Premature Termination of Fixed-Term Contracts of Employment on Grounds of Operational Requirements

by

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CHAPTER 6: Conclusion and Recommendations

SUMMARY

This study focuses on the interaction between common-law grounds and statutory grounds for the premature termination of fixed-term contracts of employment on grounds of operational requirements. The study investigates the application of the permissible grounds for premature termination of fixed-term contracts of employment, both contractually and in terms of the "fairness" principle as enshrined in the Constitution.

Both common-law remedies and current labour legislation is still applicable to modern day contracts of employment. In the face of overlapping or competing statutory rights, the courts uphold common-law rights. A parallel regime has effectively been established – one of employment law, based on statute, and one on the common law.

The purpose of this dissertation is to assess whether the South African application of legal principles in relation to the premature termination of fixed-term contracts of employment due to the operational requirements of the employer passes scrutiny when compared to the norms of the International Labour Organisation ("the ILO") as well as foreign law

Considering the complex legal framework involved in the employment relationship – particularly the contract of employment, which is subject to the law of contract on the one hand and to the labour legislation on the other – the question arises as to whether it should be permissible to prematurely terminate a fixed-term contract of employment on grounds of operational requirements of the employer and which Court has the required jurisdiction to determine same.

In conducting the study a doctrinal research method and a social justice (human rights) perspective was followed. This study assesses relevant legislation, case law and principles in the South African context, with the view of providing recommendations to address any shortcomings. The study also comprises of comparative research to assess whether the South African model complies with international law obligations.

In the conclusion and recommendations it will be confirmed whether the South African approach to the premature termination of fixed-term contracts of employment remains valid, and whether there are any aspects or approaches that can be varied to ensure greater compliance with South Africa's international law obligations.

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DECLARATION OF ORIGINALITY

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Declaration

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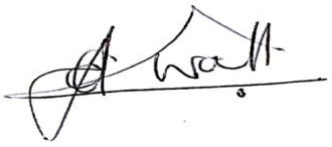
Signature of Student: 

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LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1997.
BW	*Burgerlike Wetboek.*
CCMA	Commission for Conciliation, Mediation and Arbitration.
CEACR	Committee of Experts on the Application of Conventions and Recommendations.
COIDA	Occupational Injuries and Diseases Act 130 of 1993.
ERA	Employment Rights Act 1996.
FTER	Fixed -Term Employment Regulations - SI 2002/2034.
EU	European Union.
ECJ	European Court of Justice.
EAT	Employment Appeal Tribunal.
ILO	International Labour Organisation.
LAC	Labour Appeal Court.
LRA	Labour Relations Act 66 of 1995.
PAJA	Promotion of Administrative Justice Act 3 of 2000.
SOSR	Some Other Substantial Reason.
SCA	Supreme Court of Appeal.
TCA	EU-UK Trade and Cooperation Agreement.
The Wiehahn Commission	The Commission of Inquiry into Labour Legislation. (“the Commission”)
The Code	Code of Good Practice: Dismissal.
U.K	United Kingdom.
WAB	*Wet Arbeidsmarkt in Balans.*
WWZ	Work and Security Act.

NOTE TO THE READER

The research done in this dissertation reflects the position up to 31 December 2021.

Word count: 62 595

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CHAPTER 1
INTRODUCTION

1. Introduction

> "In ordinary terms, untrammelled by legal interpretation, it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract of employment arrives."[1]

The foregoing passage by Froneman AJA, as he then was in *Fedlife Assurance Ltd v Wolfaardt,* emphasises the relation between two concepts of law that are applicable in the premature termination of a fixed-term contract of employment[2] – that of "fairness"

[1] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at 2414. See the minority judgement of Froneman AJA at para 10.
[2] A fixed-term contract is a contract of limited duration that terminates upon the occurrence of a specified date or event and the parties agree as such that the said contract will terminate automatically by the effluxion of time and not on the instance of either of the contracting parties.

(in terms of the labour legislation of the Republic of South Africa) and that of "lawfulness" (in terms of the common law).

The interaction between these concepts was brought about by the adoption of much needed labour legislation since 1980.[3] However, with the promulgation of the Constitution in 1994,[4] one system of law was established. Nonetheless, the interaction between fairness and lawfulness was not resolved through the promulgation of the Constitution.

This state of affairs is confirmed in the judgment of Nienaber JA in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd* where it was held that:[5]

> "[T]here is no sure correspondence between unlawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair".

It has become trite law in South Africa that the fairness of the termination of any contract of employment – including a fixed-term contract of employment – should be tested through the dispute resolution mechanisms established by the Labour Relations Act[6] (the "LRA"). However, such dispute resolution bodies[7], apart from the Labour Court,[8] lack the jurisdiction to determine the lawfulness of the termination of a fixed-term contract of employment. In some instances, common law and statutory principles apply to the same set of facts.[9]

[3] With the Labour Relations Act 66 of 1995 as its centrepiece.
[4] Constitution of the Republic of South Africa, 1996.
[5] 1996 (4) SA 577 (AD) at 592 F-H.
[6] Act 66 of 1995.
[7] The dispute resolution mechanisms established by the LRA consists of amongst other the Commission for Conciliation, Mediation and Arbitration and Bargaining Councils with the jurisdiction to determine disputes relating to unfair dismissal and unfair labour practice allegedly committed.
[8] See para 3.2 below. In terms of s 157(2) of the LRA and s 77(3) of the BCEA the Labour Court has concurrent jurisdiction with the High Court in respect of the lawfulness of the termination of a contract of employment.
[9] In *Archer v Public School-Pinelands High School & others* (2020) 41 *ILJ* 610 (LAC) it was confirmed that the employee is entitled to pursue both the common-law dispute, based on the breach of contract, and unfair dismissal dispute under the LRA, notwithstanding that the latter claim has already been adjudicated and both disputes arose from the same facts. See also *Rand Water v Stoop & other* (2013) 34 *ILJ* 579 (LAC), where it was held that the employer may institute a damages claim against the employee in the Labour Court in terms of s 77(3) of the BCEA, where such damages are linked to the contract of employment.

