

The Validity of Automatic Termination Clauses in Employment Contracts

by

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SUMMARY

This study aims to establish the validity of the automatic termination of an employment contract.

The automatic termination of an employment contract means that the contract is terminated *ex lege* and not by an act of the employer. Such termination will therefore not “qualify” as a dismissal for purposes of section 186 of the LRA. The result is that these employees will not be able to challenge the fairness of such termination based on the unfair dismissal provisions in the LRA.

It may be argued that such automatic terminations offer employers the opportunity to effectively circumvent their obligations under the LRA with regards to the fairness of dismissals. Automatic termination provisions are often used by employers as a mechanism to this.

The Constitution of the RSA provides that ‘everyone has the right to fair labour practices’.¹ This constitutionally guaranteed right is given effect to in the LRA² which provides employees with the right not to be unfairly dismissed.³

By depriving employees of their protection against unfair dismissal, it may be argued that their fundamental rights to fair labour practices are infringed.

This study aims to investigate the topic of automatic termination of employment contracts by analysing the provisions of, *inter alia*, the LRA and the Constitution of the RSA in order to determine the extent of protection afforded to employees against exploitation in circumstances such as these and will consider various findings of courts that may shed light on the matter. The effect of the recent amendments to the LRA in this regard will also be considered.

¹ Section 23 of the Constitution of the RSA 1996.

² The Labour Relations Act 66 of 1995.

³ Section 185.

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Chapter 1 - Introduction

1. Background and Significance of the Research

The South African labour market has become characterised by the increased use of non-standard employment in order to satisfy the immediate needs of the employer.⁴

The dynamic nature of business leaves employers with a need for more flexible and predictable agreements with employees.⁵ This is why employers are so inclined to enter into non-standard employment agreements such as fixed-term agreements or temporary employment service agreements.⁶

As a result of this a great number of employees have become subjected to less favourable terms and conditions of employment.⁷

The automatic termination of an employment contract by way of either legislative or contractual provisions is a mechanism often used by employers to terminate a contract of employment without constituting a dismissal for purposes of the LRA.

An example of such provision is where a contract of employment provides that the contract will terminate automatically and simultaneously when an employee ceases, for example, to be a director of the company.⁸ Employers would argue in these circumstances that such employee does not have any right of recourse in terms of the LRA with regards to unfair dismissal as such contract was terminated *ex lege* based on the agreed upon terms or in terms of the relevant legislative provision.

As mentioned, a fixed-term contract is an example of such non-standard employment. In terms of the common law, a fixed-term contract automatically comes to an end upon the arrival of the date or occurrence of the event on which the parties agreed the contract would terminate.⁹ It is clear that this however poses a threat of

⁴ Thoose & Tsweledi 'A Critique of the Protection Afforded to Non-standard Workers in a Temporary Employment Services Context in South Africa' 2014 18 *Law, Democracy and Development* 340.

⁵ Gericke 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' 2011 (14) 1 *PELJ* 105.

⁶ The Adcorp Employment Index (May 2104) estimates that there are 8 640 329 permanent full-time workers in SA and 3 901 254 temporary/part-time workers. See <http://adcorp.co.za/News/Documents/Adcorp%20Employment%20Index%20-%20201406.pdf>.

⁷ Cohen 'The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships' 2014 35 *ILJ* 2608.

⁸ *SA Post Office v Mampeule* [2010] 10 BLLR 1052 (LAC).

⁹ Grogan *Workplace Law* (2014) 170.

exploitation of employees as it could allow an employer to keep employees on a series of fixed term contracts, thereby protecting him/herself from liability under the LRA for potentially unfair dismissals.

The purpose of the LRA¹⁰ is 'to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary purposes of the Act¹¹, which are to give effect to the fundamental rights contained in the Constitution as well as international obligations'.¹²

According to Grogan¹³, it is an important objective of the LRA to enhance and promote job security of employees. It endeavours to do this by prescribing the circumstances under which dismissals would be fair and unfair and by providing remedies to employees who have been unfairly dismissed. Section 185 of the LRA¹⁴ provides every employee with the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices.

The Constitution of the RSA¹⁵ (the Constitution) provides that 'everyone has the right to fair labour practices'.¹⁶ Even though the term 'fair labour practice' is not defined in the Constitution, it has been made clear by South African courts¹⁷ that this fundamental right encompasses more than is expressed in the narrow definition of the term in the LRA.¹⁸

The *Labour Relations Amendment Act*¹⁹ (hereafter LRAA) has recently introduced new provisions which regulate these non-standard employment agreements and provides greater protection to employees in these circumstances.

In the recent case of *South African Transport and Allied Workers Union obo Dube and others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*²⁰ the court was required to examine the nature and terms of the employees' contracts of

¹⁰ 66 of 1995.

¹¹ S 1 of the LRA – my emphasis.

¹² S 1 of the LRA.

¹³ Grogan *Workplace Law* (2014) 164.

¹⁴ 66 of 1995.

¹⁵ 108 of 1996.

¹⁶ S 23 of the Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁷ *NEHAWU v University of Cape Town & others* [2003] JOL 10448 (CC) at par [33].

¹⁸ Van Eck *et al Fair Labour Practices in South African Insolvency Law* 1.

¹⁹ 6 of 2014.

²⁰ [2015] JOL 33144 (LC).

employment with the respondent and establish whether it allowed the respondent to validly terminate employment automatically following the termination of its contract with a client. The court held as follows²¹:

“Section 37 of the Basic Conditions of Employment Act²² (hereafter 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. Furthermore 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.”²³

The court held further that “the requirement for procedural and substantive fairness is a fundamental right in terms of section 185 of the Labour Relations Act, and the employer cannot contract out of it through automatic termination clauses.”²⁴

The court noted that the new LRA stipulates new provisions for the regulation of nonstandard employment, and effectively protects employees who would find themselves in the same situation as the applicant in this matter.²⁵

The new *subsection 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 the services.”

The court noted that the Act²⁶ also provides that “in any proceedings brought by an employee, the Labour Court or an Arbitrator may determine whether a provision in an employment contract between the temporary employment service and a client complies with subsection 4C and make an appropriate order or award.”²⁷

2. Research question

The question to be addressed is whether the automatic termination of a contract of employment, when viewed/tested in the light of the Constitutional guarantee of fair labour practices and the objective of the LRA to provide job security, is valid and

²¹ Para 37.

²² 75 of 1997.

²³ Para 37.

²⁴ *Ibid.*

²⁵ Para 56.

²⁶ In subs (4E).

²⁷ Para 58.

enforceable and consequently whether provisions allowing for such automatic termination give effect to the purpose of our labour law.

3. Preliminary Literature

This study aims to investigate the topic of automatic termination of employment contracts by analysing the provisions of, *inter alia*, the LRA and the Constitution in order to determine the extent of protection afforded to employees against exploitation. Applicable case law and findings of courts that will shed light on the matter will be considered and discussed.

4. Methodology

This research will entail the analysis of legislation, case law, journals and articles. The applicable laws in South Africa will be discussed with the aim of identifying loopholes in our labour law with regards to the protection of employees against unfair dismissals and the right to fair labour practices.

5. Proposed Structure

The research will consist of the following Chapters:

Chapter 1

This chapter serves as an introduction to the research and will provide the background.

Chapter 2

This chapter will focus on the purpose of labour law in South Africa and will include a discussion of the main sources governing such law. The following aspects will be discussed:

1. Background and the Purpose of Labour Law
2. International Law
3. The Constitution
4. The Common Law
5. The LRA

Chapter 3

This chapter looks at the development of the common-law contract of employment and includes a discussion on the following:

1. Historical Background
3. Implied terms of the Employment Contract

Chapter 4

The chapter deals with the automatic termination of employment contracts by operation of law. The following will be discussed:

1. Automatic Termination in Terms of Legislation
2. Desertion in the Private Sector
3. Termination by the Effluxion of Time
4. Termination due to Impossibility of Performance

Chapter 5

This chapter involves an analysis of non-standard employment contracts and the effect of the recent amendments to the LRA. The following topics will be discussed:

1. Indefinite contracts
2. Non-standard employment

Chapter 6

This chapter serves as a conclusion to the research.

Chapter 2 – Termination of Employment Contracts and Applicable Legislation

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Chapter 2 – Termination of Employment Contracts and Applicable Legislation

1. Background and Purpose of Labour Law

The basic sources for the regulation of labour in South Africa are the Constitution of the RSA²⁸, international law principles, legislation and the common law.²⁹

The Constitution is the supreme law of the Republic.³⁰ Legislation must be interpreted so as to give effect to fundamental rights as well as international law standards.³¹ Where legislation is however incapable of effectively regulating employment relations, the common law must be applied and when necessary developed to ‘fill the legislative gap’ in doing so.³²

The purpose of enacting labour legislation is thus to give effect/substance to the constitutional guarantee of fair labour practices contained in section 23 of the Constitution.³³

When considering the validity of the automatic termination of employment contracts, it is necessary, as a starting point, to consider the general principles regarding termination of employment contracts in our law.

2. International Law

Section 39(1) of the Constitution provides that, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.³⁴ Section 233 adds to this by stating that when legislation is interpreted “every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.³⁵

²⁸ 1996 (Constitution).

²⁹ Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 73.

³⁰ S 2 of the Constitution.

³¹ S 1 and s 3 of the LRA.

³² Section 8(3) of the Constitution provides that “a court must apply or if necessary develop the common law to give effect to a right in the Bill of Rights to the extent that legislation does not give effect to such right”.

³³ Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 73 with reference to Hepple ‘The common law and statutory rights’ in Hepple *Rights at Work: Global, European and British Perspectives* (2005) 31.

³⁴ S 39(1)(b). See *S v Makwanyane* 1995 (3) SA 391 (CC).

³⁵ S 232 provides that “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

The LRA provides that one of its purposes is “to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation”.³⁶ The LRA also requires that any person applying the Act³⁷ must interpret its provisions in compliance with international law obligations.³⁸

2.1 The ILO

The International Labour Organisation (hereafter the ILO) was founded in 1919 under the Peace Treaty of Versailles.³⁹ The original purpose of establishing the ILO was to create an institution which would provide international standards for the regulation of labour relations.⁴⁰

The primary goal of the ILO is the achievement of “decent and productive work for both women and men in conditions of freedom, equity, security and human dignity”.⁴¹

It is based on the principle that “universal and lasting peace can be established only if it is based upon social justice” that “conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled” and that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own country”.⁴²

Principles including freedom of fear, respect for human rights, freedom from want and the fight against poverty were what inspired the authors of the Philadelphia Declaration in 1944 which was adopted by the International Labour Conference to update the Organisation’s objectives and emphasize its priorities.⁴³ This declaration was solemnly added to the Constitution of the ILO.⁴⁴

³⁶ S 1(b). See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 61.

³⁷ 66 of 1995.

³⁸ S 3(c).

³⁹ Du Toit *et al Labour Relations: A Comprehensive Guide* (2015) 76.

