

Short notes on:

THE WITHDRAWAL OF AN OFFER OF EMPLOYMENT – DOES THIS CONSTITUTE A DISMISSAL?

The question is really - when does the employment relationship start? In my view, the start of the relationship is often blurred on receipt of an offer - before it is accepted. Subject to one limitation, an offer of employment can be withdrawn at any time before the job applicant has accepted the offer.¹ Let us unpack that further.

Legal Framework

In terms of section 213 of the Labour Relations Act (LRA), an employee is:

“(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

“(b) any other person who in any manner assists in carrying out or conducting the business of an employer”.

Given the definition, it is clear that a job applicant will only be deemed an employee and the employer’s legal obligations will only begin when the employee starts working for the employer. Usually, an employer withdraws the offer of employment after the offer has been accepted and the employee has signed the contract of employment, the employee is forced to rely on the law of contract to address the breach.

In the matter between Wyeth SA (Pty) Ltd v Manqele, the Appellant and Respondent concluded a contract of employment, however before the Respondent commenced with working, a dispute arose pertaining to the terms and conditions relating to the use of the company car. The employer terminated the contract of employment on the basis that both parties were unable to agree on the terms.²

¹ [Your Guide to Labour Law in South Africa | Labour Guide](#)

² Wyeth SA (PTY) Ltd v Manqele and others 2005, 6 BLLR 523

Subsequently, the employee referred a dispute of unfair dismissal to the CCMA and the matter eventually made its way to the Labour Appeal Court. The Appellant presented that the Respondent was not considered an employee as she did not commence work, therefore falling outside the legal definition of an employee. At the LAC, the court rejected the literal interpretation the Appellant has ascribed to the definition of an employee in terms of the LRA and contended that the Respondent became an employee the moment that the employment contract was signed.³

Conclusion

It would be in the employer and the employee's best interests to ensure that all terms and conditions of the employment contract has been agreed to before signing the contract of employment. An employer is not permitted to terminate a contract of employment without consequence since the employee has not yet commenced working. As depicted in the Wyeth SA (Pty) Ltd case, this could land you at the CCMA or even Labour Court.

To protect the employer and employee in these instances, it is recommended that employers confirm, that the offer of employment can be revoked should the applicant be flagged during a background check.⁴ Contact an attorney at SchoemanLaw for your labour law needs.

³ Wyeth SA (PTY) Ltd v Manqele and others 2005, 6 BLLR 523