In terms of the LRA and the Basic Conditions of Employment Act[10] (the "BCEA") a claim based on "unlawful" dismissal[11] may be instituted, either in the High Court or the Labour Court, to be decided in terms of the common law, whereas, if the same dismissal is claimed to be "unfair", it must be dealt with in terms of the LRA[12] and the dispute resolution mechanisms established in terms thereof. This creates uncertainty in terms of various courts having different jurisdictions and powers in relation to virtually the same dispute. Furthermore, there are different remedies flowing from the premature termination of the fixed-term contract of employment in terms of the common law, juxtaposed to the unfairness of such termination, as contemplated by the labour legislation. Both the Labour Court and the High Court have struggled to clarify the issue of jurisdiction relating to these aspects and the result has not been harmonious.[13]

Against this background, there is arguably no other area in South African labour law where the problems associated with this overlap of jurisdiction and remedies are better illustrated than in the instance of fixed-term contracts of employment being prematurely terminated, due to the employer's operational requirements.

2. Contextual Background

It is apparent that both common-law remedies and current labour legislation is still applicable to modern day contracts of employment.[14] In order to consider this interaction between the fairness and lawfulness of a premature termination of a fixed-term contract of employment, it is necessary to understand the historic development of the common-law contract of employment and South African labour legislation.

During the transition from Roman and Roman-Dutch law, South African labour legislation has undergone extended historic developments and influences. Roman

[10] Act 75 of 1997.
[11] S 157 of the LRA and s 77 of the BCEA provides for the Labour Court to have concurrent jurisdiction with the High Court in the determination of breaches of the contract of employment.
[12] *Langeveldt v Vryburg Transitional Local Council* (2001) 22 *ILJ* 1116 (LAC) at para 44.
[13] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA). See the majority decision at paras 3, 13 and 15-19. *Langeveldt v Vryburg Transitional Local Council* (2001) 22 *ILJ* 1116 (LAC) at para 23.
[14] *Archer v Public School- Pinelands High School & others* (2020) 41 *ILJ* 610 (LAC); *Mpane v Passenger Rail Agency of SA & others* (2021) 42 *ILJ* 546 (LC).

law[15] recognised the *locatio cundictio operarum, operis* and *rei.* These three contracts stemmed from the contract of lease, with the *locatio condictio operarum*[16] being regarded and equated to the modern-day contract of employment.

Roman law influenced the Roman-Dutch law.[17] In respect of the remuneration to be paid for the services rendered, the relationship and the rights between the employer and the employee were regulated and based on consensus.[18]

In the early development of South African labour law,[19] the sanctity of contract and common-law remedies prevailed. This is illustrated by the following passage from the judgment of Innes J in the matter of *Schierhout v Minister of Justice*:[20]

> "Now, it is a well-established rule of the English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages … No case was quoted to us where a master has been compelled to retain the services of an employee wrongly dismissed, and I know of none. The remedy has always been damages".[21]

In terms of the common law, the question remained whether the breach of a contract of employment may give rise to a remedy of reinstatement. In a significant development after *Schierhout,*[22] in 1982, it was held in *National Union of Textiles Workers and others v Stag Packings (Pty) Ltd and another*[23] that:

"as a general rule a party to a contract which had been wrongfully rescinded by the other party could hold the other party to the contract if he so elected. There was no

[15] Conradie *Fundamina* (2016) 2–3, 19. See also Conradie (LLM 2013) UFS.
[16] In terms of this contract a certain amount of a free man's personal services (*operae suae*) could be let to someone else (conductor operarum) for a certain period and in return for the payment of money.
[17] The first official recognition of the reception of the Roman law in the Netherlands occurred in 1462. Johannes Voet addressed this topic in his *Commentarius ad Pandectas*; 1827:19 2 33. Voet referred to the rendering of personal services in return for remuneration, which, in Roman-Dutch law, was commonly referred to as a *dienstcontract* or *huur en verhuur van diensten*. Hugo Grotius also addressed it, although to a lesser extent, in his *Inleiding tot de Hollandsche Rechtsgeleerdheid.*
[18] Du Toit *et al* (2015) at 104 refers to the freedom of contract, being premised on the notion of *consensus at idem*, which presupposes that terms of contract are freely concluded and reflective of the mutual will of the parties. Sanctity of contract, expressed in the dictum *pacta sunt servanda* requires contracting parties to uphold the terms and obligations to which they agreed.
[19] The development of the South African Labour law is shortly discussed below.
[20] 1926 AD 99 at 107.
[21] This judgment was delivered during 1926 at a time when the statutory protection of employees' rights was unlike that of today. So, for example, the notion of "master and servant" has long since been abolished.
[22] (1926) AD 99 at 107.
[23] (1982) 3 *ILJ* 39 (W).

reason why this general rule should not also be applicable to contracts of employment".[24]
The common-law contract of employment focuses on achieving commercial good sense, which would make fairness an unwanted and unnecessary addition to the employment agreement. Brassey aptly addressed this issue when stating that:

> "the common law gives effect to commercial good sense only by default. If there is an express term governing the matter, it defers to it however irrational it may be. For sanctity of contract is its abiding ethic".[25]

Similarly, the common law allows for the termination of an employment agreement at will – whether this is done irrationally or rationally – and does not require any form of consultation between the parties in respect of the termination of employment.[26] However, employers and employees or their collective representatives could not be left unregulated to act arbitrarily against one another in the furtherance of their own subjective demands.

The inappropriate regulation of labour law by common-law principles and the growing number of employment unrests resulted in the establishment and publication of the *Wiehahn Commission Reports*[27] in 1979. The recommendations of the Wiehahn Commission included that a court should be established to deal exclusively with labour-related matters and be conferred the jurisdiction to determine "the legality" of strikes, lockouts, picketing, intimidation and boycotts.[28]

[24] In determining whether the employee's dismissal was due to them joining a union, the Court also found that, while the employees' contracts of employment were governed by the two acts it, did not make them statutory servants having the benefit of a statutory remedy of reinstatement. It appears that the common-law principle that specific performance of this type of contract is not granted still applies. Further that it is undesirable for reinstatement to be ordered as the employees will be foisted onto an unwilling employer.
[25] Brassey *et al* (1996) at 2.
[26] Brassey *et al* (1996) at 4 – 5. The author notes that this notion of the contract of employment focusing on achieving commercial good sense goes as far as the Courts having held that the employer has no obligation to afford an employee a hearing before deciding to dismiss him or her. The author refers to *Monckten v British South Africa Co* (1920) AD 324 at 329, *Nchabaleng v Director of Education* (Transvaal) 1954 (1) SA 432 (T) at 440 A, *Van Coller v Administrator, Transvaal* (1960) (1) SA 110 (T) at 115 B, *Gründling v Beyers* (1967) (2) SA 131 (W). In England, the position at common law is the same: see the cases discussed in Ganz G (1967) *MLR* 288.
[27] Commission of Enquiry into Labour Legislation Part 1 RP 47/1979.
[28] Report of the Commission of Enquiry into Labour Legislation Part 1 RP 47/1979 IV para 4.28.5.5.

