

FIXED TERM EMPLOYMENT CONTRACTS: THE PERMANENCE OF THE TEMPORARY

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1 Introduction

Fixed term contracts are usually associated with the completion of a certain task or with replacing another employee in his or her absence. Once the task has been completed or the temporarily replaced employee has returned, the employer will have no use for the fixed term employee. It is unlikely in these situations that such an employee can claim a legal entitlement to have the contract renewed on a permanent basis.

When the envisaged task takes longer to complete than was originally foreseen, or the temporarily replaced employee is unable to work for a longer time than originally envisaged, it is not unusual for the fixed term contract to be renewed for an additional, finite period of time. If the motivation for a fixed term contract is not the completion of a certain task or acting as temporary replacement, an employee may in certain circumstances insist that the fixed term contract be converted to a contract of indefinite or permanent duration.

The employee on a fixed term contract normally has very little prospect of promotion, and is normally not granted the same benefits (including medical aid or pensions) that other employees in that workplace are entitled to. Most importantly, the fact that, in the absence of a tacit term or legitimate expectation to the contrary, a fixed term contract automatically expires when the period contracted for comes to an end means that such an employee enjoys very little job security. These disadvantages for the employee can translate into advantages for the employer. First, the employer can save costs on contributions to pension funds and other social security obligations. Second, by simply failing to renew a fixed term contract when the expiration date is reached, the employer need not go through what can become onerous, time-consuming and even costly procedures that are required by the law when dismissing employees. It is a well-documented fact that employers enter into fixed term contracts of employment for these rather unsavoury reasons.¹ Section 186(1)(b) of the Labour Relations Act² provides some protection against this type of exploitation.³ The common law principles pertaining to the law of contract can also be utilised by fixed term employees to provide protection against exploitation by the employer.

¹ See for example the judgement of Revelas J in *Biggs v Rand Water* 2003 24 ILJ 1957 (LC) 1961A.

² 66 of 1995.

³ The provision reads as follows:

s 186 (1) 'Dismissal' means that – ...

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it...?.

The purpose of this article is to demonstrate that the often-stated contention that section 186(1)(b) of the Labour Relations Act (the Act) makes changes to the common law with regard to factors or circumstances that give rise to a right to renewal is incorrect.⁴ The reason for this is that what an aggrieved fixed term employee needs to prove in order to have his or her contract renewed (usually for an indefinite period), irrespective of whether the claim is based on common law or the Act, is essentially the same. The outcome is always determined by an application of the principles of fairness or reasonableness. A subjective belief or expectation based on an objectively reasonable interpretation of the state of affairs, in the light of the conduct of the employer in the surrounding circumstances, gives rise to a right of renewal in terms of both the common law⁵ and in terms of section 186(1)(b) of the Act.⁶ Whether a failure to renew a fixed term contract under certain circumstances is construed as an unfair dismissal in terms of the Labour Relations Act, or whether it is construed as a material breach of contract in terms of the common law, it essentially amounts to the same thing. An unfair dismissal is a material breach of contract. As is discussed herein, the remedies in terms of the Act and the common law are also the same, bar the cap on the amount of compensation allowable in terms of the Act.

Second, the purpose of this article is to demonstrate that a claim for renewal of a fixed term contract on a permanent basis should be possible in terms of the Act if the surrounding circumstances justify it.

2 The common law

2.1 Introduction

At common law, a fixed term contract of employment automatically comes to an end on expiration of the period stipulated in the contract unless the parties tacitly or expressly agree to renew it.⁷ The discussion that follows concerns the tacit agreement to renew a fixed term contract. In the discussion, the meaning ascribed to a tacit term is what the parties either probably intended, or what they would hypothetically have stated their intention to be, had a bystander asked them what the position would be in a specific situation.⁸

2.2 The *Moorcock* doctrine

Bowen LJ became the creator of this widely adopted doctrine when he stated:⁹

⁴ Olivier "Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments" 1996 17 *ILJ* 1001 1035 states: "There may be circumstances where the common law would not provide a remedy – such as where the employee does not have a right to the renewal of a contract. In such a case the Act might come to the rescue of the employee, if it could be shown that the non-renewal amounted to an unfair dismissal."

⁵ The discussion on the common law below demonstrates that the existence of a tacit term to renew a fixed term contract is derived from the objective "reasonable man test" in terms of which the employee must prove that a reasonable person in his shoes would expect the contract to be renewed.

⁶ Grogan *Workplace Law* 8 ed (2005) 110-111 states: "The notion of reasonable expectations clearly suggests an objective test: the employee must prove the existence of facts which would lead a reasonable person to expect renewal."

⁷ *Brassey Employment and Labour Law* 3 (1999) A8:9.

⁸ *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 25 *ILJ* 1024 (W) 1031 A.

⁹ *The Moorcock* [1889] 14 PD 64 (CA) 68.

“Now an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.”

The *Moorcock* doctrine has been utilized on numerous occasions by the South African courts.¹⁰ As noted by Vorster, the South African courts have in general interpreted Bowen LJ’s words – with reference to the parties’ intentions – literally, and have “accordingly considered the doctrine to be relevant to the implication of terms *ex consensu*.”¹¹ It is generally accepted that the South African courts have no power to imply terms in fact other than on the basis of the actual intention of the parties.¹² Nevertheless, the doctrine has been applied in order to determine the actual, subjective intention of the parties as well as their imputed intention in the sense that the parties would have included the term sought to be implied if they had been alerted to the eventuality they face now at the time of entering into the contract.¹³ Therefore the meaning of the phrase *ex consensu* includes both an actual intention and also an imputed intention.¹⁴ The hypothetical officious bystander test is the standard test that is generally applied in South Africa for the implication of terms in fact based on the parties’ imputed intention.¹⁵ Generally, the question asked in the application of this test is how the parties themselves would have responded to the hypothetical question posed at the time of entering into the contract.¹⁶ The case law in support of this contention indicates that even if the parties

¹⁰ Vorster “The Bases for the Implication of Contractual Terms” 1998 *TSAR* 161 169.

¹¹ Vorster 1998 *TSAR* 161 169; Kerr *The Principles of the Law of Contract* 6 ed (2002) 355-357.

¹² Kerr *Contract* 355.

¹³ 356-359.

¹⁴ Vorster 1998 *TSAR* 172.

¹⁵ Kerr *Contract* 356 states: “The standard test for discovering what was in the minds of the parties is that of the hypothetical bystander, sometimes described as officious...”

