Employment offers - what does it take to conclude an agreement?

By Jacques van Wyk and Michiel Heyns

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Here we analyse what constitutes an offer and acceptance for the conclusion of a contract of employment.

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In the case of *Ntsunguzi v M2 Bio Food and Beverage (Pty) Ltd [2022]* (CCMA), following a series of interviews, the interviewee received an email from the prospective employer which read “we would like to offer you a position at our company, for a probation period of three months starting 1 October 2021. For this interim period we can offer you R20,000 per month as compensation. We look forward to hearing from you."

The interviewee replied to this correspondence seeking further details concerning the remuneration offered and expressed excitement by stating “Looking forward to hearing from you and definitely looking forward to the 1 October.” The following day the interviewee sent a further email which stated: “Just following up on the conversation below, I’m expected at the Woodstock office on 1st October and not Houtbay, is that correct?” The interviewee was then advised that the employer was still reviewing candidates and approximately a week later he was informed that another candidate was chosen.

The commissioner stated that in order to conclude a binding contract, acceptance must be clear and unequivocal or unambiguous. A counter offer is not sufficient. In this instance the interviewee unequivocally accepted the offer. The fact that he did so via email correspondence did not matter and neither did the fact that he requested some clarity about his salary. When he accepted the offer, he became an employee. By not appointing him, the employer breached the contract of employment that was established. His dismissal was therefore procedurally and substantively unfair.

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Conversely, in the matter of *Tshiki v Nelson Mandela University [2022]* (CCMA), following a recruitment process, the interviewee claimed that he was informed telephonically by an HR consultant of the employer (who thereafter passed away) that he had been successful in his application for a position he applied for. Whilst being informed of this, he was advised to send his payslip to her in order to finalise the offer. On his own version, the HR consultant later informed him that the shortlisting process for the position had been challenged and the offer had been delayed. The interviewee confirmed in a 'follow-up' correspondence that he was still awaiting the offer. Thereafter, the interviewee had been told that another candidate had been placed in the position.

In this case the commissioner found that no contract of employment was concluded as there was – on his own version – no offer and no acceptance.

Legal principles

In both the *Ntsunguzi* and the *Tshiki* matters, the CCMA referred to the Labour Appeal Court's (LAC) decision of *Wyeth South Africa (Pty) Ltd v Manqele and others [2005]* (LAC). In the *Wyeth* matter, the LAC held that a person who has concluded a contract of employment but has not yet commenced working for the employer, is an employee, for purposes of the Labour Relations Act 66 of 1995.

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Ultimately, a factual enquiry had been conducted in both the *Ntsunguzi* and *Tshiki* matters to determine whether the principle confirmed in the *Wyeth* matter had been established, that is, whether a contract of employment had been concluded. The factual enquiry involves a 'backward-looking' process. As summarised in *Young v Barnes Group [2019]* (CCMA), for an employment agreement to be valid, there must be:

1. an intention to create a legal relationship;
2. offer and acceptance;
3. agreement as to the essentials of the contract; and
4. consensus as to the rights and duties of the parties.

Importance of case

Employers are reminded to avoid providing offers of employment if the relevant recruitment processes or details of a vacant post have not been finalised as a valid employment agreement may still be created and enforced through offer and acceptance.

ABOUT THE AUTHOR

Jacques van Wyk, Director, Michiel Heyns, Senior Associate, Werksmans Attorneys