The Government at the time accepted this recommendation and the Industrial Court[29] was established. However, it is of significance that the Industrial Court was not conferred with the status of a superior court and, accordingly, there was no form of precedents being developed for legal certainty.[30] The Court's judgments did, however, create an influential "unfair labour practice" jurisprudence but there was no codification of what was "fair" or "unfair" in the employment relationship.[31]

Twenty years later, at the dawn of the South African democracy, South African labour law[32] is regulated by several legislative frameworks. These include the Constitution,[33] the LRA[34] and the BCEA[35] and have the primary aim of creating a more equal balance between the employer and the employee in accordance with internationally accepted standards,[36] thereby moving away from relying on the common law only. The South African labour law at least aims at serving as a "countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship".[37]

The LRA has the purpose of, among others, giving effect to the Constitution and the norms set by the International Labour Organization (the "ILO"). The primary objects of the LRA are set out in section 1,[38] with the objective of quick and effective resolution

[29] Van Eck (2005) (Part 1) *Obiter* 549-560. At 554 the author quite aptly summarizes the most pertinent developments identified and addressed by the Industrial Court being that employees need special protection; the law of contract (and the common law) is not suited to regulate the employment relationship without the creation of a floor of rights for workers and the common law is largely ignorant as to the rights to freedom of association and organization and the right to strike.

[30] Even though the Industrial Court was a court of law and applying the content of established law from the previous labour acts it had concurrent jurisdiction with ordinary civil courts and not that of the High Court as a specialist court. For instance the LRA amendment Act 51 of 1982 allowed for an appeal of the Industrial Court decisions to the relevant provincial division of the Supreme Court like a Magistrates Court Order being appealed against before the High Court.

[31] Howe (1984) at 2 - 5.

[32] Van Niekerk *et al* (2019) at 12-20 provide a more detailed explanation on the development of the South African Labour law pre- and post 1994.

[33] Constitution of the Republic of South Africa, 1996.

[34] Amongst others, the LRA prescribes rules for fair termination of service and jurisdiction of the Courts in determining disputes emanating from the termination of service.

[35] S 37 of the BCEA prescribes minimum notice periods for the termination of contracts of employment.

[36] Since 1994 South Africa has ratified all the International Labour Organisation's (ILO) core conventions and in doing so, it incurred international law obligations.

[37] Van Niekerk *et al* (2019) at 4 fn 4. See also Grogan (2020) at 1 where the author describe the general aim of labour law is "to the regulate the relationship between those who hire others for their labour (employers) and those who hire their labour to others (employees)".

[38] "The primary objects of the Act, amongst other, is-
to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution and
to promote- the effective resolution of labour disputes.

of labour disputes through the Labour Court, which has been established as a court of law and equity.[39]

The LRA incorporates the rationale of "fairness" in the evaluation of permissible grounds for the termination of fixed-term contracts of employment.[40] However, by no means does it have the effect or intention of repealing the basic contractual principles of the common law.

Accordingly, in the termination of the contractual relationship not only should the law of contract be complied with but also the provisions of employment legislation. Fairness and equitable principles are paramount in the termination of the contractual employment relationship.

3. Termination of Fixed-term Contracts of Employment Based on Operational Grounds

3.1. Introduction

The LRA established the CCMA as a specialist juristic body[41] that is accessible to any member of the public as an inexpensive dispute resolution forum. The functions of the CCMA and accredited bargaining councils are to attempt to resolve any dispute referred to it in terms of the LRA expeditiously, while dealing with the substantial merits of the dispute with the minimum of legal formalities[42] through conciliation and arbitration. The CCMA plays a critical role in statutory dispute resolution, with the Labour Court adjudicating more complex disputes, such as the dismissal of striking employees and large-scale retrenchments.[43]

[39] S 151 of the LRA provides that the Court's jurisdiction is equal to the High Court of South Africa in relation to matters under its jurisdiction.
[40] Schedule 7 Code of Good Practice: Dismissal. However, Van Eck (2005) *Obiter* at 557 the author confirms that it was not foreseen that the labour dispute resolution institutions would be responsible, to the exclusion of the civil courts, for the adjudication of disputes in relation to common-law contracts of employment, administrative law problems or challenges in respect of constitutional law issues with reference to the matter of *Louw v Acting Chairman of the Board of Directors of the North West Housing Corporation (*2000) 21 *ILJ* 482 (B).
[41] S 112 of the LRA.
[42] S 138 of the LRA.
[43] S 191 of the LRA.

3.2. Unfair dismissal

Every employee has the right not to be unfairly dismissed and subjected to unfair labour practices.[44] This fundamental right is enshrined in section 23 of the Constitution. Dismissals, which are defined in section 186 of the LRA,[45] relate to circumstances in which the employer has engaged in an act that brings the contract of employment to an end, in a manner recognised as valid by the law.[46] However, it has been argued that the termination of a fixed-term contract of employment on the termination date is not regarded as a dismissal, but rather as the termination of the contract through the effluxion of time.[47] In this way, only the premature termination of the fixed-term contract of employment may be considered to be included in the definition of dismissal, although it may be found that the same is not unfair in the context of the LRA.

Before the publication of the *Wiehahn Commission Reports,* there was no protection against unfair dismissal in South Africa. If an employer wished to terminate the fixed-term employment relationship prematurely, all it had to do was to comply with the contractual terms of notice, whether a fair reason existed or not. Common-law rights and remedies arising from the contract of employment were the only measures applied in a termination of a fixed-term contract of employment. Despite the introduction of the concept of fairness into individual labour law,[48] under the definition of section 186 of the LRA, parties are still free to claim damages for the repudiation of the contract in the absence of compliance with the notice period being a premature termination of the fixed-term contract of employment.[49] However, in terms of the LRA, the employee may challenge the fairness[50] of such dismissal at the CCMA or Labour Court[51] if the notice period has been observed.