¹⁶ See *Administrator (Transvaal) v Industrial Commercial Timber & Supply Co* 1932 AD 25 33 where Wessels ACJ stated: “Are we to consider the intention of the particular individual who enters into the contract? Suppose that he asserts: ‘I thought of this matter but I purposefully made no mention of it, because I thought that by keeping quiet I might avail myself of the fact that the term was not mentioned in the contract.’ Are we to say that this concludes the matter and that therefore the term cannot be implied? In my opinion the Court is not bound to accept his assertion. The Court is to determine from all the circumstances what a reasonable and honest person who enters into such a transaction would have done, not what a crafty person might have done who had an *arrière pensée* to trick the other party into an omission of the term. The transaction must be regarded as a normal business transaction between two parties both acting as reasonable business men.” This *dictum* indicates that there may be situations where the application of the two tests may render different results. However, in this case Wessels ACJ stated that the enquiry should be as to the conduct of a reasonable and honest business man. Perhaps it would have been preferable to assert that a reasonable man would not be dishonest and on that basis the result would be the same, no matter which test was applied.

had not considered the situation at the time of entering into the contract, the term can be implied as being their common intention if, had they been alerted to the situation, their response would have been “prompt and unanimous”.¹⁷ This is similar to saying that the term is so obvious that its inclusion “goes without saying”.¹⁸ The artificiality of reference to the subjective intentions of the parties is often manifest.¹⁹ The practical obstacles of ascertaining with certainty what the true intention of the parties was, are obvious. In light of the fact that in applying the officious bystander test the parties are presumed to be reasonable and honest, an unreasonable and dishonest intention will not be imputed to the parties.²⁰ Therefore the imputed intention need not necessarily coincide with the true intention of one of the parties to the contract or even both of them. Consequently, the intention of the parties is often what a judge decides it was in order to achieve what the judge considers to be the fairest result possible in the circumstances.

The concept of the reasonable man, of course, is beyond precise definition. The concept is also not static because what society considers acceptable conduct can differ from one decade to the next. Secondly, what is considered to be reasonable can differ from one individual to the next. Ultimately, what is reasonable either depends on the judge’s conception thereof, or on the judge’s conception of what society in general considers reasonable.²¹ Since the presumed intention of the parties is determined with reference to what the judge considers to be reasonable in the circumstances, any attempt to deny the application of policy considerations by the courts when implying terms into contracts is artificial. This is especially true in light of the fact that a reasonable man is generally considered to be fair and honest.²² In applying the officious bystander test in *Wilkins NO v Vogens*,²³ Nienaber JA stated that one is entitled to assume that the parties to the contract are honest and without hidden motives and reservations.²⁴

However, there is overwhelming authority to the effect that reasonableness alone is insufficient to convince a court to imply a term.²⁵ It is opined by some that the fact that the suggested term would have been a reasonable one for the parties to adopt or that its inclusion would prevent inequity or hardship to one of the parties alone, is not sufficient justification for incorporation of the term into the contract.²⁶ In *MV Prosperous Coban NV v Agean Petroleum (UK)*

¹⁷ *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W) 236H-237A.

¹⁸ Compare this with the English case of *Ali v Christian Salvesen Food Services Ltd* [1995] IRLR 624.

¹⁹ Vorster 1998 TSAR 170-172.

²⁰ *Administrateur (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25.

²¹ As was correctly observed by Lord Ratcliffe in *Davis Contractors v Fareham UDC* [1956] AC 696 728: “The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself.”

²² The reference to “fair and reasonable men” by Lord Watson in *Dahl v Nelson* (1881) 6 App Cas 38 59 and the reference to “a reasonable and honest business man” by Wessels AJA in the South African case of *Industrial Commercial Timber & Supply Co* 1932 AD 25 33 (my emphasis) lends support to this proposition.

²³ 1994 3 SA 130 (A) 141C-E.

²⁴ See also *Administrateur (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25 33.

²⁵ *Kerr Contract* 364 n 195.

²⁶ 364.

*Ltd.*²⁷ Scott AJA held that for a term to be implied it must not only be reasonable but it must also be *necessary* in the light of the presumed intention of the parties, and it must be obvious and capable of precise definition.

The criterion of necessity or business efficacy need not necessarily be fulfilled in order to imply a term on the basis of the intention of the parties.²⁸ In *Minister van Landbou-Tegniese Dienste v Scholtz*,²⁹ a term which was not necessary to render the contract efficacious, was implied on the basis of the actual intention of the parties. Whether the same applies if the term is implied on the basis of an imputed intention is unclear. Irrespective of whether this is the case or not, the practical result will in all probability be the same: If the surrounding circumstances indicate that it would be reasonable to infer a certain intention, it is likely that the term is necessary for business efficacy. Conversely, the fact that in ascertaining an imputed intention reference is had to the surrounding circumstances necessarily implies that if the term is necessary for business efficacy this in all probability indicates the existence of an imputed intention. The application of the officious bystander test to a situation concerning the non-renewal of a fixed term contract bears this out: If, for instance, the fixed term employee was employed in order to complete a certain finite task and the task was not yet complete on the expiration of the period stipulated in the contract, it would be necessary to imply a term that the contract be renewed in the interests of business efficacy. In addition, given the fact that the contracting parties are presumed to be reasonable, it would not be unjustifiable to conclude that, if asked, the parties would respond that it is so obvious in the circumstances that it goes without saying that the contract should be renewed. As pointed out by Vorster,³⁰ the officious bystander test is manipulated by the presumption that the parties to the contract are reasonable men. In this way the court can disregard objections which the party who would be disadvantaged by the implied term may raise. In fact, application of the criterion of reasonableness serves to give a rational interpretation to the contract, to give it business efficacy and to give effect to reasonable expectations of the parties.³¹

2 3 The doctrine of quasi-mutual assent and estoppel

According to Vorster, another basis for the implication of terms in South African law is to give effect to the reasonable expectation of one of the parties that the other had accepted a certain obligation.³² The author goes on to point out that it is possible that, where a term does not satisfy the requirements of the officious bystander test, which is the standard test for the implication of

²⁷ 1966 2 SA 155 (A) 163G-H.

²⁸ *Kerr Contract* 368-370; See also the English case of *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521. Since the real intention of the parties was ascertained, it was not relevant whether or not the term was necessary to accord the contract business efficacy.

²⁹ 1971 3 SA 188 (A); Vorster 1998 *TSAR* 170-171.

³⁰ Vorster 1998 *TSAR* 171.