⁴⁰ Servais *International Labour Law* (2009) 21.

⁴¹ Cohen & Moodley ‘Achieving “Decent Work” in South Africa?’ 2012 15 (2) 320 with reference to ILO 1999 www.ilo.org.

⁴² Preamble to the Constitution of the ILO.

⁴³ Servais *International Labour Law* (2009) 28.

⁴⁴ *Ibid.*

South Africa, as one of the founding members, withdrew from the ILO in 1964 on account of the apartheid policy, but rejoined the ILO in 1994 and has since then ratified all the ILO's core conventions⁴⁵ and currently plays a big role in ILO affairs.⁴⁶

On 22 June 1982 ILO Convention C158, regulating the termination of employment on the initiative of the employer, was adopted and came into force on 23 Nov 1985.⁴⁷

In terms of Article 4 of Convention C158 “the employment of a worker may not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements”.⁴⁸

Article 7 of the Convention provides that “the employment of a worker may not be terminated for reasons related to the worker's conduct or performance before he was given an opportunity to defend himself against the allegations, unless this cannot reasonably be expected of the employer”.⁴⁹

Article 8 of the Convention entitles an employee to appeal against a termination which is considered to be unjustified.⁵⁰

These provisions emphasise the importance of fairness when it comes to the termination of employment contracts. Even though South Africa has not ratified this Convention, it doesn't preclude South Africa from being influenced by and/or implementing these principles in our law.⁵¹ These principles are what sets the standard for labour law and should still be used as a yardstick to measure compliance with international labour standards.

In this respect it is clear that South African unfair dismissal law gives effect to all three the principles of ILO Convention C158 as mentioned above.⁵² In terms of the LRA, every employee has the right not to be unfairly dismissed and any dismissal

⁴⁵ Freedom of Association and the Right to Organise (No. 87); Right to Organize and Collective Bargaining (No. 98); Forced Labour (No. 29); Abolition of Forced Labour (No. 105); Minimum Age (No. 138); Worst Forms of Child Labour (No. 184); Equal Remuneration (No. 100); and Discrimination (No. 111).

⁴⁶ Van Niekerk *et al Law@work* (2015) 22.

⁴⁷ ILO 2010 www.ilo.org.

⁴⁸ C158 - Termination of Employment Convention, 1982 (No. 158).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Smit & van Eck '*International Perspectives on South Africa's Unfair Labour Law*' 2010 43 (1) *CILSA* 66.

⁵² *Ibid.*

that was not for a fair reason and not conducted in accordance with a fair procedure will be deemed unfair.⁵³

On 29 September 2010 South Africa, together with the ILO and other constituents, launched the Decent Work Country Programme (DWCP) which assisted Government in obtaining its objective to achieve decent work standards in South Africa.⁵⁴ The four pillars of 'decent work' are: "(i) the promotion of fundamental principles and rights at work; (ii) the promotion of employment and income opportunities; (iii) the expansion and improvement of social protection coverage and (iv) the promotion of social dialogue and tripartism".⁵⁵

From what has been discussed above, it is clear that South Africa is serious in its attempts at achieving fair labour practices in accordance with international labour standards.

3. The Constitution of the Republic of South Africa

It is impossible to consider any rights afforded in terms of legislation without considering it in the context of the Constitution and the rights guaranteed therein. This is because the Constitution is the supreme law in South Africa and any law or conduct inconsistent with it is invalid.⁵⁶

The Bill of Rights is cornerstone of democracy in South Africa and the rights therein must be promoted, protected, respected and fulfilled.⁵⁷

As stated the Bill of Rights applies to all law. It not only binds the legislature; the executive; the judiciary and all organs of state, but also a natural or juristic person. It furthermore, where applicable, takes into account the nature of the right, as well as the nature of any duty imposed by such right.⁵⁸ As such a court must apply, and if necessary develop the common law to give effect to the rights in the Bill of Rights, in as far as it does not give effect to a right.⁵⁹ A court may also develop such rules to

⁵³ S 186 and s 188 of the LRA.

⁵⁴ RSA Decent Work Country Programme 2010 to 2014 4. Internet address?

⁵⁵ *Ibid.* See Cohen & Moodley 'Achieving "Decent Work" in South Africa?' 2012 15 (2) 319-344.

⁵⁶ S2 of the Constitution.

⁵⁷ See s 7 of the Constitution.

⁵⁸ S 8(1) and (2).

⁵⁹ S 8(3)(a).

limit the right, provided that the limitation is in accordance with section 36(1).⁶⁰ This is commonly referred to as the limitation clause. This power or duty of courts is confirmed in section 173 of the Constitution.

When considering labour law in the context of these provisions, it is clear that the functioning of labour law must be evaluated within the ambit of the Constitutional right to fair labour practices.⁶¹ In other words when the validity of any provision of labour law is tested and found to be in conflict with a provision in the Constitution, it will be invalid.⁶² It also allows for the interpretation of such legislation.⁶³

Finally, it is also clear that the common law provisions regarding labour relations may be developed or limited in as far as it is necessary to give effect to the Bill of Rights.⁶⁴ For example in *Old Mutual Life Insurance Co SA Ltd v Gumbi*⁶⁵ the Supreme Court of Appeal held that the common-law contract of employment had developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

Section 39(2) of the Constitution requires that Constitutional values must play a role in all legal interpretation. It provides that “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and the objects of the Bills of Rights”.⁶⁶

With regards to fundamental rights conferred by the Constitution with specific reference to labour law, the labour rights are set out in section 23 which provides *inter alia* that everyone has the right to fair labour practices.⁶⁷

The purpose of the LRA and the BCEA is to give effect to the rights contained in section 23 and even though the EEA⁶⁸ was not primarily created for the regulation of labour relations, it cannot be read in isolation from the Constitutional provisions.⁶⁹

⁶⁰ In terms of section 8(3)(b).

⁶¹ Van Niekerk *et al Law@work* (2015) 38.

⁶² S 8(2).

⁶³ Van Niekerk *et al Law@work* (2015) 38.

⁶⁴ *Ibid.*

⁶⁵ [2007] 8 BLLR 699 (SCA).

⁶⁶ S 39(2).

⁶⁷ S 23(1). See *NEHAWU v UCT* 2003 3 SA 1 (CC) par 33-34 where the court held that “our Constitution is unique in constitutionalising the right to fair labour practices. The concept of fair labour practices is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations”.

All three these statutes must be interpreted in accordance with the Constitution and must be applied in such a manner so as to give effect to it.⁷⁰ It is thus clear that all labour laws are subject to Constitutional scrutiny for the purpose of protecting the rights of both employees and employers.

It can be said that section 23 thus lays the foundation for the interpretation and application of all sources of labour law.

4. The Common Law

There are a number of ways in which a contract of employment or the employment relationship can be terminated. For example, if a contract was concluded for a specified period of time, or until the completion of a particular project, such contract would terminate automatically at the end of the specified period, or upon completion of the project.⁷¹

A contract can also be concluded for an indefinite period in which case the contract may be terminated by one of the parties, or upon the employee reaching retirement age.⁷²

In terms of the common law the employer is entitled to terminate a contract of employment by giving the required notice or without any notice where summary dismissal is justified.⁷³

Significant restrictions have however been placed on employers in this regard by the LRA and the BCEA.

The LRA requires that termination on notice must be for a fair reason and in accordance with a fair procedure.⁷⁴ There was a time it seemed, based on the findings of various court cases⁷⁵, that the Supreme Court of Appeal had accepted the view that these requirements were incorporated into a contract of employment as an

⁶⁸ 55 of 1998.

⁶⁹ Du Toit *et al Labour relations Law: A comprehensive guide* (2015) 74.

⁷⁰ S 3(b) of the EEA, s 3(b) of the LRA and s 2(a) of the BCEA.

⁷¹ Van Niekerk *et al Law@work* (2015) 95. See *SA Maritime Authority v McKenzie* 2010 (3) SA 601 (SCA).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ S 188.

⁷⁵ See *Fedlife Assurance v Wolfaardt* [2001] 12 BLLR 1301 (SCA); *Old Mutual Life Assurance v Gumbi* [2007] 8 BLLR 699 (SCA); *Boxer Superstores Mthatha & another v Mbenya* [2007] 8 BLLR 693 (SCA) and *Murray v Minister of Defence* [2008] 3 All SA 66 (SCA).

implied term through the development of the common law.⁷⁶ This “development” of the common law was however reversed in the case of *SA Maritime Authority v McKenzie*.⁷⁷ A discussion on this topic follows in chapter 3.

5. The LRA

Section 1 of the LRA determines that the purpose of the Act is “to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act”.⁷⁸

An important objective of the LRA is to enhance the job security of employees. It achieves this by creating requirements for the dismissal of employees and determining circumstances which would constitute unfair dismissal.⁷⁹

Section 185 of the LRA provides every employee with the right not to be unfairly dismissed, as well as the right not to be subjected to unfair labour practices.⁸⁰

It is clear that when dealing with any case involving the termination of a contract of employment it will be necessary to establish, as a starting point, whether a ‘dismissal’ actually occurred in order to rely on any provisions dealing with unfair dismissal.⁸¹ It is therefore necessary to establish what exactly qualifies as a dismissal.

Section 186(1) of the LRA defines dismissal. This statutory definition of dismissal is much broader than the common-law concept of termination of employment, as mentioned above.⁸²

Section 186(1)(a) determines that dismissal means that “an employer has terminated employment with or without notice”.⁸³

It is clear from the definition that dismissal is something that is effectively caused by an employer. In other words it is an act of the employer, in which ever way, which

⁷⁶ Gogan *Workplace Law* (2014) 50.

⁷⁷ 2010 (3) SA 601 (SCA).

⁷⁸ S 1(a)-(d).

⁷⁹ Gogan *Workplace Law* (2014) 164.

⁸⁰ S 185(a) and (b).

⁸¹ Gogan *Workplace Law* (2014) 164.

⁸² Van Niekerk *et al Law@work* (2015) 222.

⁸³ S 186(1)(a).

results in dismissal. Some act is therefore required by an employer to bring about a dismissal.

It is for this reason, it is argued, that the automatic termination of an employment contract cannot be seen as a dismissal, and an employee in these circumstances consequently has no right of recourse in challenging the validity of his termination based on unfair dismissal. Consequently, the validity of the automatic termination of a contract of employment is brought into question.

In the case of *National Union of Leatherworkers v Barnard NO & another*⁸⁴ the court applied a broad interpretation of this provision⁸⁵ and held that what was necessary for the termination by the employer to be presents was that the employer had “engaged in an act which brings the contract of employment to an end in a manner recognised by law”.⁸⁶ This view was referred to with approval in *SA Post Office v Mampuele*⁸⁷ where the court held that dismissal means “any act by an employer which results, directly or indirectly, in termination of an employment contract”.⁸⁸

In conclusion, one has to ask the question: If every employee has the right not to be unfairly dismissed and the right to fair labour practices; should an employer be allowed to circumvent these protective provisions afforded to employees by claiming that a contract of employment had terminated automatically by operation of law? Does that not defeat the purpose of the LRA to protect all employees and promote job security?