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[44] S 185 of the LRA.
[45] "Dismissal means that-
a) An employer has terminated employment with or without notice".
[46] Van Niekerk *et al* (2019) at 237. The author refers to the broader interpretation of termination adopted by the LAC in *National Union of Leatherworkers v Barnard NO & another* (2001) 22 *ILJ* 2290 (LAC) and cited with approval in *SA Post Office Ltd. V Mampuele* (2010) 10 BLLR 1052 (LAC) at para 16.
[47] *Enforce Security Group v Fikile & others* (2017) 38 *ILJ* (LAC).
[48] Du Toit *et al* (2015*)* at 423.
[49] Du Toit *et al* (2015*)* at 423-424.
[50] Whether the termination of services related to the conduct or capacity of the employee or the operational requirements of the employer.
[51] ILO Convention 182 requires that an employee's services may not be terminated unless there is a valid reason connected to the capacity or conduct of the employee or based on the operational requirements of the organisation; See also Van Niekerk *et al* (2019) at 235.

Section 186(1)(b)[52] now regards as a dismissal the termination of a fixed-term contract of employment by the employer, if the contract of employment has reached its expiration date and the employee expected that the same shall be renewed on the same terms as previously or indefinitely.[53] This provision specifically prevents employers from circumventing the dismissal laws by entering into a series of fixed-term contracts, thereby relying on the termination of such contracts through the effluxion of time, rather than on the termination at the instance of the employer (a statutory dismissal).[54]

If there is no material breach of the terms of the agreement by the employee by reason of his or her conduct or capacity, then the employer must not only comply with the contractual grounds for termination, but also with the fairness requirements, as set out in the Code of Good Practice.[55]

A dispute in terms of the termination of employment due to either the employee's misconduct or incapacity, as defined in the LRA,[56] is referred to the CCMA for arbitration but only in relation to the requirement of the termination being for a fair reason, or due the employer's operational requirements.

3.3. The *Wolfaardt* and *Buthelezi* Decisions

In general terms and aside from the protection afforded to an employee employed on a fixed-term contract of employment, the premature termination of a fixed-term contract of employment due to the employer's operational requirements is not

[52] This section provides that: "(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-
(i) To the renew 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; or
(ii) 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".
[53] No mention is made of the reason for the termination i.e., operational requirements. It is submitted that the legislature did not, with the introduction of this definition, intend for circumstances of premature termination of the fixed-term contract.
[54] Van Niekerk *et al* (2019) at 240.
[55] Schedule 7 to the LRA mirroring the ILO Convention 182.
[56] S 188 0f the LRA provides for the accepted grounds for termination of the contract of employment and dealt with in detail later in this research.

specifically provided for in the LRA. Judgments dealing with the overlap between the common law and statute in the premature termination of a fixed-term contract of employment do not provide satisfactory answers.[57]

In the majority judgment of the Supreme Court of Appeal (the "SCA") in *Fedlife Assurance Ltd v Wolfaardt,*[58] the SCA held that the premature "unlawful" termination of a fixed-term contract may be substantively and procedurally fair in terms of the LRA.[59] The nature of the dispute brought before the Court is of prime importance, as the High Court has jurisdiction to entertain the dispute, as long as the employee claims that the dismissal has been unlawful. According to the SCA the Labour Courts' jurisdiction to adjudicate upon unfair dismissal does not exclude the jurisdiction of the High Court to hear such disputes based on lawfulness.[60]

However, the minority judgment per Froneman AJA (as he then was) found that the common-law contract of employment must give some form of expression to the fundamental right not to be unfairly dismissed. An employee's unlawful dismissal constitutes an unfair dismissal and the LRA fully deals with the consequences of an unfair dismissal.[61]

Under section 195 of the LRA – the compensation that may be awarded under section 194 is in addition to, and not a substitute to, any other amount to which the employee is entitled to for damages in lieu of specific performance. The Labour Court does have the competence to award damages, in terms of section 158(1)(a)(vi), if that is what is called for under section 195 of the Act. Such a claim should be determined exclusively by the Labour Court and by virtue of the provisions of section 157(1) of the LRA.[62]

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[57] Du Toit (2008) *SALJ* 95–133; *Jacot-Guillarmod v Provincial Government, Gauteng* (1999) 3 SA 594 (T). See also *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 2 BLLR 124 (LAC) at 128-129 where the previous LAC reached the same conclusion as in *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 3 - that the statutory remedy does not supersede the contractual remedy.
[58](2001) 22 *ILJ* 2407 (SCA).
[59] (2001) 22 *ILJ* 2407 (SCA) at para 27.
[60] (2001) 22 *ILJ* 2407 (SCA) at para 24.
[61] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 14.
[62] (2001) 22 *ILJ* 2407 (SCA) at para 16.

In the unanimous Labour Appeal Court ("LAC") judgment of *Buthelezi v Municipal Demarcation Board,*[63] Jafta AJA confirmed that, under the common law, a party to a fixed-term contract has no right to terminate such contract in the absence of a repudiation or a material breach of the contract by the other party – even on notice – unless its terms provide for such termination.[64]

The LAC held that no party is entitled later to seek escape from its fixed-term obligations on the basis that its assessment of the future has been erroneous or that certain things have been overlooked.[65] Both parties make a choice of concluding a contract for a fixed-term and there is no unfairness in the exercise of that choice.[66]

The Court went further and found that:

> "without a clear indication from the LRA that the legislature intended to alter the common-law rule relating to a premature termination of a fixed-term contract during its currency, it cannot be contended that the Act has such effect".[67]

The Court found that the premature termination of a fixed-term contract was unfair, purely by virtue of its unlawfulness. The operational requirements, if any existed, did not give the employer the legal right to terminate the contract of employment between the parties.[68]

In *Buthelezi*, the LAC confirmed that the extent to which the LRA may permit an employer to "fairly" terminate a contract of employment prematurely had not altered the common-law principle that, in the absence of a breach of contract, a fixed-term contract may not be cancelled unilaterally during its currency. Both common law and statutory remedies apply to the same set of facts.

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[63] (2004) 25 *ILJ* 2317 (LAC).
[64] (2004) 25 *ILJ* 2317 (LAC) at para 9.
[65] In the common law a contract of employment is entered into for a fixed-term and the parties agree to honour and perform their respective obligations in terms of that contract for the duration of the contract.
[66] The Court found that the employer is free not to enter a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term at para 11.
[67] (2004) 25 *ILJ* 2317 (LAC) at para 14.
[68] Cohen (2007) *SA Merc LJ* 26 – 43.