³¹ See *inter alia* the case of *Van den Berg v Tenner* 1975 2 SA 268 (A) where the application of the *Moorcock* doctrine rendered the same result as the process of giving a rational construction to the contract.

³² Vorster 1998 *TSAR* 161.

terms in fact in South Africa, it can still be implied on the basis that one of the parties had a reasonable expectation that the other party was under a certain obligation.³³ In other words, where no intention can be imputed to a party, it may still be possible to successfully argue that the party, by its conduct, created a reasonable expectation that it intended to be bound by the term sought to be implied. If the party seeking to imply the term can demonstrate a subjective belief (although objectively determined) that the other party intended to be bound by the term sought to be implied, the other party will be precluded from denying such intention.

Applied to the context of fixed term contracts, this means that if an employee has a reasonable expectation that the contract should be renewed, a tacit undertaking to that effect by the employer will be implied into the contract. An employer's conduct can create this reasonable expectation and therefore amount to a tacit undertaking or implied term to *inter alia* renew a fixed term contract.

For example, in *FAGWU v Lanko Co-operative Ltd*³⁴ the old Industrial Court held that the employer had by its conduct given all the farm workers who returned at the beginning of the season a tacit undertaking to re-employ them. The basis of the finding was that the employer's conduct in the past, which represented its normal custom and practice, had created a reasonable expectation of re-employment amongst the labourers. Thus, the employer's conduct had created a subjective expectation in the minds of the employees which was objectively reasonable. Alternatively, or negatively stated, if an employer conducts itself in a manner that creates reasonably held expectations on the part of its employees, it will be precluded from denying these expectations. In *Coop v SA Broadcasting Corp*³⁵ this rule was referred to as the "doctrine of quasi-mutual assent".³⁶ In this case, the medical scheme rules entitled retired employees to continue as members of the scheme indefinitely if they so wished. The employer subsidized this benefit at the same rate as for all other employees, namely 60%. When the employer unilaterally withdrew these subsidies, the retirees brought an application to the High Court for relief. The employer contended that the subsidy was a gratuity and not a term of the contract of employment. The Court held that in the absence of evidence as to whether this was a condition of service, the doctrine of quasi-mutual assent was applicable and that a clear and implied term had been established by the plaintiffs. Consequently, the Court held that the plaintiffs were entitled to continue as members of the medical aid scheme post retirement as a condition of service on the same basis as other employees.

The employer took this decision on appeal to the Supreme Court of Appeal.³⁷ The appeal court upheld the finding of the court *a quo*. However, the basis of this finding was the doctrine of estoppel or ostensible authority as opposed to that of "quasi mutual assent". The Court held that even though the employer

³³ 161.

³⁴ 1994 8 BLLR 81 (IC).

³⁵ 2004 25 ILJ 1933 (W).

³⁶ This doctrine was also applied in *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 All SA 343 (SCA).

³⁷ *SA Broadcasting Corp v Coop* 2006 27 ILJ 502 (SCA).

had not given its senior officers or management employees actual authority to implement this scheme, the employer had created a façade of regularity and approval of the scheme. Furthermore, the Court found that the essentials of estoppel – namely, that the person relying on estoppel was misled by the person sought to be held liable, that the person who acted on his or her behalf was authorized to do so, that such belief was reasonable, and that the representee acted on this belief to his or her detriment or prejudice – had all been met.³⁸

The fact that the Supreme Court of Appeal found in favour of the employees on the basis of estoppel instead of the doctrine of quasi mutual assent, as the court *a quo* had done, may be significant: The bulk of authority seems to favour the view that in order to succeed in a claim based on estoppel, detriment or prejudice as a result of the reliance must be proved.³⁹ In contrast, this is not necessary if the claim is based on a legitimate expectation or the doctrine of quasi mutual assent. In the context of a fixed term contract that is not renewed, the employee will normally be in a position to prove that he or she has suffered a detriment as a direct result of the failure to renew the contract. The fact remains however, that our courts have recognized and applied the doctrine of quasi mutual assent. Therefore, in terms of the common law, an employee who has a subjective belief or expectation based on an objectively reasonable interpretation of the state of affairs in the light of the conduct of the other contracting party (in the surrounding circumstances) that the fixed term contract will be renewed, can enforce that expectation on the basis of the doctrine of quasi mutual assent⁴⁰ or estoppel. Whether or not it is objectively reasonable to entertain the subjectively held expectation or belief, is ultimately the determinant factor in ascertaining the existence or otherwise of a tacit or implied term.⁴¹ Therefore, the courts will have to determine what is reasonable in the circumstances.

Once again therefore, the concept of the reasonable man is the vehicle whereby a term is implied. Clearly, what a reasonable man will do in a hypothetical situation in the opinion of a judge, will be influenced by considerations of public policy. Inevitably, despite rhetoric to the contrary, the ensuing result will be whatever the judge considers reasonable in the circumstances.

Although judges are constrained by precedent, custom, public opinion and the general morality of the community,⁴² the outcome of a case ultimately depends on the judge's interpretation of what is fair and reasonable.⁴³ Judges have been known to apply patently artificial techniques of construction in

³⁸ *SA Broadcasting Corp v Coop* 2006 27 ILJ 502 (SCA).

³⁹ *Peri-Urban Areas Health Board v Breet NO & Another* 1958 3 SA 783(T).

⁴⁰ Vorster 1998 TSAR 161-163.

⁴¹ The discussion below demonstrates that this is exactly what is required to succeed on the basis of s 186(1) of the LRA.

⁴² Judges have to provide coherent reasons that appear to be logical and principled to justify their decisions.

⁴³ Dimatteo "The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment" 1997 *South Carolina LR* 294 343-353 for a comprehensive explanation of the reasons for the inevitability of the fact that the subjective opinions of the judiciary have a role to play in the implementation of the reasonable man test.

order to arrive at a result that they consider fair or to avoid an outcome that they consider to be unfair.⁴⁴

The open admission that judges can and do make law because it is inevitable that their decisions are tainted by subjectivity is anathema to those who still adhere strictly to the principles of the classical theory of contract of the nineteenth century. One of the main criticisms leveled against the application by judges of vague and abstract notions such as reasonableness and fairness, is that it introduces unacceptable levels of uncertainty and unpredictability into the law. Since the viable participation in commercial activities is to some extent dependent on certainty and predictability of the law, a system that allows judicial discretion, according to this view, is unacceptable.