It is my argument that the automatic termination of employment contracts by operation of law permits a lacuna in our labour law, which could allow employers to circumvent dismissal law protection by not complying with the requirement of fairness, as envisaged by our Constitution and labour laws. It is important that employers will be held liable in terms of the LRA to give effect to the primary object of the Act namely to protect employees’ right not to be unfairly dismissed.⁸⁹

⁸⁴ (2001) 22 ILJ 2290 (LAC).

⁸⁵ S 186(1).

⁸⁶ Para 16.

⁸⁷ [2010] 10 BLLR 1052 (LAC).

⁸⁸ Para 12.

⁸⁹ See ss 3 and 185 of the LRA.

Chapter 3 – Development of the Common Law Contract of Employment

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Chapter 3 – The Development of the Common Law Contract of Employment

1. Introduction

In establishing the validity of automatic terminations of employment contracts, it is necessary to consider the development of the common-law contract of employment. Since the dawning of the constitutional right to fair labour practices and the concomitant right not to be unfairly dismissed in terms of the LRA, the courts in various judgments, reflected on the impact of the Constitution on the common-law.

This chapter will focus on the interaction between the common law and labour legislation with particular reference to the constitutionally guaranteed right to fair labour practices and the impact on common law principles applicable to the contract of employment. The question that will ultimately be addressed is whether the common law has been developed in terms of the Constitution to such an extent that an employee is granted a right to fair labour practices and consequently a right not to be unfairly dismissed by means of an implied term in the contract of employment itself.

In terms of the common law, either party to an employment contract may terminate the contract by giving notice as agreed or, if a period for notice had not been agreed upon, reasonable notice.⁹⁰ A contract of employment can thus under the common law be terminated for any or no reason provided that the agreed or reasonable notice is given.⁹¹ The Basic Conditions of Employment Act⁹² (hereafter the BCEA) does not affect this right and merely places limitations on notice periods contained in employment contracts.⁹³ The LRA however sets further requirements in that the termination on notice must be for a fair reason and in accordance with a fair procedure.⁹⁴

⁹⁰ Grogan *Workplace Law* (2014) 49.

⁹¹ Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 28 at 43.

⁹² 75 of 1997.

⁹³ S 37(1).

⁹⁴ S 188(1).

2. Historical Background

The contract of employment was originally regarded as the foundation for all matters concerning the regulation of employment relations.⁹⁵ It served as the sole mechanism for regulating employment relation matters.

The contract of employment was founded on the notion of one party (the employee) agreeing to place his/her services at the disposal of another (the employer) in return for remuneration.⁹⁶ These contracts had no regard for fairness and were purely judged on the lawfulness thereof.⁹⁷

As stated by le Roux & Mischke “principles applicable to the common law contract of employment do not recognise the concept of fair dismissal as developed by the Old Industrial Court and as now found in Chapter VIII of the LRA”.⁹⁸ The reason why the employee is dismissed is therefore irrelevant under the common law, and the employee has no right to be heard before his employment is terminated. The only requirement is that the dismissal must be ‘lawful’.⁹⁹

Kahn-Freund suggests that contracts of employment are entered into on the premise that it is an agreement between equals, but in reality the law conceals the fact that these contracts are not concluded between equals.¹⁰⁰

As previously noted, the employment relationship is one that can be described as *sui generis*, as it functions within a sphere of inherent inequality between employers who are generally accepted as the party with the financial power while the employee

⁹⁵ Collins ‘Market power, bureaucratic power, and the contract of employment’ (1986) 15 *ILJ* (UK) 1 5.

⁹⁶ Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 104.

⁹⁷ In *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) at para 31 Froneman AJA stated that “prior to the acceptance and enactment of the Constitution, our law maintained a rigid distinction between common-law contract of employment, which was said to have nothing to do with fairness, and a statutory dispensation, which had much to do with fairness”.

⁹⁸ Le Roux & Mischke ‘Constitutional and Common Law Remedies’ (2007) *CLL* 16 (11) 116.

⁹⁹ *Ibid.*

¹⁰⁰ Davies & Freedland *Kahn-Freund’s Labour and the Law* (1983) 15. Kahn observes at 18 that “the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and subordination may be concealed by that indispensable figment of the legal mind known as the “contract of employment””.

is acknowledged as the financially dependent party. The purpose of labour law, it is suggested, is to counteract the inequality in bargaining power.¹⁰¹

The Constitution recognises everyone's right to fair labour practices and directs that when courts develop the common law, the spirit and object of the Bill of Rights must be promoted.¹⁰² The Constitution further provides that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".¹⁰³

With the enactment of the Constitution and its fundamental right to fair labour practices, fundamental changes were brought about. The LRA was enacted which codifies law regarding unfair dismissals and provides statutory remedies for unfair dismissals and unfair labour practices. Common law principles regulating the contract of employment became a constitutional matter as defined in section 167(7).¹⁰⁴

The concept of fairness took centre stage and the lawfulness of the contract was no longer the only important consideration when it came to the enforcement of employment contracts.¹⁰⁵ Great emphasis was placed on fairness and collective bargaining as a means of achieving more equal bargaining power, as well as greater protection for the vulnerable individual employee.¹⁰⁶

It can be said that a focus shift had in effect taken place from the actual provisions of the contract to the employment relationship in the light of the fundamental right to fair labour practices guaranteed in the Constitution. The validity of a contract of employment was no longer solely dependent on its lawfulness, but was qualified by the requirement of fairness in terms of the Constitution and the LRA. The courts

¹⁰¹ *Ibid* at 18.

¹⁰² Ss 23(1) and 39(2).

¹⁰³ S 39(3).

¹⁰⁴ S 167(7) of the Constitution confirms that a constitutional matter includes "any issue involving the interpretation, protection or enforcement of the Constitution".

¹⁰⁵ *NEHAWU v UCT* 2003 (2) BCLR 154 (CC) para 33-34.

¹⁰⁶ Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 105.

were however still not granted an unlimited unfair labour practice jurisdiction and no power to intervene in private employment agreements.¹⁰⁷

A whole new opportunity opened up for the common law to be re-interpreted and developed to give effect to this new requirement of fairness. The common law remains relevant in the regulation of employment relationships but it is now subject to the test of Constitutionality.¹⁰⁸ The continued role of the common law is ensured by s 8(3) of the Bill of Rights which provides for the development of the common law in order to give effect to a right in the Bill of Rights where legislation does not do so.¹⁰⁹

The crucial question to ask is to what extent should or may the common law be developed by courts to give effect to fundamental rights? In other words what exactly entails the scope of the courts' constitutional duty to develop the common law? What are the indicators that oblige the courts to develop common law principles and when is development not permitted?

3. Implied Terms of the Employment Contract

Contracts of employment consist of terms which are either tacit or implied. Implied terms are often necessary to give effect to the true intentions of the contracting parties where such intentions were not expressly included in the contract. It is possible for implied terms to arise either from the facts (tacit terms included in the contract) or from law.¹¹⁰

Implied terms arising from the facts are those terms which were intended to form part of the agreement, but parties neglected to expressly include them. Implied terms arising from law on the other hand have nothing to do with the intention of the

¹⁰⁷ Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2015) 106 with reference to: Christie 'The Law of Contract and the Bill of Rights' in *Bill of Rights Compendium* 3H1 3H8.

¹⁰⁸ See *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) para 17 where Nugent AJA noted that "the LRA is not exhaustive of the rights and remedies that accrue to an employee upon termination of the employment contract nor does it 'abrogate an employee's common law entitlement to enforce contractual rights'".

¹⁰⁹ S 23(1) of the Constitution recognises everyone's right to fair labour practices and s 39(2) requires that when the courts develop the common law they promote the spirit and objects of the Bill of Rights.

¹¹⁰ Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2015) 106.

parties, but are terms which constitute the *naturalia*¹¹¹ of a contract with a particular nature.

In *Barkhuizen v Napier*¹¹² the Constitutional Court confirmed public policy as a basis for incorporating implied terms into a contract of employment and stated that public policy, rather than good faith, should be relied on to challenge the validity of contractual provisions.¹¹³ The court stated that public policy, as a product of our Constitutional values, “imports the notions of fairness, justice and reasonableness”.¹¹⁴

The court continued by emphasizing the importance of freedom of contract as this gives effect to our Constitutional values of freedom and dignity.¹¹⁵

It is my understanding that the inherent inequality which is the main element of most employment relationships as described by Kahn-Freund,¹¹⁶ is the primary reason for the need to imply terms into a contract of employment. This is done to achieve greater equality in the bargaining position between the parties and to ‘fill in the gaps’ where an employment contract does not give effect to Constitutional values, and particular to fairness. It can thus be said that the unequal bargaining relationship serves as a ‘justification’ for the implication of terms into a contract of employment which seek to promote equality and fairness amongst the parties.¹¹⁷

The role of courts in developing the *naturalia* of the contract of employment in order to give effect to the right to fair labour practices has been demonstrated in various cases.

¹¹¹ *Naturalia* have been described as “terms which are, as a rule, attached by the law (hence, *ex lege* terms) to every contract of a particular class”. They are “based on the notion of what is...economically and generally viable, fair and reasonable” and develop and change over time’: Bosch ‘The Implied Term of Trust and Confidence in South African Labour Law’ (2006) 27 *ILJ* 28 fn 3 with reference to Van der Merwe *et al Contract: General Principles* 2ed (2003) 260.

¹¹² 2007 (7) BCLR 691 (CC).

¹¹³ *Barkhuizen v Napier* above para 73. The court noted at para 28 that public policy in South Africa is shaped by our Constitutional values including human dignity, the achievement of equality as well as human rights and freedoms.

¹¹⁴ *Ibid.* See also *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA) para 95 where the court held that “the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of “freedom of contract” while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates”.

¹¹⁵ *Barkhuizen v Napier* above para 57.

¹¹⁶ Davies & Freedland *Kahn-Freund’s Labour and the Law* (1983) 17-18.

¹¹⁷ Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 108.

3.1 An Implied Term of Fairness

The question arose whether the common law contract of employment could be developed so as to incorporate the right not to be unfairly dismissed as an implied contractual term.¹¹⁸ According to Le Roux and Mischke it was 'predictable' that applicant employees would rely on the Constitution to argue that common law contract of employment should be adapted to provide protection against unfair dismissal.¹¹⁹

In *Fedlife Assurance v Wolfaardt*¹²⁰ the court accepted that an implied right not to be unfairly dismissed might possibly have been incorporated into the common law contract of employment by the Constitution.¹²¹ Judge Froneman AJA, in his minority judgement, held that the right not to be unfairly dismissed is a wider concept than the one based on lawfulness and that the one encompasses the other.¹²² He concluded that because the right not to be unfairly dismissed is regulated by the LRA which deals fully with the consequences and remedies for unfair dismissal, the High Court should leave such disputes to the labour courts.¹²³

For some time it seemed as if the common law contract of employment had indeed been developed by our courts so as to include an implied term of fairness.¹²⁴ In three judgments starting in 2007 the SCA relied on the constitutional right to fair labour practices to develop the common law to incorporate an obligation of fairness into all employment contracts.¹²⁵

¹¹⁸ Van Niekerk *et al Law@work* (2015) 97.