In the face of overlapping or competing statutory rights, the Courts uphold common-law rights. A parallel regime has effectively been established – one of employment law, based on statute, and one on common law. This parallel regime has given added momentum by subsequent judgments, as will be discussed in more detail in this dissertation. This is also quite evident from the remarks of Froneman AJA in the *Wolfaardt* matter, where he stated that:[69]

> "[P]rior to the enactment of the Constitution, our law maintained a rigid distinction between a common-law contract of employment, which was said to have nothing to do with fairness, and statutory labour dispensation, which had much to do with fairness".

3.4. Constitutional, Administrative and Labour Law Overlaps

The relationship between statutory and common-law remedies has been analysed with clarity in the administrative sphere and the principles that have been developed, are equally illuminating in the context of labour law. The Constitutional Court explains the relationship between the Constitution and the common law as follows:[70]

> "There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including common law, derives its force from the Constitution and is subject to constitutional control".

This was further elaborated upon in the later judgment of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism,*[71] where O'Regan J applied this analysis in the context of a statute having been enacted to regulate the constitutional right in question:

> "Common law informs the provisions of PAJA[72] and the Constitution and derives its force from the latter. The extent to which common law remains relevant to administrative review will have to be developed on a case-by- case basis as the Courts interpret and apply the provisions of PAJA and the Constitution".[73]

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[69] (2001) 22 *ILJ* 2407 (SCA) at para 3.
[70] *Pharmaceutical Manufacturers Association of SA; in re Ex Parte Application of President of RSA* (2000)(2) *BCLR* 674 (CC) para 44ff.
[71](2004) (4) SA 490 (CC) para 22. See also *Minister of Health NO v New Clicks South Africa (Pty) Ltd* (2006) (2) SA 311 (CC) para 437.
[72] Promotion of Administrative Justice Act, No. 2 of 2000.
[73] *Pharmaceutical Manufacturers Association of SA* (2000) (2) SA 674 (CC) at para 45.

This notion is equally true to the South African labour law. There ought not to be two systems of law regulating labour law but only one system of law that is grounded in the Constitution. The Court's power to review labour action flows from the Constitution itself. Common law informs the provisions of the labour law and the Constitution and derives its force from the Constitution. The Courts have also developed the extent to which common law remains relevant to labour law on a case-by-case basis, interpreting and applying the provisions of the Constitution, the common law and the LRA.

However, this has seen an overlapping in jurisdiction in causes of action between the Labour Court, the High Court and other tribunals.[74] It further settled the debate that the Constitution does not require nor permit the development of the common law to duplicate a statutory right.[75]

This overlap of labour law and the common law was already referred to in *Langeveldt v Vryburg Transitional Local Council,*[76] where Zondo JP assumed that a claim of unlawful dismissal could either go to the High Court or the Labour Court. However, if the same dismissal is claimed to be "unfair", it must be dealt with in terms of the LRA. This dissertation argues that the premature termination of fixed-term contracts should be resolved by the Labour Courts only.

3.5. Overlapping Jurisdiction

The establishment of the Labour Court and its exclusive jurisdiction over disputes emanating from the LRA was brought about by the overlapping and competing

[74] *SAMSA V Mckenzie* (017/09) (2010) ZASCA 2 (15 February 2010). The Court confirmed that a claim for damages for breach of contract falls within the ordinary jurisdiction of the High Court, albeit that the contract is one of employment. The Court referred with approval to the *Wolfaardt* matter and *Tsika v Buffalo City Municipality* (2009) (2) SA (ECD) where Grogan AJ found that "[t]his court and other civil courts retained their common-law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment".

[75] The right not to be unfairly dismissed as set out in s 185 of the LRA. Similarly in *Boxer Superstores Mthatha v Mbenya* (2007) (5) SA 450 (SCA) at para 5 the Court held that contractual claims are cognisable in the High Court. The fact that they may also be cognisable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction. See also *Mohlaka v Minister of Finance & others* (2009) 30 *ILJ* 622 (LC) at paras 14 and 29 where Pillay J held that the scope for developing the common-law of employment is practically confined to situations where there is no legislation implementing the right to fair labour practices or where "a mechanical application of the text of legislation has the effect of denying or diminishing rights in conflict with the Constitution"; See also Du Toit (2010) *ILJ* at 36 – 37; Chapter 4 para 2.4.2.

[76] (2001) 22 *ILJ* 1116 (LAC) para 23.

jurisdictions of the civil and Labour Court experienced under the previous labour dispensation.[77] Section 157(1) of the LRA states that: "subject to the Constitution, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court".

Du Toit aptly observes that:

> "[i]n general, the enactment of labour legislation in South Africa (as in other countries) signified that government was attempting to pour oil on the troubled waters of common-law relationship. The outcome, it is argued, has been one in which contract and statute – quite unlike oil and water - have become inextricably intermingled".[78]

Despite the clear and unambiguous terms of section 157(1) of the LRA[79] in relation to the exclusive jurisdiction of the Labour Court, the legislature also introduced section 157(2), which states that:

> "The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -
> a) employment and from labour relations;
> b) any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as an employer; and
> c) the application of any law for the administration of which the Minister is responsible."

This notion of concurrent jurisdiction is mirrored in section 77(3) of the BCEA,[80] which provides as follows:

> "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract".

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[77] Van Eck (2006) (Part II) *Obiter* 20-32.
[78] Du Toit (2008) *SALJ* 95. In fn 4 the author elaborated, stating "[t]hat is, not only by regulating the contractual relationship to prevent abuse but also by promoting collective bargaining as a means of addressing the inherent equality between employer and employee: see generally Davies and Freedman's Kahn-Freund's *Labour and the Law* 3ed (1983). Thus the Industrial Conciliation Act 11 of 1924, which laid the foundations for centralized collective bargaining in South Africa, was a direct response to the revolt of white mineworkers against their employers' common-law power to hire (cheaper black employees) and fire (unionized white employees); In similar vein, it's radical revision fifty-five years later (discussed below) was prompted by the revolt of black workers against the conditions imposed on them in terms of largely unreconstructed common-law regime, aggravated by apartheid legislation. See also the comments by Froneman J in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 2 BLLR 124 (LAC) at 128-129".
[79] Act 66 of 1995.
[80] Act 75 of 1997.