There are two simple answers to this objection. First, subjectivity is inevitable, but it is constrained by precedent, custom and the general sense of morality of the community.⁴⁵ Second, a law based on reasonableness, fairness, precedent and morality in general, is likely to be predictable, certain and fair.⁴⁶ Court decisions are most likely to be predictable and uniform because these characteristics, *inter alia*, render judgments acceptable and justifiable. Since judges have to justify their decisions, they are likely to endow their decisions with these characteristics.

The illusion of contractual consent, and the fiction of the imputed intention, should be abandoned. The courts should openly admit to the application of considerations of fairness and reasonableness as is the case in civil jurisdictions. This will prevent the contortions that judges indulge in to camouflage the real impetus for their decisions. If judges hide behind these fictions, the law is prevented from developing new principles because these principles remain obscured and unarticulated.⁴⁷

2.4 Reasonableness and fairness in the employment contract

Admittedly, the concept of “reasonableness” is difficult to define and give precise content to. Nevertheless, the courts have had to determine what “a reasonable person” would do in certain circumstances. Despite the vagueness and uncertainty of the concept of the implied term of mutual trust and confidence, the (then) Appellate Division⁴⁸ has acknowledged that it is part of the *naturalia contractus* of all contracts of employment in terms of South African law.⁴⁹

The implied term of mutual trust and confidence in contracts of employment – combined with the constitutional imperative of the courts to develop

⁴⁴ Robertson “The Limits of Voluntariness in Contract” 2005 *Melbourne University LR* 205-206.

⁴⁵ Vorster 1998 *TSAR* 181 advocates the abandonment of the *Moorcock* doctrine. He is of the view that if terms are implied in law, the application of considerations of reasonableness and public policy is likely to be constrained: He argues: “A judge who knows that he is creating a precedent is more likely to proceed with caution than one who thinks he will avoid the tentacles of the doctrine of precedent by purporting to base his decision on factors uniquely relevant to the case before him”.

⁴⁶ Dimatteo 1997 *South Carolina LR* 302; 343.

⁴⁷ Vorster 1998 *TSAR* 177-178.

⁴⁸ Now referred to as the Supreme Court of Appeal.

⁴⁹ *Council for Scientific and Industrial Research v Fijen* 1996 17 *ILJ* 18 (A).

the common law in line with constitutional principles⁵⁰ – add impetus to the argument that, in determining whether or not a tacit term to renew a fixed term contract exists, reference must be made to the principles of reasonableness and fairness. In *Grobler v Naspers Bpk*,⁵¹ the Court extended the common law rule of vicarious liability, on the basis of vague concepts such as “policy considerations”, and “the legal convictions of the community”. The employer’s vicarious liability was extended to include an employer’s liability for sexual harassment by its employees. The Court held that, in its duty to develop and adapt the common law, it must keep abreast with changing socio-economic circumstances and should extend the common law on the basis of policy considerations where the law is not sufficiently flexible to cater for altered social and economic circumstances. This decision was upheld on appeal, where Farlam JA reiterated that the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace, and if the employer fails to do so that it must compensate the victim for harm caused thereby.⁵² *NK v Minister of Safety & Security*⁵³ is another case in point. Three policemen took turns to rape a twenty-year-old woman. The Constitutional Court, on the basis of the principles embodied in the Constitution, extended the common law scope of the principle of vicarious liability and found the employer vicariously liable for the criminal acts of its employees despite the fact that their actions constituted a clear deviation from their duties. These decisions demonstrate that, in deciding whether or not a tacit agreement or term exists, or whether to oblige an employer to renew a fixed term contract despite an express provision that there shall be no expectation of such renewal, judges have to give content to vague concepts such as reasonableness and fairness. The implied term of mutual trust and confidence and the constitutional imperative to develop the common law in line with the spirit, purport and object of the Bill of Rights should inform these decisions.

2.5 Express term prohibiting renewal

The general rule is that an implied term cannot take precedence over an express term.⁵⁴ It follows that in circumstances where the fixed term contract contains a clause to the effect that the employee shall have no expectation of renewal whatever the circumstances, it seems that there is no possibility of the implication of a tacit term to the effect that the contract will be renewed.

However, in *Johnstone v Bloomsbury*,⁵⁵ where the court was faced with a term implied in law which conflicted with an expressed term, the Court gave precedence to the implied term. The facts of this case are as follows:

⁵⁰ Section 39(2) of the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. Despite the vagueness of the concepts embodied therein, the courts have been able to fulfil and give content to this constitutional imperative.

⁵¹ 2004 25 ILJ 439 (C).

⁵² *Media Ltd 24 v Grobler* 2005 26 ILJ 1007 (SCA) para 68.

⁵³ 2005 26 ILJ 1205 (CC).

⁵⁴ *Lynch v Thorne* [1956] 1 WLR 303 306.

⁵⁵ [1992] QB 333.

Dr Johnstone was employed by Bloomsbury Health Authority as a senior house officer in the obstetric department of University College Hospital in London. In terms of clause 4(b) of the contract of employment, Dr Johnstone was required to work a forty hour week. In addition to those forty hours he was obliged to be available on call for up to an average of an additional forty eight hours per week over a specified period. The pay for this overtime was “somewhat unusually not at a higher rate than the basic pay, but at one-third of this rate.”⁵⁶ Dr Johnstone worked for more than eighty eight hours a week for some weeks. As a result of the consequent sleep deprivation he became ill. Dr Johnstone alleged, *inter alia*, that the Health Authority was in breach of an implied duty to take reasonable care of his safety as an employee.

In response to counsel’s assertion that an express term must prevail over an implied term, Stuart-Smith LJ stated:⁵⁷

“But this is not an implication that arises because it is necessary to give business efficacy to the contract as in *The Moorcock* (1889) 14 PD 64; it arises by implication of law.”

Perhaps the motivation for this view that a term implied in law as opposed to a term implied in fact (on the basis of the *Moorcock* doctrine), can prevail over an expressed term is founded on the fact that one of the criteria listed in the *BP Refinery* case⁵⁸ for the implication of terms in fact is that the term sought to be implied does not conflict with an expressed term. As far as terms implied in law are concerned, the courts have not (to my knowledge)⁵⁹ expressed the view that, in order to be implied, the term should not conflict with an expressed term. It is likely that this has not been done for the simple reason that it goes without saying that an express term takes precedence over an implied term. Although conceding that “an express clause in a contract of employment could be so framed as to limit or exclude the implied term”,⁶⁰ Stuart-Smith LJ was of the view that this was not the case in the circumstances before the Court, and that the express and implied terms could co-exist. Nevertheless, although not spelled out in so many words by Stuart-Smith LJ, it is clear that the co-existence is only possible if the employer’s rights in terms of the express term are exercised with due regard to the employer’s duties in terms of the implied term. In short, the implied term was given precedence over the expressed term.