¹¹⁹ Le Roux and Mischke 'Constitutional and Common Law Remedies' (2007) *CLL* 16 (11) 116.

¹²⁰ [2001] 12 *BLLR* 1301 (SCA).

¹²¹ *Fedlife Assurance v Wolfaardt* above para 12.

¹²² *Ibid* para 42-44.

¹²³ *Ibid*.

¹²⁴ Grogan *Workplace Law* (2014) 50. Grogan notes that there was period during which it appeared that the Supreme Court of Appeal had adopted the view that the requirements of fair reason and –procedure for notice of termination were incorporated into the common law contract of employment as an implied term.

¹²⁵ Benjamin 'Braamfontein versus Bloemfontein: The SCA and Constitutional Court's Approaches to Labour Law' 2009 *ILJ* 757. See *Old Mutual Life Assurance v Gumbi* [2007] 8 *BLLR* 699 (SCA), *Boxer Superstores Mthatha & another v Mbenya* [2007] 8 *BLLR* 693 (SCA) and *Murray v Minister of Defence* [2008] 3 *All SA* 66 (SCA).

In two judgments by the Supreme Court of Appeal in *Old Mutual Life Assurance v Gumbi*¹²⁶ and *Boxer Superstores Mthatha & another v Mbenya*,¹²⁷ the court came to the conclusion that the common law contract of employment had been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

The view of the Supreme Court of Appeal, based on these two cases, is clearly that the common law had developed under the Constitution to allow an employee to choose, on the same facts, whether to institute action in the CCMA or the Labour court based on unfair dismissal or unfair labour practices in terms of the LRA or whether to institute action in the High Court for unfair dismissal based on breach of contract.

In the case of *Murray v Minister of Defence*¹²⁸ Cameron JA held that since members of the National Defence Force are excluded from the application of the LRA, they are entitled to rely directly on their Constitutional rights to dignity and fair labour practices as well as their contractual right not to be treated unfairly. This effectively extends an employee's right to claim damages based on the employer's duty to fair dealing towards its employees. It has been argued that this case contains the broadest statement on the impact of the Constitution on the contract of employment.¹²⁹ It was held as follows:

*“However it is in my view best to understand the impact of these rights on this case through the constitutional development of the common-law contract of employment. This contract has always imposed mutual obligations of confidence and trust between employer and employee. Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers the duty of fair dealing at all times with their employees – even those the LRA does not cover.”*¹³⁰

¹²⁶ [2007] 8 BLLR 699 (SCA). In this case the employee alleged that he was unfairly dismissed based on the lack of fair procedure. The court recognised an implied right to a pre-dismissal hearing in addition to the statutory protection against unfair dismissals.

¹²⁷ [2007] 8 BLLR 693 (SCA). Cameron AJ referred with approval to the *Gumbi* case and held at para 6 that “every employee now has a common law contractual claim – not merely a statutory unfair labour practice right – to a pre-dismissal hearing. Contractual claims are considerable in the High Court. The fact that they may also be cognisable in the Labour Court through that courts unfair labour practice jurisdiction does not detract from the High Court’s jurisdiction”.

¹²⁸ [2008] 3 All SA 66 (SCA).

¹²⁹ Benjamin ‘Braamfontein versus Bloemfontein: The SCA and Constitutional Court’s Approaches to Labour Law’ 2009 *ILJ* 758.

¹³⁰ *Murray v Minister of Defence* above para 5.

Wallis AJA however affected what appeared to be an about turn in the SCA's previous stance in the case of *SA Maritime Safety Authority v McKenzie*¹³¹ where the court was faced with the question whether the employee had the right to sue his employer for an alleged unfair dismissal on ground of a breach of an implied contractual duty not to dismiss him unfairly, which he argued was incorporated into his contract of employment *ex lege*.¹³²

Wallis AJA held that where a Constitutional right has been given effect to in legislation such as the LRA, it is unnecessary to develop the common law contract of employment to include it.¹³³ It was concluded therefore that employees are not entitled to rely on common law remedies, developed in terms of the Constitution, where the LRA gives effect to the relevant Constitutional guarantees.¹³⁴

As noted by the court in *Mohlaka v Minister of Finance*¹³⁵ the Constitution authorises courts in applying a basic right to develop the common law only 'to the extent that legislation does not give effect to that right'.¹³⁶

Where legislation thus gives effect to Constitutional rights there is no need to develop the common law. It is clear that courts are not unlimited in exercising their power to develop the common law, but that they are only required to do so when legislation does not give effect to a right in the Constitution.

In support of this view Wallis AJA referred to Professor Halton Cheadle in this regard:

*"The LRA specifically gives effect to the constitutional right to fair labour practices and the consequent right accordingly the Constitutional basis for developing the common law of employment and thereby altering the contractual relationship is absent. The Constitution does not warrant or require an importation from the realm of constitutionally protected labour rights into individual contracts of employment by way of an implied term."*¹³⁷

¹³¹ [2010] 3 All SA 1 (SCA).

¹³² Grant & Whitear-Nel 'Can an employee claim damages as a result of an implied contractual term that he will not be unfairly dismissed? *South African Maritime Authority v McKenzie* 2013 SALJ 130 (2) 310.

¹³³ *SAMSA v McKenzie* above para 15.

¹³⁴ *Ibid* para 28.

¹³⁵ [2009] 4 BLLR 348 (LC).

¹³⁶ S 8(3)(a).

¹³⁷ Halton Cheadle - See *SAMSA v McKenzie* SCA above par 37.

4. Concluding remarks

It has been argued that when common law rights duplicate statutory rights it would not only be unjustified, but that it would call into question the purpose of enacting the statutory rights in the first place.¹³⁸

It is clear from the above discussion that it can now be understood that the common-law contract of employment has not developed under the Constitution to the extent that it includes an implied term of fairness.

It has been made clear through case law that where legislation gives effect to a right conferred by the Constitution, there is no need for such provisions to be imported into the contract of employment.¹³⁹ The implication of such terms into a contract of employment would afford no additional protection to an employee than what is already available in terms of legislation.¹⁴⁰

¹³⁸ Du Toit 'Oil on Troubled Waters? The slippery interface between the contract of employment and statutory labour law' (2008) 125 *SALJ* 95at 96-97.

¹³⁹ *SAMSA v McKenzie* [2010] 3 All SA 1 (SCA) para 28.

¹⁴⁰ *Ibid* at para 18 with reference to Freedland *The Personal Employment Contract* (2003) 120 where he makes the point that "statutory rights and obligations may be associated with or attached to personal work or employment contracts without necessarily taking the form of implied terms of the contract".

Chapter 4 – Automatic Termination of Employment by Operation of Law

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Chapter 4 – Automatic Termination of Employment by Operation of Law

1. Introduction

Every employee is protected against unfair dismissal in terms of the LRA.¹⁴¹ However, before an employee can rely on such protection it must first be proven that the termination of employment did in fact constitute dismissal for purposes of the Act.¹⁴²

Section 186(1)(a) of the LRA determines that ‘dismissal’ means that “an employer has terminated a contract with or without notice”. Consequently, in order to benefit from the protection afforded by the LRA against unfair dismissals, the termination must have been a direct result of an act or decision by the employer.¹⁴³

Once a dismissal is proved, the onus shifts to the employer to prove that dismissal was for a fair reason and was effected in accordance with a fair procedure.¹⁴⁴ If a dismissal is found not to have been in accordance with these requirements of fairness, it will constitute an unfair dismissal and the employee will be entitled to remedies granted by the LRA in this regard.

There are however certain terminations that do not constitute dismissals for purposes of the Act. Such terminations include the termination of a fixed-term contract by the effluxion of time, termination upon reaching normal or agreed retirement age and termination due to impossibility of performance. There are also various statutory provisions which provide for automatic termination of employment in certain circumstances.¹⁴⁵

The effect of these terminations is that the contract of employment terminates *ex lege* and does not constitute dismissal as defined in section 186 of the LRA. This means that an employee whose employment is terminated in this manner, will not be able to rely on any of the dismissal provisions in the LRA. These provisions, and consequently the LRA, are effectively circumvented.

¹⁴¹ S 185.

¹⁴² 66 of 1995.

¹⁴³ *Ouwerhand v Hout Bay Fishing Industries* 2004 25 ILJ 731 (LC).

¹⁴⁴ S 188(1).

¹⁴⁵ See the Public Services Act 103 of 1994, Employment of Educators Act 76 of 1998 and the Insolvency Act 24 of 1936.

This chapter will focus on those provisions which provide for the automatic termination of employment contracts and the legality thereof in the light of an employee's constitutional right to fair labour practices and protection against unfair dismissal in terms of the LRA.

2. Automatic Termination in Terms of Legislation

2.1 Public Service

Various statutes governing employment in the public sector contains provisions which determine that an employee will be "deemed discharged" from service in certain circumstances.¹⁴⁶

Examples of such provisions are section 17(3) of the Public Service Act¹⁴⁷ (hereafter the PSA) and section 14 of the Employment of Educators Act¹⁴⁸.

It can be said that these provisions make continued employment 'conditional' on the fulfilment of the requirement to return to work within a specified period of time. If this 'condition' is not met, the employee will be deemed to have been discharged and employment will terminate automatically by operation of law.

Section 17(3) of the PSA provides that an employee who is absent from his or her official duties without the permission of the head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service, on account of misconduct from the date immediately following his or her last day of attendance.¹⁴⁹

If an employee, who is deemed to have been dismissed in terms of the above provision, returns to work after the expiry of one calendar month, the relevant executive authority may, on good cause and notwithstanding anything to the contrary contained in any law, approve the reinstatement of such employee in the public service.¹⁵⁰

¹⁴⁶ Grogan *Workplace Law* (2014) 179.

¹⁴⁷ 103 of 1994. Section 17(3) was formerly section 17(5).

¹⁴⁸ 76 of 1998.

¹⁴⁹ S 17(3)(a)(i).

¹⁵⁰ S 17(3)(b).

With very similar wording, section 14 of the Employment of Educators Act provides that an educator appointed in a permanent capacity, who is absent from work without permission of the employer for a period exceeding 14 consecutive days shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct.¹⁵¹

The Act states further that if an educator who is deemed to have been discharged in terms of the provision above returns to work, the employer may, on good cause and not withstanding anything contrary contained in the Act¹⁵², approve the reinstatement of such educator.¹⁵³

These provisions consequently automatically terminate the employment relationship by operation of law.¹⁵⁴ This is so because no act or decision of the employer brought the employment to an end. It happened as a result of the operation of a statutory provision triggered by the occurrence of an event.¹⁵⁵ Based on the above it may be argued that the result of these provisions is the inclusion of an *ex lege* resolving-condition in the contract of employment of these employees.