The effect of this concurrent jurisdiction is that the jurisdiction of the High Court is not ousted in favour of the Labour Court in terms of constitutional matters arising from the LRA or arising from an employment relationship – despite the exclusive jurisdiction of the Labour Court.[81]

4. Significance of the Study

The Explanatory Memorandum to the LRA Bill of 1995, noting the different laws applicable to different categories of employees, states the following:

> "[S]uch a multiplicity of laws creates inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion. A single statute that applies to the whole economy but nevertheless accommodates the special features of its different sectors is far preferable".[82]

Considering the complex legal framework involved in the employment relationship – particularly the contract of employment, which is subject to the law of contract on the one hand and to the employment legislation on the other – the question arises as to whether the parties may conclude a fixed-term contract of employment, incorporating an early termination clause, and whether such a clause *must* satisfy the terms of the law of contract and labour legislation.

In *Langeveldt,*[83] Zondo JP expressed himself about competing jurisdictions, highlighting the fact that, by virtue of the provisions of section 157(1) of the LRA, only the Labour Court has jurisdiction to adjudicate disputes about breach of picketing rules. However, third parties, such as landlords or property owners (as involved in *Fourways Mall (Pty) Ltd v SACCAWU),*[84] cannot approach the Labour Court for relief, as there is no employer-employee relationship between them and the strikers. They would have to approach the superior courts for virtually the same acts, which are committed by the same people, in the same place and at the same time.

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[81] *Fredericks v MEC for Education & Training, Eastern Cape* [2002] 2 BLLR 119 (CC) paras 31–41.
[82] (1995) 16 *ILJ* at 281-282.
[83] (2001) 22 *ILJ* 1116 (LAC).
[84] (1999) 20 *ILJ* 1008 (W), in which a property owner sought relief against striking workers who were not its employees.

The learned judge correctly noted that this may lead to further uncertainty, as judges of two different courts of the same status involved in adjudication of virtually the same conduct, run the inherent risk of the two courts giving conflicting judgments. He found that:

> "This runs contrary to the very purpose of developing a certain and coherent system of law. It is also totally unacceptable in that it is not cost effective …There is no justification for any of this. The dispute resolution system applicable to all employment and labour disputes needs to be streamlined as far as possible".

The foregoing was reaffirmed in *Chirwa v Transnet Ltd & others,*[85] where Skweyiya J held as follows:[86]

> "[T]his is a dispute envisaged by s 191 of the LRA, which provides a procedure for its resolution including conciliation, arbitration and review by the Labour Court … Accordingly, it is my finding that the High Court had no concurrent jurisdiction with the Labour Court to decide this matter".

This remark by the Constitutional Court confirms that, to the extent that the right to fair labour practices is regulated by the LRA, disputes arising from its violation should be resolved by the dispute resolution mechanisms created by the LRA, and/or excluded from the jurisdiction of the High Court.[87] It would make sense that the Court will follow this process. However, section 157 (2) of the LRA still confers concurrent jurisdiction on the High Court and the Labour Court in respect of, amongst other, disputes arising from the violation of fundamental rights entrenched in Chapter 2 of the Constitution arising from employment and labour relations.

The abovementioned judgment of the Constitutional Court in the *Chirwa* matter should have resolved this overlapping of jurisdictions. However, the LRA may, indeed, be bypassed by alleging a violation of a constitutional right in the Bill of Rights providing the scope for judges of the High Court to continue to entertain labour disputes framed as breaches of a fundamental right of an employees, other than those set out in section 23 of the Constitution. This has resulted in conflicting decisions and the emergence of the exact scenario against which Zondo JP warned prior to the *Fedlife* decision.

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[85] (2008) 29 *ILJ* 73 CC; [2008] 2 BLLR 97 (CC). The Court found that the dispute concerning dismissal for poor work performance, which is covered by the LRA and for which specific dispute resolution procedures have been created, is therefore a matter that must, under the LRA, be determined exclusively by the Labour Court.
[86] (2008) 29 *ILJ* 73 CC; [2008] 2 BLLR 97 (CC) att paras 63-65.
[87] (2008) 29 *ILJ* 73 CC; [2008] 2 BLLR 97 (CC) at paras 41 and 124.

It appears as if the foregoing line of thought and arguments lead to the original concern of which forum and which remedies are available in the adjudication of the premature termination of a fixed-term contract of employment (due to the operational requirements of the employer), with the latest jurisdictional aspect being dealt with by the unanimous decision of the Constitutional Court in the matter of *Baloyi v Public Protector and others.*[88] The aspect of pre-dismissal hearings[89] or the overlap between administrative law and labour law[90] have been settled with sufficient authority. It will, accordingly, be argued in this study that the policy makers should consider amending the terms of section 157 to confer exclusive jurisdiction to the Labour Court in determining labour disputes.

5. Research Questions

This research aims at answering the following pertinent research questions:

5.1. Is it permissible to terminate a fixed-term contract of employment prematurely on grounds of operational requirements?

5.2. What are the appropriate remedies available to parties involved in the premature termination of fixed-term contracts of employment due to the employer's operational requirements?

5.3. Is there a need to involve both the labour courts *and* civil courts in determining disputes about the premature termination of fixed-term contracts of employment resulting from the employer's operational requirements?

5.4. What are the lessons to be learned from the ILO and from England and the Netherlands to the premature termination of fixed-term contracts of employment due to the employer's operational requirements?

[88] *Baloyi v Public Protector and others* [2020] ZACC 27. The Court found that the High Court does have the jurisdiction to determine the unlawful premature termination of the contract by the employer.
[89] *Samsa v McKenzie* (017/09) [2010] ZASCA 2 (15 February 2010).
[90] *Chirwa v Transnet Ltd & others* [2008] 29 *ILJ* 73 CC; 2008 2 BLLR 97 CC and *Gcaba v Minister for Safety and Security & others* (2009)12 BLLR 1145 (CC).

6. Hypothesis

Considering the continuous debate surrounding the inter-relation between the common law and labour law in the premature termination of fixed-term contracts of employment, it is hypothesised that the Labour Court should have exclusive jurisdiction, as suggested by Zondo DJP in *Langeveld*,[91] to determine disputes relating to the premature termination of fixed-term contracts of employment due to the employer's operational requirements, and to remove common-law remedies for contracts of employment altogether. The latter was hinted towards in the minority judgment of Froneman AJA in *Wolfaardt*[92] as section 195 of the LRA incorporates the possibility of awarding common-law damages. It may be appropriate to extend the definition of dismissal to include the premature termination of fixed-term employment resulting from the employer's operational requirements.