Stuart-Smith LJ took the view that the alleged breach of the implied term that the employer is obliged to take reasonable care of the safety of its employees, was not incompatible with the express term contained in clause 4(b) of the contract of employment. He reasoned that the employer’s right to expect Dr Johnstone to work those overtime hours was to be exercised having due regard to its (the employer’s) implied duty to take reasonable care of the safety of its employees. In other words, the employer’s right as per expressed

⁵⁶ Per Stuart-Smith LJ 340.

⁵⁷ 343.

⁵⁸ *BP Refinery (Westernport) (Pty) Ltd v Hastings Shire Council* (1977) 52 ALJR 20.

⁵⁹ Although the *Moorcock* doctrine is now generally taken to apply to terms implied in fact, it was held in some of the older cases that the citation of Bowen LJ is also applicable to terms implied in law as legal incidents. See in this regard *inter alia*, *Young v Hoffman Manufacturing* [1907] 2 KB 646 (CA) 652-653;

⁶⁰ [1992] QB 333 343.

term, although not declared invalid, could only be exercised provided such exercise did not encroach on Dr Johnstone's rights as per the implied term. Since there was no obligation on the employer to make Dr Johnstone work eighty eight hours per week, Stuart-Smith LJ reasoned, the expressed term was not incompatible with the implied term. The following analogy was made:⁶¹

"If these were the hours of a contract of a heavy goods driver, and he fell asleep at the wheel through exhaustion and suffered injury ... the employee would have a good claim against his employer for operating an unsafe system of work."

Sir Nicolas Browne-Wilkinson concurred with Stuart-Smith LJ. In his view, if the contract had imposed an "absolute obligation"⁶² on Dr Johnstone to work an additional forty eight hours on average per week, there could be no breach of the implied term on the part of the employer. However, since the employer has a discretion as to how many hours overtime, if any, Dr Johnstone should work, the implied term is not incompatible with the expressed term.

Leggatt LJ delivered a dissenting judgment. Although he expressed the view that "it may indeed be scandalous that junior doctors should not now be offered more civilised terms of service in our hospitals",⁶³ he concluded simply that "as a matter of law, reliance on an express term cannot involve breach of an implied term."⁶⁴

All three judges however, were of the view that it would be inappropriate to base their decisions on public policy, and expressed the view that the courts should exercise restraint in basing decisions on public policy.⁶⁵ One cannot help but wonder whether the majority judgments were not in reality motivated by the judges' sense of justice, since the practical outcome of the decision was that the implied term prevailed over the expressed term.

In *Erasmus v Senwes Ltd*,⁶⁶ the Court held that employer prerogative provided for in terms of an express term in the contract could not be exercised in an unfettered manner, but that the power to amend the contract was subject to the standard of reasonableness. The applicants in this case were all former employees of Senwes. Upon retirement, they continued to be members of a medical scheme towards which Senwes made contributions on behalf of the retirees. During the previous few years Senwes had made a number of unilateral changes to the structure and amounts of the subsidies which it contributed. In November 2004, Senwes decided to reduce the amount of subsidies payable to the applicants. The applicants sought, as a matter of urgency, orders restraining Senwes from implementing its decision. The Court found that Senwes was contractually bound, in terms of the contracts of employment between itself and the applicants, to make contributions on their behalf towards the medical scheme. Furthermore, on retirement Senwes gave each

⁶¹ 434.

⁶² 350.

⁶³ 348.

⁶⁴ 349.

⁶⁵ 346-347, 348, 349.

⁶⁶ 2006 27 *ILJ* 259 (T).

applicant a letter wherein it unequivocally stated that it would continue to pay the subsidy. In fact, Senwes continued to pay these subsidies even when it faced difficult financial times.

The contract, however, provided that Senwes's board of directors and management could amend any of the terms of the employment contract without notice to, or the consent of, the applicants. Regarding this term, Du Plessis J held that Senwes's power to amend its own obligations to subsidise medical schemes would only be objectionable if such power rendered the obligation uncertain and therefore unenforceable. He concluded that it was not objectionable because the power was not unfettered and it was subject to an objective standard. He explained that, since all contracts are subject to the principles of good faith and that parties should as far as possible be held to their contracts, the rule that discretion must be exercised *arbitrio boni viri* should apply.⁶⁷ Applied to this case, Du Plessis J concluded that it meant that Senwes was obliged to exercise its discretion reasonably. After having referred to relevant precedent, Du Plessis J found that since the concept of reasonableness is so settled in our law it can readily be used, and is used as an objective and justiciable standard by a court. Consequently, he held that Senwes's power to amend the contract was not unfettered and was subject to the standard of reasonableness. He held that reasonable exercise of a power or discretion to amend a contract signifies that the party vested with such power must take into account the rights and interests of all the parties to the contract⁶⁸ bearing in mind the nature and content of the original contractual obligation.⁶⁹ Senwes was found not to have done this and consequently to have breached the contract between itself and the applicants. In short, a tacit term that the employer should exercise its discretion in a reasonable manner was implied or imported into the contract.

It follows that if the fixed term contract provides that the employer has a discretion whether or not to renew the contract, this discretion should be exercised in a reasonable manner. This proposition enjoys even more support given the constitutional right to fair labour practices.⁷⁰

Circumstances may arise where a contract specifically excluding the possibility of renewal may be perceived as an attempt on the part of the employer to evade its statutory obligations, and may consequently be declared invalid. For example, the fixed term contract of employment in the case of *SA Rugby Players Association on behalf of Bands and SA Rugby (Pty) Ltd*⁷¹ contained an express clause to the effect that the applicants might entertain no expecta-

⁶⁷ Du Plessis J referred to a dictionary, which translates the term as "the decision of a good man" and explains it as a "reasonable decision".

⁶⁸ Cheadle "The First Unfair Labour Practice Case" 1980 *ILJ* 200 201-202 suggests that the concept of fairness in the context of the employment relationship similarly entails that the interests of both parties should be balanced. He stated that fairness is "really no more than the balance of the respective interests of the employer and the employee in a capitalist society."

⁶⁹ 267.

⁷⁰ S 23 of the Constitution provides that everyone has the right to fair labour practices. See *South African Clothing & Textile Workers Union v Mediterranean Woollen Mills (Pty) Ltd* 1995 4 LCD 316 (LAC) in this regard.