These employees are however not left without any remedy.¹⁵⁶ Employee's who are deemed to be dismissed, are entitled to 'appeal' to the relevant head of department and provide reasons why they should be reinstated and may seek review of this decision in terms of the LRA.¹⁵⁷

The question arose whether a decision on appeal, not to reinstate an employee constitutes a dismissal. The answer to this question has been cleared by the courts. It was confirmed that an employer's decision not to reinstate the employee, does not constitute a dismissal, because the contract terminated *ex lege*. A termination of the

¹⁵¹ S 14(1)(a). See *Phenithi v Minister of Education & others* 2006 27 ILJ 477 (SCA) where the court held that this 'deemed dismissal' provision was not reviewable because it did not entail any decision, and also that that provision was not in conflict with either the LRA or the Constitution.

¹⁵² 76 of 1998.

¹⁵³ S 14(2).

¹⁵⁴ In *HOSPERSA & another v MEC for Health* 2003 24 ILJ 2320 (LC) the court held in an *obiter dictum* that these provisions should only apply where the employee had 'disappeared without a trace' and in all other cases the absence without leave of an employee should be treated as misconduct and should be dealt with in accordance with the applicable disciplinary code.

¹⁵⁵ Cohen 'Termination of Employment Contracts by Operation of Law – Bypassing the unfair dismissal provisions of the Labour Relations Act' 2006 17 (1) STELL LR 92. See *Nkopo v Public Health and Welfare Bargaining Council* 2002 23 ILJ 520 (LC).

¹⁵⁶ *Ibid* at 93.

¹⁵⁷ S 158(1)(h) provides that "the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

contract or employment relationship was not effected by a decision of the employer.¹⁵⁸

In *De Villiers v Head of Department: Education Western Cape Province*¹⁵⁹ the court dealt with the question whether a decision on appeal not to reinstate an employee constituted a reviewable administrative action. The court noted that an employer's actions in these circumstances involves a 'straight forward exercise of power' once the employment contract was terminated.¹⁶⁰

The court was satisfied that since the contract of employment had terminated by operation of law, and not as a result of a decision by the employer, the employer's decision not to reinstate the employee did not constitute a dismissal.¹⁶¹

The court concluded that, taking into consideration the inequality of power in the employment relationship and the lack of alternative recourses for the employee, the employer's decision not to reinstate constituted reviewable administrative action.¹⁶² The court however added that even if it was incorrect in its finding, the decision would in any event be subject to review in terms of section 158(1)(h) of the LRA.¹⁶³

In *Grootboom v National Prosecuting Authority*¹⁶⁴ the Constitutional court held that a 'deemed dismissal' in terms of section 17(3) of the PSA will constitute a dismissal when the employee was not really absent without leave.¹⁶⁵

It is clear from this finding by the Constitutional Court that an employee must in fact be absent without leave before section 17(3) of the PSA may be used to terminate a contract of employment by operation of law.

¹⁵⁸ *MEC, Public Works, Northern Province v CCMA* [2003] 10 BLLR 1027 (LC) and *Grootboom v National Prosecuting Authority* [2010] 9 BLLR 949 (LC) para 40.

¹⁵⁹ 2009 30 *ILJ* 1022 (C). In determining whether the employers action constituted an administrative action subject to review the court considered the source, nature and subject matter of the power exercised and whether it involves the exercise of a 'public duty' as well as how closely it relates to public policy matters.

¹⁶⁰ *De Villiers v Head of Department: Education Western Cape Province* above para 20.

¹⁶¹ *Ibid.*

¹⁶² *Ibid* para 21.

¹⁶³ *Ibid* para 22. The court held at para 30 that "an employer should, as a general rule, approve the reinstatement unless the employment relationship has been rendered intolerable". See also *Grootboom v National Prosecuting Authority* [2010] 9 BLLR 949 (LC) where the court held that an employer does not have unfettered discretion in determining whether or not to reinstate an employee, but that he must be influenced by fairness and justice.

¹⁶⁴ 2014 35 *ILJ* 121 (CC). Both the Labour Court (see *Grootboom v NPA and another* [2010] 9 BLLR 949 (LC)) and the Labour Appeal Court held that the applicant had not been dismissed because his employment had terminated by "operation of law" (*Grootboom v National Prosecuting Authority and another* [2013] 5 BLLR 452 (LAC)).

¹⁶⁵ Para 45.

2.2 Insolvency

Prior to 1 January 2003, section 38 of the Insolvency Act¹⁶⁶ provided that employees' contracts would terminate automatically upon liquidation or sequestration of an employer.

The Labour Appeal Court was faced with the question whether the act of passing a resolution for the winding up of a company constituted dismissal for purposes of the LRA in *National Union of Leatherworkers v Barnard NO*.¹⁶⁷ The court held that the key question was whether the employer engaged in an act which discontinued the employment relationship.¹⁶⁸ In this case the court confirmed that it was the decision of the employer to pass the resolution which effectively ended the employment relationship and this constituted a dismissal.¹⁶⁹

The court distinguished between voluntary- and compulsory winding-up on the basis that in the latter, the decision to wind up falls within the complete discretion of the court and does not constitute a decision by the employer.¹⁷⁰ It has been argued that the court was incorrect in its reasoning here as it was the inability of the company to pay its debts that effectively caused the process of winding-up and not the decision by the court.¹⁷¹

In 2003 section 38 was however amended and now provides that the "contracts of employment of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order".¹⁷²

Section 38(4) provides that after such suspension the trustee or liquidator may terminate the employment contracts subject to compliance with section 38(5) and (6) of the Act. However, if 45 days has lapsed since the date of appointment of the final trustee or liquidator and no agreement had been reached regarding continued employment, the contracts will terminate automatically by operation of law.¹⁷³

¹⁶⁶ 24 of 1936.

¹⁶⁷ [2001] 9 BLLR 1002 (LAC).

¹⁶⁸ *National Union of Leather Workers v Barnard NO* above para 23.

¹⁶⁹ *Ibid* para 25.

¹⁷⁰ *Ibid* para 17.

¹⁷¹ Van Eck, Boraine & Steyn 'Fair Labour Practices in South African Insolvency Law' 2004 121 *SALJ* 908,909.

¹⁷² S 38(1).

¹⁷³ S 38(9).

It has been argued, and I am in agreement, that this new legislative provision merely postpones the automatic termination of employment contracts.¹⁷⁴

An employee whose contract terminated automatically is entitled to claim compensation for loss suffered as a result of the termination in terms of the common law.¹⁷⁵ Section 41 of the BCEA¹⁷⁶ now also includes a right to severance pay when the employer is sequestrated.¹⁷⁷

3. Desertion in the Private Sector

Desertion in the private sector refers to the situation where an employee is absent from the workplace, and has no intention of returning. Such conduct by an employee constitutes repudiation of the employment contract, as a fundamental term of the contract is breached, namely that of the duty to deliver a personal service.¹⁷⁸

In terms of the common law, when one party repudiates the terms and conditions of the contract, the other party can choose to either accept the repudiation and to effectively terminate the employment relationship, or to hold the other party to the terms of the contract.¹⁷⁹

The question that flows from such circumstances is what caused the actual termination of the contract? Is it the employee who ends employment by desertion, or is it the employer who acted upon the former's desertion? In the latter case termination will be as a result of an act by the employer, and will therefore constitute dismissal. It may be argued that when applying the principle of causation, the desertion was in fact the direct cause of the dismissal, as no dismissal would have taken place had it not been for the desertion.

In *SABC v CCMA*¹⁸⁰ the court was tasked to establish whether the employee's failure to return to work within a specified period of time, constituted termination of employment or whether it was dismissal. The court rejected the argument that

¹⁷⁴ Van Eck, Boraine & Steyn 'Fair Labour Practices in South African Insolvency Law' 2004 121 *SALJ* 910.

¹⁷⁵ Cohen 'Termination of employment contracts by operation of law – Bypassing the unfair dismissal provisions of the Labour Relations Act' 2006 17 (1) *STELL LR* 98.

¹⁷⁶ 75 of 1997.

¹⁷⁷ Van Niekerk *et al Law@Work* (2015) 236.

¹⁷⁸ Cohen 'The Legality of the Automatic Termination of Contracts of Employment (2011) 32 (3) *Obiter* 666.

¹⁷⁹ *SABC v CCMA* (2001) 22 *ILJ* 487 (LC) 492.

¹⁸⁰ 2001 22 *ILJ* 487 (LC).

desertion is the same as resignation.¹⁸¹ Instead, the court found that desertion constitutes a breach of contract which does not automatically terminate employment, but gives the other party the option of ‘accepting’ the repudiation to bring the contract to an end.¹⁸²

It was concluded therefore that it was the act of the employer who elected to exercise his right to terminate the contract based on the breach that effectively terminated the contract of employment and the deserting employee was therefore dismissed.¹⁸³

It is my understanding that judge-made law established that the act of desertion does not automatically terminate a contract of employment, but merely constitutes breach of contract in the form of repudiation. If the employer chooses to accept the repudiation, it will terminate the contract of employment and the employee will have been dismissed. Such dismissal has to comply with the requirements of procedural fairness in terms of the LRA.¹⁸⁴

With regards to this requirement, the situation with deserting employees seems to be more complicated than in other circumstances. The court in *SABC v CCMA*¹⁸⁵ held that the employer should have held a disciplinary enquiry before dismissing the employee as the employee’s absence should have been treated as misconduct until proven to have been desertion.¹⁸⁶

In *Jammin Retail (Pty) Ltd v Mokwane & Others*¹⁸⁷ it was held that the statutory ‘deemed dismissal’ provisions applicable to the public sector do not apply to private sector employment and that public as private sector employees should be afforded the opportunity to be heard prior to a final decision to dismiss. In this case the court noted that it was possible for the employer to trace the employee and to hold an

¹⁸¹ *SABC v CCMA* above 492.

¹⁸² *Ibid* 492.

¹⁸³ *SABC v CCMA* above 493.

¹⁸⁴ See s 188(1)(b) of the LRA.

¹⁸⁵ (2001) 22 *ILJ* 487 (LC).

¹⁸⁶ *Ibid* 492. The court noted that where there is nothing preventing an employer from holding a disciplinary enquiry, for example when the employees hereabouts are known, then it should be done.

¹⁸⁷ 2010 4 *BLLR* 404 (LC).

enquiry into the reason for absence, but the employer failed to do so. The dismissal was therefore held to be procedurally unfair.¹⁸⁸

It is my understanding, based on the above reasoning, when dealing with desertion in the private sector, the employer will be required to hold a disciplinary enquiry, where possible, into the absence of the employee. What would be required of an employer will depend on the particular facts and circumstances of each case.¹⁸⁹

In conclusion, it is clear from the above authority that an automatic termination clause in an employment contract based on the absence without leave must be considered as invalid. Desertion constitutes a breach of contract which does not automatically terminate a contract of employment.