7. Research Methodology and Limitations

7.1. Methodology

In conducting the research, the doctrinal research method, which is typical of legal research, was followed.[93] The principle purpose of employing doctrinal research is to provide normative comment of "how things should be", to formulate proposals for improvement.[94] Legal doctrinal analysis seeks to achieve consistency and coherence in relation to a particular set of rules by employing, in essence, the same textual analysis, practical argumentation and structured reasoning. The application of the doctrinal research method requires a close examination of the legal framework consisting of the present legislation and case law and the combination of all the relevant elements to establish a coherent view of the law relevant to the matter under investigation.[95]

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[91] *Langeveldt v Vryburg Transitional Local Council* (2001) 22 *ILJ* 1116 (LAC).
[92] (2001) 22 *ILJ* 2407 (SCA) at para 16.
[93] Watkins and Burton (2013) 8. The author mentions that the concept of doctrinal research is described as the process used to identify, analyse, and synthesise the content of law.
[94] Fourie (2015) 8 *Erasmus L. Rev* 95.
[95] Watkins and Burton (2013) 10. The writers state that the three core features of doctrinal research include that arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications. The second feature is that the law must represent a system and, thirdly, that even exceptions must take place in such a way that the systems remain coherent.

This study assesses relevant legislation, case law and principles in the South African context, with the view of providing recommendations to address any shortcomings. In line with the doctrinal research approach, the development of labour law in South Africa is considered through the periods prior to enactment and after the implementation of the Constitution.

Unlike pure doctrinal research, which confines the study to a critical analysis of the law, to make recommendations for reform,[96] a comparative study will also be applied to answer the research questions in this study. The purpose of comparing the legal questions in the South African law with those in a different legal system is to establish elements of unity between the South African context and that of the foreign jurisdiction.[97] Furthermore, the object is find inspiration for proposed amendments to the South African law. This is essential for the development of our law. As Kahn-Freund[98] accurately stated, "[c]learly there is no field of human endeavour in which it is more important to set up international standards and to transplant institutions and principles from more to less developed countries".

This study agrees with the view expressed by Weiss[99] that the only way to identify the uniqueness of one's own system is to assess it from the outside. Accordingly, the English and Dutch law is considered.

In the English labour market, the following two primary legal regulation systems are relevant to dismissals: the common-law rules governing the termination of employment, and the statutory right to claim unfair dismissal in terms of the Employment Rights Act ("ERA").[100] In terms of the ERA, an unfair dismissal requires a two-stage test of fairness and reasonableness. The six, broadly defined, potentially fair reasons include redundancy.[101]

[96] Hutchinson (2015), 8 *Erasmus L. Rev* 130.
[97] Kahn-Freund (1974) *MOD. L. Rev*. 37. See also Morris and Murphy (2011) 31.
[98] Kahn-Freund (1974) *MOD.L.Rev* 37 at 20.
[99] Weiss (2003) *COMP. LAB.L & POL'y.J* 25:177.
[100] S 95 (1) of the Employment Rights Act, 1996.
[101] Koukiadaki (2010) *JILPT* 9 at 1–22.

In respect of the premature termination of the fixed-term contract of employment, the employee is in a similar position than the permanent employee. Although the fixed-term employment is largely regulated by the Fixed-Term Employment Regulations ("FTER"),[102] its termination is regulated by the ERA, provided that the employee complies with the necessary qualifying period of employment (two years). Further analysis of the FTER and ERA will be done in this study to determine elements of unity between the South African approach to the premature termination of fixed-term contracts of employment due to the employer's operational requirements and that of the English law. Furthermore, the object is to find inspiration for proposed amendments to the South African law. England (as part of the United Kingdom with Northern Ireland) is also a founding member of the ILO.

Dutch labour law is partly codified, and the Civil Code (*Burgerlijk Wetboek*) is the most important single source of employment law. Book 7 of the Code amongst others deals with employment contracts, fixed-term and temporary agency work contracts, and termination of contract. The Netherlands is also a member of the ILO and, like South Africa, also relies on case law for further development of the law. A comparison between the South African and the Dutch labour law will be made in relation to the approach to the premature termination of a fixed-term contract of employment on grounds of operational requirements in addressing the research questions and proposing amendments to the South African labour law.

It is therefore quite evident that lessons may be learned from the foreign law as set out herein above and such evaluation of foreign law will be a valuable source to support the law reform as hypothesised and in answering the research questions as raised.

[102] SI 2002/2034, as amended. The regulatory reforms as introduced by the FTER were designed to implement in Britain the Council Directive 99/70 of the European Commission with the purpose to improve the quality of fixed-term work by ensuring the principle of non-discrimination between fixed-term workers and comparable permanent workers and to establish a framework to prevent abuse arising from the misuse of fixed-term employment contracts and concluding various successive fixed-term contracts. See Koukiadaki (2010) *JILPT* 9 at 11–12.

7.2. Limitations

This study is not aimed at addressing the premature termination of the fixed-term contract of employment for reasons defined in section 186(1)(b) of the LRA in relation to the non-renewal of such contract, or the employee's expectation of renewal. Furthermore, this study does not address the circumstances in which the employee earns below the threshold determined by the Minister of Labour in accordance with, and as contemplated by section 198 A of the LRA. This study also does not address the specific remedies for payment of damages, as contemplated by the Compensation for Occupational Injuries and Diseases Act, ("COIDA"),[103] the deeming provisions applicable to fixed-term contracts of employment in relation to whether the individual is an employee or not nor the Constitutional, administrative and labour law overlaps in the termination of fixed-term contracts of employments.

This study focuses on the development of the interaction between the common-law grounds and statutory grounds – as fully explained in Schedule 8 to the LRA [104] for the premature termination of fixed-term contracts of employment resulting from the employer's operational requirements. The study investigates the application of the constitutional principles of establishing permissible grounds for premature termination of fixed-term contracts of employment, both contractually and in terms of the "fairness" principle as enshrined in the Constitution.

This study covers publications and case law up to 31 December 2021.