⁷¹ 2005 26 *ILJ* 176 (CCMA).

tion of renewal. Nevertheless, and in spite of this clause, the Commissioner found that, given the surrounding circumstances, a reasonable expectation of renewal in terms of section 186(1)(b) of the Labour Relations Act did exist.

There is also the possibility, although perhaps remote,⁷² that an express clause in a fixed term contract of employment to the effect that the contract will not be renewed, may be considered to be contrary to public policy and therefore invalid. Clauses or contracts that are contrary to public policy have been described as follows:

“Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.”⁷³

A clause which excludes the possibility of renewal could potentially be immoral, because it robs an economically vulnerable employee of job security and allows the employer to escape its statutory obligations towards the employee. In such a situation, the employee also enjoys no possibility for career advancement, unless he secures other employment. However, the courts have emphasized time and again that this discretion to declare clauses or contracts contrary to public policy should be exercised sparingly. The main reason for this is that public policy favours the freedom to contract.⁷⁴ Yet, despite a preference for the freedom to contract, courts must still “take into account the doing of simple justice between man and man.”⁷⁵ Ultimately, what the courts will consider immoral or contrary to public policy will depend on the surrounding circumstances of the case,⁷⁶ which includes the respective bargaining power of the parties.⁷⁷ The respective bargaining power of the parties has become even more relevant given the constitutional rights to dignity and equality.⁷⁸ Applied to the employment context, the generally unequal bargaining position of the parties may “be a factor in striking down a contract on public policy and constitutional grounds.”⁷⁹

⁷² This possibility is rendered remote by a preference for the policy of sanctity and freedom of contract. Secondly, there is no need to declare such a clause to be contrary to public policy, since it can be ignored if perceived to be a device to escape statutory obligations.

⁷³ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA (A).

⁷⁴ See discussion in *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) 211; and *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A).

⁷⁵ Per Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 544. See also *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A).

⁷⁶ *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) 212.

⁷⁷ *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1993 4 SA 206 (W) 212; *Napier v Barkhuizen* 2006 4 SA 1 (SCA).

⁷⁸ *Napier v Barkhuizen* 2006 4 SA 1 (SCA). See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 28 where Ngcobo J states: “Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law”. At para 29 he concludes: “what public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is therefore unenforceable.”

⁷⁹ 4.

2 6 Renewal for an indefinite or a fixed period?

Whether the renewal of a fixed term contract should be on a fixed term basis or on a permanent basis is obviously also determined by the application of the principles of reasonableness and fairness to the surrounding circumstances.⁸⁰ As is the case with the determination of whether a tacit term for the renewal of the contract exists, the imputed intention of the parties is discovered by application of a common sense approach to the surrounding circumstances.⁸¹ Relevant factors to determine the imputed intention in this regard include the wording of the agreement and the “genesis and purpose of the contract, previous negotiations and correspondence between the parties, subsequent conduct of the parties⁸² showing the sense in which they acted”.⁸³ It follows that if the existence of a term is determined by the application of reasonableness to the surrounding circumstances, the content of that term should also be determined by reference to the same factors.

2 7 Remedies

An employer’s failure to renew a fixed term contract in circumstances where there was a tacit or express agreement to the effect that it would be renewed, constitutes a breach of contract. The aggrieved party is entitled to be put in the position he would have occupied had the employer not breached the contract.⁸⁴ The employee could therefore claim specific performance in the form of re-instatement and/or damages, depending on the circumstances.

If the judge deems it appropriate to award compensation in the case of a claim based on the common law, there is no applicable statutory limit to the amount of compensation claimable. Damages for breach of certain special types of contract, such as contracts of employment, “are frequently assessed according to the principles that have evolved to meet the special requirements of those contracts.”⁸⁵ In *Pretoria Society for the Care of the Retarded v Loots*,⁸⁶ Nicholson JA, following English law, listed a number of guidelines that should be considered in determining the amount of an award for compensation in the employment context.⁸⁷ In this case the plaintiff alleged that she had been constructively dismissed. This case was decided in terms of the old Labour Relations Act⁸⁸ which, unlike the present Labour Relations Act, placed no

⁸⁰ *De Paauw and Living Gold* 2006 27 ILJ 1077 (ARB).

⁸¹ The arbitrator in *De Paauw and Living Gold*, put it as follows: “It is now beyond doubt that in all cases where ambiguity exists in respect of an intended meaning, an exploration of extrinsic facts is mandatory. Indeed even where the text is not *ex facie* ambiguous, the background facts that constitute the context must be encapsulated in the considerations to be analysed to produce an interpretation.” (1079).

⁸² For example, in *Seforo and Brinant Services* 2006 27 ILJ 855 (CCMA), the fact that the employee continued working after the expiration of the fixed term, was taken to constitute a tacit renewal on a permanent basis.

⁸³ *Coopers & Lybrand v Bryant* 1995 3 SA 751 (A).

⁸⁴ Christie *The Law of Contract* 5 ed (2006) 543.

⁸⁵ Christie *Contract* 543.

⁸⁶ 1997 18 ILJ 981 (LAC).

⁸⁷ These were the factors mentioned by Combrinck J in *Ferodo (Pty) Ltd v De Ruite* 1993 14 ILJ 974 (LAC) 981C-G.

⁸⁸ 28 of 1956.

limitations on the amount claimable for an “unfair labour practice”.⁸⁹ These guidelines are:⁹⁰

- (i) there must be evidence before the court of actual financial loss suffered by the person claiming compensation;
- (ii) there must be proof that the loss was caused by the unfair labour practice;
- (iii) the loss must be foreseeable, ie not too remote or speculative;
- (iv) the award must endeavour to place the applicant (in monetary terms) in the position in which he would have been had the unfair labour practice not been committed;
- (v) in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
- (vi) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;
- (vii) the benefit which the applicant receives, for example by way of severance package, must be taken into account.

In short, the judge is once again required to make a value judgment as to what is fair and reasonable in the circumstances, with regard to the question whether to order re-instatement or re-employment or whether to award compensation. If it is deemed to be fair to award damages, the amount of damages will be ascertained by recourse to the same principles.