4. Termination by the Effluxion of Time

A contract of employment may be entered into on the basis that it will be valid only for a specified period of time or until the occurrence of a specified event. These contracts are examples of contracts that terminate automatically by operation of law. The termination of such a contract therefore will not constitute dismissal.¹⁹⁰ Employees employed in terms of these contracts will consequently not be entitled to rely on the dismissal provisions in terms of the LRA upon termination. The protection afforded by section 186(1)(a) of the LRA is thus circumvented.¹⁹¹

Examples of such contracts are fixed-term contracts and contracts that are automatically terminated upon the attainment of retirement age.

¹⁸⁸ See also *SATAWU obo Langa v Zebediela Bricks (Pty) Ltd* 2011 32 ILJ 428 (LC) where the court held that employees who had failed to return to work despite a HC interdict and repeated requests by the employer had no intention of returning and had deserted. The court concluded that this desertion automatically terminated the contracts and the employee's were not dismissed and not entitled to a hearing prior to termination.

¹⁸⁹ Cohen 'Termination of employment contracts by operation of law – Bypassing the unfair dismissal provisions of the Labour Relations Act' 2006 17 (1) STELL LR 97.

¹⁹⁰ Van Niekerk *et al Law@Work* (2015) 234 97.

¹⁹¹ Cohen 'Termination of employment contracts by operation of law – Bypassing the unfair dismissal provisions of the Labour Relations Act' 2006 17 (1) STELL LR 98.

4.1 Fixed-Term Contracts

A fixed-term contract is a contract that is entered into for a specified period of time.¹⁹² Such contract will therefore terminate automatically on the arrival of the date or upon the occurrence of the event on which the parties agreed.¹⁹³

There is however an exception to automatic termination in the case of fixed-term contracts. In terms of the recently amended section 186(1)(b)(i) of the LRA employees are deemed dismissed when they reasonably expected the employer to renew the fixed term contract on the same or similar terms but the employer failed to do so.¹⁹⁴ This is also the case when an employee reasonably expected an employer to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.¹⁹⁵

4.2 Attainment of Retirement Age

Similarly a contract will terminate automatically once an employee reaches the normal or agreed retirement age. Such contract terminates solely by the effluxion of time and will not constitute a dismissal for purposes of the LRA.¹⁹⁶

Whether an employee had indeed reached retirement age is a question of fact and must be determined by taking into consideration the contract of employment, applicable policies and all relevant rules of the retirement fund.¹⁹⁷

In *Evans v Japanese School of Johannesburg*¹⁹⁸ there was no agreed retirement age and staff had generally retired at 65 in the past. The court held that a unilateral decision by the employer to institute a retirement age of 60 and requiring a 63-year-old employee to retire constituted an automatically unfair dismissal based on age.

¹⁹² S 198B of the LRA.

¹⁹³ Grogan *Workplace Law* (2014) 170.

¹⁹⁴ The new amended s 186(1) came into force on the 1 January 2015.

¹⁹⁵ S 186(1)(b)(ii). See also s 190(2)(a) which provides that "if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of *dismissal* is the date on which the employer offered the less favourable terms or the date of employer notified the *employee* of the intention not to renew the contract".

¹⁹⁶ *Schmahmann v Concept Communications Natal (Pty) Ltd* 1997 8 BLLR 1092 (LC). See s 187(2)(b) of the LRA.

¹⁹⁷ Van Niekerk *et al Law@Work* (2015) 235.

¹⁹⁸ (2006) 27 *ILJ* 2607 (LC).

5. Termination due to Impossibility of Performance

In terms of the common law a contract of employment will terminate automatically when it becomes permanently impossible to perform in terms of the contract.¹⁹⁹ Such termination takes place by operation of law and will not constitute dismissal for purposes of the LRA. It is important to note that the impossibility in these circumstances is not due to the fault of either of the parties.²⁰⁰

Supervening impossibility occurs when “performance of the obligation is prevented by superior force that could not reasonably have been guarded against”.²⁰¹

Impossibility of performance may take the form of either physical impossibility or legal impossibility.²⁰²

5.1 Physical Impossibility

Physical impossibility may include *inter alia* the death of the employee which would render performance impossible. Another example is imprisonment of the employee.²⁰³

In *NUM & another v CCMA & others*²⁰⁴ it was held that where an employer cancels a contract of employment after the employee was sentenced to 10 months imprisonment, the ‘acceptance’ of the employee’s repudiation of the contract, in that he will be unable to offer his services as a result of his incarceration, constitutes dismissal for purposes of the LRA.

5.2 Legal Impossibility

Legal impossibility may include a statutory requirement that prohibits an employee from performing or may be a consequence of a legal provision which renders performance impossible.

¹⁹⁹ Cohen ‘The Legality of the Automatic Termination of Contracts of Employment’ (2011) 32 (3) *Obiter* 670.

²⁰⁰ *Ibid.*

²⁰¹ Brassey ‘The Effect of Supervening Impossibility of Performance on Contract of Employment’ 1990 *Acta Juridica* 22 23.

²⁰² Cohen ‘Termination of employment contracts by operation of law – Bypassing the unfair dismissal provisions of the Labour Relations Act’ 2006 17 (1) *STELL LR* 99.

²⁰³ *Ibid.* See s 188 (a)(i) regarding incapacity of the employee.

²⁰⁴ [2009] 8 *BLLR* 777 (LC).

In *FAWU obo Meyer v Rainbow Chickens*²⁰⁵ the commissioner held that the withdrawal of the employees, Muslim Judiciary Council, accreditation to slaughter chickens resulted in supervening impossibility of performance, and that his contract of employment had automatically terminated as a result.²⁰⁶

There is however a certain degree of uncertainty in cases such as these. As noted above, it is required that performance must be permanently impossible to rely on impossibility of performance as a justification for automatic termination of a contract of employment. It may be argued that performance does not really become permanently impossible in cases involving a lack of qualification or certification as it would not be impossible to obtain such qualification or certificate. One would have to consider the nature of the particular business and the extent of the impossibility.

In *PG Group (Pty) Ltd v Mbambo NO*²⁰⁷ the court had to determine whether a decision by the shareholders to remove an employee from office in terms of the company's articles of association constituted a dismissal. The applicant argued that it had no alternative and no discretion but to treat the appointment of the respondent as terminated because the employment was terminated by operation of principle of supervening impossibility of performance.²⁰⁸ The court held that any decision by the shareholders is a decision of the company and therefore it was the decision of the applicant, not its shareholders, to dismiss the employee and it therefore constitutes dismissal for purposes of section 186.²⁰⁹

Similarly in *Chillibush v Johnston & others*²¹⁰ the court considered whether the removal of an employee from the Board of Directors caused employment to terminate automatically.

The court noted that it is not permissible for an employer to contractually negotiate terms of dismissal as this will constitute a contravention of section 5(2)(b) and section 5(4)(12) of the LRA which prohibits parties from agreeing to limit an

²⁰⁵ [2003] 2 BALR 140 (CCMA).

²⁰⁶ See also *Norval v Vision Centre Optometrists* 1995 2 BLLR135 (IC) where it was held that the termination of the contract of employment of an employee lacking the necessary qualifications to practice as an optometrist did not constitute dismissal because the contract became null and void due to illegality.

²⁰⁷ [2005] 1 BLLR 71 (LC).

²⁰⁸ Para 73.

²⁰⁹ Para 74.

²¹⁰ [2010] 6 BLLR 607 (LC).

employee's statutory rights.²¹¹ Limiting an employee's right to protection against unfair dismissal will also be in conflict with the constitutional right to fair labour practices.

The court emphasised the importance of distinguishing lawfulness from fairness and held that even though removal of the employee as director was lawful in terms of the Companies Act that does not mean that the employee no longer has the right to claim dismissal and/or unfair dismissal.²¹²

6. Concluding remarks

Every employee is granted the right to a fair procedure when being dismissed.²¹³ It is my understanding that this right, among others, is an attempt to give effect to the principle of fairness that the LRA aims to achieve in employment relationships. The LRA, in giving effect to the Constitution, aims to establish a fair relationship between employee and employer by requiring that certain steps and requirements need to be adhered to before an employee may be dismissed. Thereby avoiding a situation where employees are dismissed for any reason, which may not be fair, and consequently resulting in major job insecurity.²¹⁴

It would seem that depriving employees of this right, as the provisions discussed in this chapter do, is in direct conflict with very purpose of the LRA and employees' constitutional right to fair labour practices.

I am of the view that these provisions should be applied with caution and only where no other option is available to an employer. Provisions limiting the rights of employees must still be applied in a manner that gives effect to the Constitution as all provisions are subject to constitutional scrutiny. Any limitation of a constitutionally protected right will have to be justifiable in terms of the constitutional limitation clause.²¹⁵

²¹¹ Para 38.

²¹² *Chilibush v Johnston & others* above para 41.

²¹³ S 188(1) of the LRA.

²¹⁴ Achieving greater job security is one of the primary objects of the LRA – Grogan *Workplace Law* (2014) 164.

²¹⁵ S 36(1) of the Constitution.

Chapter 5 – Non-Standard Employment Contracts and the Recent Amendments to the LRA

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Chapter 5 – Non-Standard Employment Contracts and the Recent Amendments to the LRA

1. Introduction

Due to the dynamic nature of the labour market in South Africa it has become apparent that the use of non-standard employment contracts is regarded as a measure to satisfy the immediate needs of employers.²¹⁶ Consequently it has been established that an increase in informalisation of labour in South Africa through the use of “non-standard” employment contracts is the much preferred choice of many employers.²¹⁷

According to Theron “the nature of work has changed radically, and employment in post-apartheid South Africa has been characterised by ‘casualisation’ and ‘externalisation’”.²¹⁸

This “non-standard” employment which includes, *inter alia*, fixed-term contracts, temporary employment services and part-time work are different from standard ‘indefinite contracts’ in that they are concluded for a specified period of time or until the completion of a specified task, after which they may automatically terminate.

It has been argued²¹⁹ that these contacts are preferred by employers because they allow for a greater degree predictability and freedom.

This has complicated the nature of the employment relationship and more importantly the protection afforded to employees in such circumstances. These contracts have far reaching implications for employees as they result in reduced job security, less benefits and unfair treatment with regards to dismissal. It has been argued²²⁰ that the legal scope of employment and employment protection is increasingly out of sync with the reality of working relationships.

²¹⁶ Thoose & Tsweledi ‘A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa’ 2014 (18) *Law, Democracy and Development* 340.

²¹⁷ Van Niekerk *et al Law@work* (2015) 67.

²¹⁸ Theron ‘Employment is not what it used to be’ (2003) 24 *ILJ* at 1271.

²¹⁹ Gericke ‘A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment’ 2011 (14) 1 *PELJ* 105.

