismiss Dube and it was within her own power to avoid her dismissal.

[61] In *Fidelity Springbok Security Services (Pty) Ltd v SATAWU obo Chabalala and 7 Others*[54] the Court said the following, specifically referring to an offer of alternative employment in the context of an allegation of unfair retrenchment:

> '.... the dismissed employees did not accept this offer. If they had accepted it, the dismissed employees would not have been dismissed and there would have been no claim for unfair dismissal… Even if there may have been unfairness in the way in which the appellant handled the consultation process or any aspect of the matter prior to that offer, such unfairness would not have been in issue if they accepted the job offer'.

[62] The factors in determination of the entitlement to severance pay were dealt with in *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation and*

[54] Unreported LAC case no JA 14 / 2004 dated 28 February 2006 ; see also *Arthur Kaplan Jewellers (Pty) Ltd v Mariet Van Deventer* Unreported LAC case no JA 54 / 03 dated 21 February 2006 at par 11

Arbitration and Others[55]. The Court said the following, which ratio can also be applied in this matter:

> '…. an employee who unreasonably refuses an offer of alternative employment is not without fault. He has himself to blame if he subsequently finds himself without employment and, therefore, does not deserve to be treated on the same basis as the employee who finds himself without employment due to no fault on his part …. Where the employer offers to continue to employ the employee - whether in the same position but on different terms or on the same terms but in a different position or in the same position and on the same terms but in a different place, that is still alternative employment. It is an offer of an alternative contract of employment'.

[63] The decisions in *Entertainment Catering Commercial and Allied Workers Union of SA and Others v Shoprite Checkers t/a OK Krugersdorp*[56]; *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[57]; and *Schatz v Elliott International (Pty) Ltd and Another*[58] all supports a view that an employee offered a viable alternative to a dismissal, but refuses to take it, cannot complain that the termination of his/her employment for operational reasons was unfair. Dube could have applied for a position on the new Wits contract; she was specifically asked to, and should not have sought a disability benefit, in order for any claim of unfair dismissal by her to have any substance. Without having done so, it is not without effort to find any reason to believe that her dismissal was unfair.

[64] There is ample evidence showing that the respondent bent backwardly in this case to ensure that as many employees as possible would get taken on the new contract. Dube was consulted on numerous occasions, and when she indicated that she would rather pursue the disability route, the respondent still assisted her in that regard. I am satisfied that the respondent acted prudently and fairly in the circumstances.

[55] (2003) 24 *ILJ* 373 (LAC) at para 24 – 25
[56] (2000) 21 *ILJ* 1347 (LC) at para 28
[57] (2006) 27 *ILJ* 292 (LAC) at para 69
[58] (2008) 29 *ILJ* 2286 (LC)

[65] In considering the facts already set out above, as well as the absence of any evidence as to mitigation of damages and the past and current employment status of the applicant, it is my view that Dube is not entitled to any compensation for the reason that she declined what I considered reasonable alternative employment[59].

[66] I accordingly make the following order:

1. There was a dismissal.

2. The dismissal was for operational requirements.

3. The dismissal of the applicant is not procedurally unfair.

4. There is no order as to costs.

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Mosime AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr Vusi Shongwe, Trade Union Official of SATAWU

For the Third Respondent: Mr Sean Snyman

Instructed by: Snyman Attorneys

[59] Item 11 of the Code of Good Practice: Operational Requirements provides: 'If an employee either accepted or unreasonably refused to accept an offer of alternative employment, the employees statutory right to severance pay is forfeited'.