3 The Labour Relations Act 66 of 1995

3 1 The existence of a reasonable expectation of renewal

In terms of section 186(1)(b) of the Labour Relations Act, an employer’s failure to renew a fixed term contract on the same or similar terms in circumstances where the employee has a reasonable expectation that the contract should be so renewed, constitutes a dismissal. Over the years, the Industrial Court (in terms of the old Labour Relations Act) and the Commission for Conciliation, Mediation and Arbitration (CCMA), as well as the Labour Court in terms of the present Labour Relations Act, have applied the principles of fairness or reasonableness in ascertaining whether such a reasonable expectation exists. Factors that are considered in deciding whether or not a legitimate expectation is present include the fact that the work is necessary; that the money is available; that the fixed term employees had performed their duties in terms of the fixed term contract well; that the fixed terms contracts were renewed in the past;⁹¹ and that representations were made by the employer or

⁸⁹ In terms of section 46(9) of the Labour Relations Act 28 of 1956, a constructive dismissal could constitute an unfair labour practice.

⁹⁰ 990A-B.

⁹¹ *King Sabata Dalinyebo Municipality v Commission for Conciliation, Mediation & Arbitration* 2005 26 ILJ 474 (LC).

its agents.⁹² In *SA Rugby (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*,⁹³ Gering AJ stated that a number of factors may be relevant to the enquiry whether there was a reasonable expectation of renewal on the same or similar terms. These include the actual, express terms of the contract; the past practice with regard to renewals; the nature of the employment; the reason for a fixed term; any assurances that the contract would be renewed; and failure to give reasonable notice of non-renewal of the contract.

This list is not a *numerus clausus*; ultimately, the existence or otherwise of a reasonable expectation requires an exercise of the same value judgment applicable in ascertaining a tacit agreement to renew in terms of the common law. In short, having due regard to all the surrounding circumstances, the judge or arbitrator will have to decide whether a reasonable person in the situation of the employee would harbour a reasonable expectation of renewal. The same factors will be considered, irrespective of whether the enquiry concerns the existence or otherwise of a tacit agreement of renewal in terms of the common law, or whether the enquiry concerns the establishment or otherwise of a reasonable expectation in terms of section 186(1)(b) of the Labour Relations Act. As is the case in determining the existence of a tacit term or agreement in terms of the common law, the enquiry as to whether the expectation in terms of s 186(1)(b) is reasonable, is an objective one.⁹⁴ A reasonable expectation in terms of this provision must be proved objectively in the sense that the employee must prove that a reasonable person in his circumstances would expect the contract to be renewed.⁹⁵ This is the same as the objective reasonable man test applied in ascertaining a tacit term or contract in terms of the common law.

3 2 Express terms in the contract negating expectations of renewal

An express term in a fixed term contract stating that the employee entertains no expectation of renewal is not a guarantee that no reasonable expectation in terms of section 186(1)(b) of the Act can be found to exist.⁹⁶ This result is achieved by reference, once again, to the principles of reasonableness and fairness given the surrounding circumstances.

3 3 Renewal for indefinite or fixed period?

Section 186(1)(b) provides that an employer's failure to renew a fixed term contract *on the same or similar terms* (my emphasis), in circumstances where the employee has a reasonable expectation that the contract should be so renewed, constitutes a dismissal. The words "on the same or similar terms" were given a

⁹² *SA Rugby Players Association on behalf of Bands and SA Rugby (Pty) Ltd* 2005 26 ILJ 176 (CCMA).

⁹³ 2006 27 ILJ 1041 (LC) 1045.

⁹⁴ *Auf der Heyde v University of Cape Town* 2000 8 BLLR 877 (LC); *Dierks v University of South Africa* 1999 4 BLLR 304 (LC); *SA Rugby (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2006 27 ILJ 1041 LC.

⁹⁵ *Grogan Workplace Law* 110-111.

⁹⁶ In *SA Rugby Players Association on behalf of Bands and SA Rugby (Pty) Ltd* 2005 26 ILJ 176 (CCMA); and in *Yebe and University of Kwazulu-Natal (Durban)* 2007 28 ILJ 490 (CCMA), a legitimate expectation of renewal of a fixed term contract was found to exist despite there being such a term in the contract.

literal interpretation in *Dierks v University of South Africa*,⁹⁷ to the effect that a reasonable expectation in terms of this section can never include an expectation of permanent employment. The Labour Court in *Mc Innes v Technikon Natal*⁹⁸ disagreed on the basis that since it is the employer that creates the reasonable expectation, if the expectation created is for an indefinite period, then the section must be read to include that situation.⁹⁹ A compelling reason for the interpretation that allows for an expectation of renewal on a permanent basis or for an indefinite period is that such interpretation is consistent with the purpose or objectives of the section. Revelas J, in *Biggs v Rand Water*,¹⁰⁰ opined that the purpose of section 186(1)(b) is to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security, so that when the employer wishes to dismiss the employee, the obligations imposed on the employer in terms of the Act need not be adhered to. Similarly, in *Mafike and Kwikot (Pty) Ltd*,¹⁰¹ the arbitrator found that, in the circumstances, it was evident that the expiry dates of the fixed term contracts were not intended to be genuine, but were inserted merely to enable the employer to evade its obligations in terms of applicable labour laws. The arbitrator consequently concluded that the contract had to be construed as being for an indefinite or permanent duration.

3.4 Remedies

In terms of section 193(1) of the Act, if the Labour Court or an arbitrator finds a dismissal to be unfair (failure to renew a fixed term contract on the same or similar terms where there is a reasonable expectation that this will be done constitutes a dismissal), the Labour Court or arbitrator may order the employer to re-instate the employee, or order the employer to re-employ the employee, or order the employer to pay the employee compensation. In terms of section 193(2) of the Act, the

“Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

In terms of section 194 of the Act the award for compensation cannot exceed twelve months’ salary unless the dismissal is automatically unfair,¹⁰² in which

⁹⁷ 1999 20 *ILJ* 1227 (LC) 248F.

⁹⁸ 2000 6 *BLLR* 701 (LC) 707.

⁹⁹ See *Wood v Nestlé SA (Pty) Ltd* 1996 *ILJ* 184 (IC) a 190J- 191A ; *Malandoh v SA Broadcasting Corporation* 1997 18 *ILJ* 544 (LC) 544 547D-E.

¹⁰⁰ 2003 24 *ILJ* 1957 (LC) 1961A.

¹⁰¹ 2005 26 *ILJ* 2267 (BCA).