²²⁰ Benjamin ‘Beyond “lean” Social Democracy: Labour Law and the Challenge of Social Protection’ 60 (2006) *Transformation* at 35-57.

Chapter IX of the LRA now provides for the regulation of “non-standard” employment.

2. Indefinite contracts

The standard form of the employment contract concluded for an indefinite period is merely a contract that does not specify a date of termination.²²¹ This contract will therefore endure ‘indefinitely’ until it is terminated either by agreement, by giving reasonable or agreed notice, or upon election by one of the parties to terminate the employment relationship due to breach of contract.²²² The contract can also be terminated on another ground accepted in law, for example when an employee is dismissed.²²³ In these circumstances an employee would enjoy full protection under the LRA with regards to dismissal.²²⁴

3. Non-standard employment

The Labour Relations Amendment Bill memorandum²²⁵ notes that policy-makers aim to respond to the ‘increased informalisation of labour’ as mentioned above by ensuring ‘that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work’.²²⁶

The LRAA²²⁷ has specifically identified three categories of persons who are deemed to require improved protection.²²⁸ These include employees placed by ‘temporary employment services (hereafter TES) or labour brokers, fixed-term employees and part time employees’.²²⁹

²²¹ Grogan *Workplace Law* (2014)46.

²²² *Ibid.*

²²³ See s 186 of the LRA.

²²⁴ See s 185 of the LRA.

²²⁵ See the ‘Memorandum of objectives on the Labour Relations Amendment Bill, 2012’ in Gazette 35212 of 5 April 2012.

²²⁶ Van Niekerk *et al Law@work* (2015) 67. See the Memorandum of Objects on Labour Relations Amendment Bill, 2012.

²²⁷ 6 of 2014.

²²⁸ Chapter IX of the LRA.

²²⁹ *Ibid.* See Thoose & Tsweledi ‘A Critique of the Protection Afforded to Non-standard Workers in a Temporary Employment Services Context in South Africa’ 2014 (18) *Law, Democracy and Development* 341.

According to Bosch ‘one of the key features of the 2014 amendments is that they will provide a balance between the interests of employees and those of employers’.²³⁰

This is a notion that will be welcomed in our labour law as it has become apparent that many employers had taken advantage of flexible working arrangements in the past. It is abundantly clear that these ‘non-standard’ employees are not protected as employees are meant to be protected in terms of their constitutional right to fair practices and their right to dismissal protection as regulated by the LRA.

A discussion of some of the above mentioned forms of employment follows.

3.1 Fixed-term contracts

In terms of the LRA a ‘fixed term contract’ means “a contract of employment that terminates on the occurrence of a specified event; the completion of a specified task or project; or a fixed date”.²³¹ Such contract would thus be deemed automatically terminated once the specified period had lapsed or the task had been completed.

There is however an exception to automatic termination in these circumstances. Where an employee reasonably expected that the contract would be renewed on the same or similar terms but it was not done, it will constitute a dismissal.²³²

Fixed-term contracts were initially intended for employers who are vulnerable to economic or seasonal fluctuations.²³³ These types of contracts were however eventually recognised as a ‘loophole’ in legislation that allows an employer to circumvent protections and obligations under the LRA and the Constitution.²³⁴

The use of fixed-term contracts for employees that earn less than the statutory threshold²³⁵ was drastically changed by the 2014 amendments to the LRA.²³⁶ Section 189B provides that an employer may not employ a person on a fixed term

²³⁰ Bosch ‘The Proposed 2012 Amendments Relating to Non-Standard Employment: What will the New Regime Be?’ (2013) 34 *ILJ* 1631.

²³¹ S 198B(1) . Dismissal protection in terms of the amended section exclude fixed-term workers who in earn in excess of the threshold amount of R205,433 per annum as stated in s 6 of the BCEA.

²³² S 186(1)(b) of the LRA. See also the new s 198B.

²³³ Tamara ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ 2014 (35) *ILJ* 2609.

²³⁴ Cohen ‘When Common Law and Labour Law Collide- Some Problems Arising out of the Termination of Fixed-term Contracts’ (2007) 19(1) *South African Mercantile Law Journal* 26.

²³⁵ S 6(3) BCEA.

²³⁶ Grogan *Workplace Law* (2014) 44.

contract for longer than three months unless certain exceptions apply, or the employer is able to provide justifiable reasons for doing so.²³⁷

Where no exception is applicable, and the employer is unable to provide justifiable reasons, the conclusion or renewal of such fixed term contract will be deemed to be of indefinite nature and the ordinary protections against unfair dismissals apply.²³⁸

3.2 Temporary employment services (TES)

The LRA defines a labour broker or TES as “any person who, for reward, procures for or provides to a client other persons – (a) who renders services to, or performs work for, the client; and (b) who are remunerated by the temporary employment service”.²³⁹

An automatic termination clause is a mechanism often used by labour brokers where the services of an employee are no longer required by a client. In other words, the contract between the TES and the employee would state that when the client no longer requires the services of the employee, the contract would automatically come to an end, thus avoiding liability for an unfair dismissal.

The lawfulness of such a provision has extensively been tested by our courts. A discussion of some of these cases follows.²⁴⁰

In *South African Post Office v Mampeule*²⁴¹ the respondent, the CEO and director of the company was employed in terms of a contract which provided that his employment would terminate “automatically and simultaneously” if he ceases for any reason to hold the office of director. The employee was suspended and the board of directors terminated his directorship because of what they alleged was a breakdown in the trust relationship with the employee. His employment was consequently automatically terminated.

The employee instituted action in the Labour Court for breach of contract and an automatically unfair dismissal on the basis that he was dismissed for making

²³⁷ S 198B(3).

²³⁸ S 189B(5).

²³⁹ S 198(1). See also s 82 of the BCEA 75 of 1997.

²⁴⁰ See *Assign Services (Pty) Ltd v CCMA and Others* (JR1230/15) [2015] ZALCJHB 283 (8 September 2015) taken on review in terms of s 198A(3)(b)(i) regarding the interpretation of the deemed employer.

²⁴¹ [2010] 10 BLLR 1052 (LAC).

protected disclosures. South African Post Office Limited (SAPO) argued that Mampeule's removal as a director, and the subsequent automatic termination of his employment contract, did not constitute "dismissal" for purposes of section 186(1)(a) of the LRA. They argued that his contract had terminated *ex lege*, by way of the "automatic termination" clause in his contract.

SAPO's argument was rejected in the court *a quo* on the basis that the "automatic termination" provision relied on by them:

*"...are impermissible in their truncation of 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."*²⁴²

The LC accepted that the "automatic termination" provisions fell foul of the provisions in section 5(2)(b) and section 5(4) of the LRA against the limitation of statutory rights in a contract of employment. The court went further to say that to uphold the "automatic termination" provision would set a dangerous precedent.²⁴³ The court stated that the provisions of the Act would be too easily bypassed by similar terms in the future.²⁴⁴

On appeal to the LAC it was held, in agreement with the court *a quo*, that any act by an employer that directly or indirectly results in the termination of the contract of employment constitutes dismissal.²⁴⁵ The court consequently held that the employee was effectively dismissed by the Minister.

The court went further to state that it is accepted in labour law jurisprudence that lawfulness cannot be equated with fairness and therefore it is not a defence to an unfair dismissal claim that the employee's dismissal was lawful. The court stated as follows:²⁴⁶

"Thus Mampeule, like any other employee, enjoyed the right not to be unfairly dismissed or more appropriately unfairly removed. This is more so since the Act was enacted to give effect to the right to fair labour practices guaranteed in s 23(1) of the Constitution of the

²⁴² *South African Post Office v Mampeule* above para 5. See para 46 of the court *a quo*'s judgment.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

²⁴⁵ Para 12.

²⁴⁶ *Ibid* at (b).

Republic of South Africa Act 108 of 1996. The right not to be unfairly dismissed is not only essential to the enjoyment of this constitutional imperative but is one of the most important manifestations thereof and further forms the foundation upon which the relevant sections of the Act are erected and is consonant with the spirit and the letter of the Act.”

The court held that the rights conferred by section 5 of the LRA must trump the “automatic termination” provision of the contracts.

Section 5(2)(b) provides:

“...no person may do, or threaten to do, any of the following...prevent an employee...from exercising any right conferred by this Act.”

Section 5(4) further provides:

“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 finally held that SAPO had failed to discharge its onus of proving that the “automatic termination” clause prevails over the relevant provisions of the act. The court noted that a heavier onus rests on a party who argues that it is permissible to contract out of the right not to be unfairly dismissed in terms of the Act.²⁴⁷

The court expressed its disapproval of the ability to contract out of the protection against unfair dismissal and explained that this would be *contra bonos mores*.²⁴⁸

In conclusion the court stated that, taking all the facts into consideration, it is clear that SAPO was trying to avoid its obligations under the Act by using the “automatic termination” clause.²⁴⁹

In *Sindane v Prestige Cleaning Services*²⁵⁰ the employee was employed by a labour broker. In terms of their agreement the period of employment between the parties was for a definite period terminating at the termination of the contract between the client and the labour broker.

When the client scaled down its cleaning requirements, the services of the applicant and a colleague were terminated. The applicant claimed that he had been unfairly dismissed. The respondent claimed that his services had terminated according to the

²⁴⁷ *South African Post Office v Mampeule* above para 23.

²⁴⁸ *Ibid.*

²⁴⁹ Para 24.

²⁵⁰ [2009]12 BLLR 1249 (LC).

terms of his fixed-term contract and denied that the applicant had been dismissed. The court had to determine whether dismissal had taken place.

The employee's legal representative argued that the principle applied in the *SAPO*²⁵¹ case should also apply here as this type of contract attempts to deprive employees of their right not to be unfairly dismissed. The court rejected this argument and distinguished the facts of this case from that of *SAPO* on a number of grounds, including that the termination of the contract in the *SAPO* case was directly caused by an act of the employer due to alleged misconduct by the employee and not to the natural expiry of the contract.²⁵²

The Court held that employment contracts may be terminated in a number of ways that do not constitute dismissals as defined in the LRA.²⁵³ These include the expiry of a fixed-term contract after the passage of a specified time or on the happening of a specified event. In such cases, the cause of the termination is not an act by the employer, unless the employer frustrates a reasonable expectation that the contract will be renewed.²⁵⁴

The Court accordingly found that the applicant in this case was not dismissed but that his employment was terminated as a result of the natural expiry of the contract, and not the employer's contribution.²⁵⁵

It is my understanding that these two cases indicate that where an employer directly or indirectly contributes to the termination of a contract, it will be deemed to be a dismissal. However, where employment is terminated as a result of the natural expiration of the contract for example where a client no longer requires the services of an employee, it will be deemed to have terminated automatically and would not constitute a dismissal.

The decision in *Sindane v Prestige Cleaning Service*²⁵⁶ was however criticised in *Nape v INTCS Corporate Solutions (Pty) Ltd*²⁵⁷ where Judge Boda FA opined as follows:

²⁵¹ [2010] 10 BLLR 1052 (LAC).

²⁵² Para 1.

²⁵³ Para 16.

²⁵⁴ *Ibid.*

²⁵⁵ Para 18.

“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.”²⁵⁸

In this case the employee was employed by a labour broker. The client informed the labour broker that the employee had been removed due to alleged misconduct. The labour broker conducted a disciplinary enquiry and issued a final warning, but the client insisted that the employee had to be removed and refused to allow the employee to return to its premises. The broker consequently retrenched the employee, and argued that he had no other choice.

The court commented on the agreement between the labour broker and the client and held that “it is impermissible for parties to structure their relationship in such a manner as to undermine the fundamental guarantees afforded by the LRA, including the right of a TES employee not to be unfairly dismissed”.²⁵⁹

The court held that in applying the right not to be unfairly dismissed, the court will not be bound by contractual limitations created between parties that conflict with the fundamental rights of employees.²⁶⁰

In *Mahlamu v CCMA & others*²⁶¹ the applicant was employed as a security guard in terms of an employment contract which stipulated that it would terminate automatically on termination of the contract between the employer and its client, or if the client no longer required the applicant’s service “for whatsoever reason”. When the client cancelled the security contract, the labour broker informed the applicant that his services were no longer required because it had no alternative position for him.

The commissioner found that, since the client no longer required the applicant’s services, the employment contract between the applicant and his employer had

²⁵⁶ [2009] 12 BLLR 1249 (LC).

²⁵⁷ [2010] 8 BLLR 852 (LC).

²⁵⁸ *Nape v INTCS Corporate Solutions (Pty) Ltd* above para 92.

²⁵⁹ See also *COSAWU obo Nyakazu v Prestige Cleaning Services (Pty) Ltd* (2010) 31 ILJ 1950 (CCMA) where the commissioner held that “such agreements are unenforceable on grounds of s 5 of the LRA which stipulates that any provision in a contract that limits protection granted in terms of the LRA is invalid”.

²⁶⁰ Para 66.

²⁶¹ [2011] 4 BLLR 381 (LC).

terminated automatically, and that the applicant had accordingly failed to prove that he had been dismissed.

On review the Court referred to the case of *South African Post Office v Mampeule*²⁶² with approval and noted that the LRA gives every employee the right not to be unfairly dismissed. The question before the court was therefore whether contracts of the type between the applicant and his employer were permitted by the LRA.

The court held that employers and employees cannot contract out of the protection against unfair dismissal afforded to the employees whether through the device of “automatic termination” provisions or otherwise as a contractual device that purports to render the termination of a contract of employment as 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 the very mischief that section 5 of the Act prohibits.²⁶³

In the recent case of *SATAWU obo Dube and others v Fidelity Supercare Cleaning Services Group (Pty) Ltd*²⁶⁴ the court had to consider the nature and terms of employees’ contracts to determine whether it allowed the respondent (labour broker) to validly terminate employment automatically following termination of its contract with the client.

The contracts of employment provided for the automatic termination thereof upon the termination of the contract between the company (labour broker) and the client.

Upon termination of its contract with the client the respondent issued letters to all the employees advising them of the termination and informed them that their employment would consequently terminate as agreed.²⁶⁵

In the Labour Court SATAWU contended that this constituted dismissal based on operational requirements. They also argued that the dismissal was unnecessary as

²⁶² [2010] 10 BLLR 1052 (LAC).

²⁶³ Para 21 and 22.

²⁶⁴ [2015] JOL 33144 (LC).

²⁶⁵ Para 6.

the contract with Wits had in fact continued on new terms. They argued that the dismissal was unfair.²⁶⁶

The respondents argued that there was no dismissal and that the employment contracts had terminated automatically because of the agreed term of their contracts that had been fulfilled.²⁶⁷

The court noted that the new LRAA²⁶⁸ provides for the regulation of non-standard employment and effectively protects employees who find themselves in a situation similar to that of the applicant.²⁶⁹

The court referred to section 198 (4C) which 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.”²⁷⁰

The court held²⁷¹ that a contractual provision that provides for the automatic termination of the employment contract and undermines the employee’s right to fair labour practices or “that clads slavery with a mink coat” is now prohibited and statutorily invalid.

On the facts the court however held that the dismissal was in fact based on operational requirements but that the applicant could have avoided the dismissal by applying for the position on the new Wits contract.

This case clearly demonstrates the effect of the recent amendments to the LRA in that there is now a duty on TES’s and clients to ensure that all contractual agreements are in compliance with the above authorities and the LRA. It is clear that an employer will no longer be able to simply rely on the provisions of a contract to circumvent protections afforded to employees in terms of the LRA.

²⁶⁶ *SATAWU obo Dube and others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* above para 9.

²⁶⁷ Para 10.

²⁶⁸ 6 of 2014.

²⁶⁹ Para 56.

²⁷⁰ The court noted at para 59 that based on this legislative provision, labour brokers may no longer use commercial contracts to circumvent legislative protections against unfair dismissals.

²⁷¹ Para 59.

4. Concluding remarks

As noted, the purpose of the LRA²⁷² is to “advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary purposes of the Act”, which are to give effect to the fundamental rights contained in the Constitution as well as international obligations.²⁷³

In *NEHAWU v University of Cape Town & others* the Constitutional Court noted that the ‘one of the core purposes of the LRA and section 23 of the Constitution is to safeguard workers’ employment security, especially the right not to be unfairly dismissed’.²⁷⁴

It is my argument that employers have relied on these “non-standard” forms of employment to circumvent the statutory obligations and to justify the differential treatment of employee’s in these circumstances.²⁷⁵ This has resulted in the unfair treatment of a great number of employees in South Africa. These employment scenarios are in direct conflict with the purpose of establishing security in employment which is central to the principle of fair labour practices as well as decent work.²⁷⁶

It has been argued²⁷⁷ that fixed-term-, part-time- and TES employees have been deprived of all four pillars of decent work²⁷⁸ through commercial exploitation and that they have consequently been rendered vulnerable and insecure.

It is clear that the recent amendments to the LRA with regards to “non-standard” employment have brought about some positive changes. The impact of these new provisions is however yet to be seen as it will largely depend on the effective implementation and protection thereof.²⁷⁹

²⁷² 66 of 1995.

²⁷³ S 1 of the LRA – my emphasis.

²⁷⁴ (2003) 24 *ILJ* 95 (CC) para 42.

²⁷⁵ Cohen ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ 2014 (35) *ILJ* 2621.

²⁷⁶ *Ibid.*

²⁷⁷ Cohen ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ 2014 (35) *ILJ* 2622.

²⁷⁸ See Chapter 2.

²⁷⁹ *Ibid* fn 277.

Benjamin²⁸⁰ states that these amendments are an attempt to achieve regulated flexibility through reconciling the principles of equity and efficiency. Thus, in my understanding, allowing for the freedom and predictability that ‘non-standard’ employment provides, only now subject to some conditions and requirements.

It is however argued²⁸¹ that this is still far from what the ILO envisioned in terms of “decent and productive work for women and men in conditions of freedom, equity, security and human dignity”.²⁸²

²⁸⁰ Benjamin ‘Labour Law Beyond Employment’ 2012 *ActaJuridica* 21 at 31.

²⁸¹ Cohen ‘The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships’ 2014 (35) *ILJ* 2622.

²⁸² Decent Work: Report of the Director General’ ILO Conference 87th Session (Geneva 1999) <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

Chapter 6 – Conclusion

Every employee has the right not to be unfairly dismissed.²⁸³ The LRA also guarantees every employee the right to a fair process prior to dismissal.²⁸⁴ Provisions, whether contractual, in terms of legislation or the common law, which provide for the automatic termination of employment contracts result in the circumvention of the protections afforded by the LRA.

Depriving employees of these protections is clearly in conflict with the purpose of the LRA and an employee's constitutional right to fair labour practices. It has been established²⁸⁵ that the concept of "fair labour practices" is not defined in the constitution and it is argued that this is so because it was intended to be a flexible concept which could be interpreted in a manner so as to give effect to the principle of fairness in each individual case.²⁸⁶

It has become abundantly clear that the principle of fairness is at the heart of what South African labour law attempts to achieve. Fairness is a concept that is premised on the particular circumstances of each case.²⁸⁷ Fairness will have to be determined having regard to the inherently unequal relationship which is the employment relationship and the conflicting rights and interests of the employer and the employee.

Even though labour legislation is enacted to give effect to the rights contained in the constitution, the Constitutional Court in *NEHAWU v University of Cape Town*²⁸⁸ explained that the constitutional right to fair labour practices is a concept much wider than what is given effect to in the by LRA. It is thus possible that regulation by labour legislation will not always be exhaustive in giving effect to the constitutional right to fair labour practices.

²⁸³ S 185(a) of the LRA.

²⁸⁴ S 188(1).

²⁸⁵ *NEHAWU v UCT* 2003 24 *ILJ* 95 (CC) para 33.

²⁸⁶ Cohen 'Termination of Employment Contracts by Operation of Law – Bypassing the Unfair Dismissal Provisions of the Labour Relations Act' (2006) 17 (1) *STELL LR* 101.

²⁸⁷ *Ibid.*

²⁸⁸ 2003 24 *ILJ* 95 (CC).

It has been established that the Constitution is the supreme law of the Republic of South Africa and all laws are subject to constitutional scrutiny to ensure the effective protection of rights of both the employer and employee.²⁸⁹

It can therefore be concluded that any provision, legislative or contractual, which unfairly prejudices employees will most likely not pass the fair labour practices ‘test’, unless it can be shown that it is a justifiable limitation in terms of section 36(1) of the Constitution.

The Constitution provides that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.²⁹⁰ Everyone also has a right to human dignity which includes the right to have their dignity respected and protected.²⁹¹

It is my opinion therefore that these provisions resulting in the automatic termination of employment contracts are subject to constitutional scrutiny irrespective of what is provided for or not provided for in the LRA. Even though the protective provisions of the LRA with regards to unfair dismissal are effectively circumvented by these automatic termination provisions, it can be argued that they are still subject to the constitutional ‘test’ of fair labour practices.

I am of the opinion that these statutory and contractual provisions should be applied with caution and should only be allowed in circumstances where the employer has no other option.

It is my submission that a Code of Good Practice on handling automatic termination of employments should be drafted to provide for the ‘gaps’ that are left in respect thereof by legislation.

²⁸⁹ S 2 of the Constitution.

²⁹⁰ S 9(1).

²⁹¹ S 10 of the Constitution.

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AJ	Acta Juridica
BALR	Butterworths Arbitration Labour Reports
BCEA	Basic Condition of Employment Act
BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation Mediation and Arbitration
CLL	Contemporary Labour Law
EEA	Employment Equity Act
Fn	Footnote
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
Para	Paragraph
PELJ	Potchefstroom Electronic Law Journal
PSA	Public Services Act
S	Section
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review