¹⁰² In terms of s 187 a dismissal will be automatically unfair if the reason for dismissal is one or more of the following: the employee joined a trade union; the employee exercised a right in terms of the LRA; the employee disclosed protected information; the employee participated in a protected strike / protest action or refused to work during a protected strike or lock-out; to compel an employee to accept a demand in a matter of mutual interest; the employee took action against the employer which he was entitled to take; the pregnancy of the employee or related reasons; discrimination by the employer against the employee; a transfer contemplated in terms of s 197/197 A.

case the award cannot exceed an amount of twenty four months' salary. For example, if an employee's fixed term contract is not renewed because of her pregnancy or membership to a trade union, and she had a reasonable expectation that her contract would be renewed, this would constitute an automatically unfair dismissal. She would be able to claim an amount in compensation of up to twenty four months' salary.

In determining what remedy to award, the judge or arbitrator is guided by the principles of fairness and reasonableness. If the arbitrator decides to award compensation as opposed to re-instatement or re-employment, the amount of compensation awarded is also determined with due regard to these principles, bearing in mind the cap imposed by the Act.

4 Conclusion

After citing a number of cases where the old Industrial Court had concluded that there was a legitimate expectation of renewal of a fixed term contract, Olivier concludes that since the inception of the unfair labour practice regime it is no longer unconditionally accepted that a fixed term contract of employment automatically terminates at the effluxion of the contract. He argues that considerations of fairness introduced in terms of the unfair labour practice regime could justify a finding that a contract which, prior to the inception of the unfair labour practice regime would have automatically terminated, will not necessarily automatically terminate.¹⁰³ The implication is that the unfair labour practice regime in terms of the previous Labour Relations Act radically altered the common law position in that it introduced considerations of fairness. By implication, the same can be said of section 186(1)(b) of the current Act. A consequence of this implication is that an employee stands a better chance of having a fixed term contract renewed in terms of the legislation than in terms of the common law.

As seen from the discussion of the common law and the implication of tacit terms based on the doctrine of quasi mutual assent or legitimate expectation, this view is somewhat facile. It was demonstrated how, even in terms of the common law, if considerations of fairness and reasonableness demand it, the contract must be renewed. Considerations of fairness have always been a justification for the importation of a tacit agreement to the effect that a fixed term contract would be renewed. Thus, it was never unconditionally accepted that a fixed term contract of employment would automatically terminate at the expiry of the contract.¹⁰⁴ The common law position has always been that the contract would automatically terminate unless otherwise agreed: It has accordingly been argued that the importation of a tacit agreement to this effect is based on the same considerations of fairness and reasonableness that a right to renewal in terms of both the old unfair labour practice regime and section 186(1)(b) of the Labour Relations Act are based. It should consequently be noted that there

¹⁰³ Olivier 1996 *ILJ* 1005.

¹⁰⁴ For example, in *Braund v Baker, Baker & Co* 1905 EDC 54, the possibility of a fixed term contract having been tacitly renewed on the basis of conduct of the employer and other surrounding circumstances was considered.

have been no drastic changes to the common law in terms of the old and the present Acts with regard to the factors considered when determining whether a right to renewal exists. Irrespective of whether the claim for renewal of a fixed term contract of employment is based on the common law or on statute, the determining criteria for the existence of a right to renewal are reasonableness and fairness. In other words, the existence of a reasonable expectation in terms of section 186(1)(b), and the existence of a tacit agreement to renew the contract in terms of the common law, are determined by reference to the same criteria. The archaic¹⁰⁵ interpretation of the common law that claims that contract must always prevail over equity is challenged. This rather superficial interpretation of the common law with reference to the implication of terms of fact has led to an insistence that, since labour legislation is based on the notions of fairness and equity, it differs from the common law. The cases discussed have proved that the common law does in fact adhere to principles of fairness and equity.¹⁰⁶ The judicial incantations that make reference to the actual consensus of the parties often constitute a ploy used by judges who feel a need to appear to uphold the principle of the sanctity of contract at all costs. In effect, they are not implementing the actual consensus of the parties, but rather the terms that they consider reasonable and fair in the circumstances.

It follows that if the existence of a term is determined by the application of reasonableness in the surrounding circumstances, so too should the content of that term be determined by reference to the same factors. Therefore the reference to “on the same or similar terms” in section 186(1)(b) should not be interpreted to refer to the duration of the contract, but merely to other provisions including the amount of pay, job description and other working conditions.

Given the fact that the criteria for the establishment of a legitimate expectation of renewal in terms of the Act and the criteria for the establishment of a tacit agreement for renewal in terms of the common law are essentially the same, and the fact that in terms of the common law a tacit agreement for renewal on a permanent basis can be claimed if the surrounding circumstances justify it, I see no reason why a claim for renewal on a permanent basis cannot be made in terms of section 186(1)(b) of the Act if the surrounding circumstances justify it. In any event, as was discussed above, an interpretation of the provisions of section 186(1)(b) that prevents a claim for renewal on a permanent basis, would run contrary to the policy considerations that motivated the inclusion of this section in the Act.

The argument can be summarised as follows. Despite the fact that the section refers to an expectation “on the same or similar terms”, a fixed term employee who has a legitimate expectation of renewal, and who bases her claim on section 186(1)(b), is entitled to renewal on a permanent basis if such expectation is reasonable and fair in the circumstances. Since the legislation directly confers primacy of equity over contract, and since the legislation

¹⁰⁵ This is typical of the classical theory of contract of the nineteenth century.

¹⁰⁶ For example, terms that are contrary to public policy are invalid.

is backed by the constitutional right to fair labour practices,¹⁰⁷ it makes no sense to limit the expectation of renewal to one for another fixed term if the surrounding circumstances call for a reasonable expectation on a permanent basis. Finally, a literal and limited interpretation of the section, which limits expectation of renewal to another fixed term, runs contrary to the policy considerations which gave rise to the section in the first place.

SUMMARY

The purpose of this article is to demonstrate that section 186(1)(b) of the Labour Relations Act makes no changes to the common law with regard to factors or circumstances that give rise to a right to renewal of a fixed term contract of employment. The reason for this is that what an aggrieved fixed term employee needs to prove in order to have his or her contract renewed (usually for an indefinite period), irrespective of whether the claim is based on common law or legislation, is essentially the same. The outcome is always determined by an application of the principles of fairness or reasonableness. A subjective belief or expectation, based on an objectively reasonable interpretation of the state of affairs in the light of the conduct of the employer in the surrounding circumstances, gives rise to a right of renewal in terms of both the common law and in terms of section 186(1)(b) of the Labour Relations Act. Secondly, the purpose of this article is to demonstrate that a claim for renewal of a fixed term contract on a permanent basis should be possible in terms of the Labour Relations Act if this would be fair and reasonable in the surrounding circumstances.

¹⁰⁷ S 23(1) of the Constitution.