[103] Act 130 of 1993.
[104] Schedule 8: Code of Good Practice: Dismissal deals with some of the key aspects of dismissals for reasons related to conduct and capacity. It is a general explanation of the various forms of grounds for dismissal with the key principle that employers and employees should treat one another with mutual respect. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees. The said schedule therefore addresses fair reasons for dismissal incorporating fair procedures to be followed in dismissals for industrial action, misconduct, probation, poor work performance, and incapacity.

8. Structure of the Dissertation

The dissertation is structured into the following chapters:

Chapter 1: Introduction

The first chapter of this study introduces the research topic and provides a background to the study. The chapter sets out the two concepts of law that are applicable in the premature termination of a fixed-term contract of employment – that of "fairness", in terms of the labour legislation, and that of "lawfulness" in terms of the common law. The chapter also briefly addresses the significance of the study, the research questions raised, the hypothesis, the research methodology, limitations and the intended structure of the dissertation.

Chapter 2: The Role and Function of Labour Law

In chapter 2 the various perspectives to labour law is discussed.[105] The development of modern labour law is explained together with the constitutionalisation of the South African labour law.[106] The rationale for incorporating the fairness requirement in termination of contracts of employment in the current labour dispensation is explained in the concluding remarks.

Chapter 3: Termination of Fixed-Term Contracts

In chapter 3 the common-law contract of employment, the permissible grounds for termination of employment[107] and the grounds for premature termination of the fixed-term contracts of employment[108] is discussed. This chapter determines whether it is permissible to prematurely terminate a fixed-term contract of employment on grounds of operational requirements and the remedies available to employees challenging same. Specific reference is made to the *Buthelezi* judgment. The chapter addresses

[105] Chapter 2 paras 2. and 3.1.
[106] Chapter 2 paras 3.3.2. and 3.3.3.
[107] Chapter 3 para 2.
[108] Chapter3 para 5.

the premature termination of the fixed-term contract of employment on grounds of operational requirements as dealt with through the common law and statutory principles.

This chapter also provides background to the need for law reform aimed at the premature termination of the fixed-term contract of employment due to the employer's operational requirements.

Chapter 4: Overlapping Jurisdiction of the Labour Court and the High Court

In chapter 4 the exclusive jurisdiction of the Labour Court is considered, as developed through case law and stated through provisions enacted in the LRA and the BCEA.[109] Specific reference is made to the relevant sections of each act. However the growing number of labour matters referred to the High Court is discussed in relation to the jurisdiction of the High Court in labour matters to determine which court should determine labour disputes.

Chapter 5: South Africa's International Law Obligations and Comparative Study

This chapter focuses on the establishment and functioning of the ILO[110] and considers the conventions, protocols and recommendations made by the ILO in as far as they apply to the premature termination of a fixed-term contract of employment due to the employer's operational requirements.

The foreign law and principles applied to the premature termination of a fixed-term contract of employment in England[111] and the Netherlands[112] is investigated in Chapter 5. A comparison will be drawn between the legal principles applied in case law and statutory enactments of both the aforesaid countries and the principles applied to the premature termination of fixed-term contracts of employment due to the employer's operational requirements compared to the South African context.

[109] Chapter 4 para 2.2 – 2.4.
[110] Chapter 5 para 1.
[111] Chapter 5 para 4.
[112] Chapter 5 para 5.

Chapter 6: Conclusion and Recommendations

Conclusions are drawn and proposals are made regarding possible interventions that could facilitate change to the legal framework of the premature termination of fixed-term employment contracts due to the employer's operational requirements.

Upon conclusion of this study and answering the research questions presented in paragraph 5 above, changes are suggested to the legislative framework. A proposal for amendments to the LRA will be suggested to make specific provision for the premature termination of fixed-term contracts of employment as well as the appropriate forum to determine disputes relating to the premature termination of fixed-term contracts of employment on grounds of operational requirements. These amendments, which align with other legislation, is made to ensure the effective regulation of the relationship between the employer and employee in the premature termination of the fixed-term contract of employment on grounds of operational requirements.

CHAPTER 2
THE ROLE AND FUNCTION OF LABOUR LAW

1. Introduction

> "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".[1]

The approach to the premature termination of a fixed-term contract of employment emphasises the interaction between fairness derived from the employment legislation and lawfulness in terms of the law of contract. This chapter discusses the different perspectives or approaches to labour law as background to the Human Rights approach, as adopted from the Social Justice approach to labour law and followed in South Africa.

[1] *Pharmaceutical Manufacturers Association of SA; in re Ex Parte Application of President of RSA* (2000)(2) *BCLR* 674 (CC) para 44ff.

The development of the South African labour law is discussed from being grounded in the law of contract to the implementation of the fairness principle in termination of employment as well as the fundamental human rights of, amongst other, the constitutional right to fair labour practice.[2] Reference is made to the Libertarian or Fee Market approach as endorsed in the common law and the Social Justice approach to emphasise the importance of the constitutional development of the labour law in South Africa.

In common law the sanctity of contract and minimum judicial interference in contracts was followed and applied in the employment context.[3] The common law accordingly focused on and had the aim of enforcing the commercial aspect of an employment relationship whether the terms thereof were rational or irrational.[4] It gave the parties the ability to act irrationally.[5]

A clear example of this is found in the matter of *Printing and Numerical Registering Co v Samson*,[6] where it was determined that public policy requires that mature and competent men should be free to contract and be bound to the agreements that they so voluntarily[7] entered.[8]

The remedy for breach of contract was damages. This was confirmed by the Appellate Division (as it then was) in *Schierhout v Minister of Justice.*[9] Specific performance was not awarded in respect of contracts of employment.

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[2] S 23(1) of the Constitution.
[3] Brassey (1996) at 2.
[4] Brassey (1996) at 2; The author further argues at 7 that the one party was not obliged to consult the other before acting in a way adverse to him thereby unilaterally changing the agreement when and how it suits him, if he does not mind paying a negligible sum of compensation, which is what damages usually amounted to.
[5] Brassey (1996) at 4.
[6] *Printing and Numerical Registering Co v Samson* (1875) LR 19 Eq. 462.
[7] Jessel R in *Printing and Numerical Registering Co v Samson* 1875 LR 19 Eq. 462 held that the terms of the contract is "held sacred and shall be enforced by the courts of justice" and that this is required more than any other public policy; *Wells v South African Aluminite Company* (1927) AD 69; At 73 this passage was quoted with approval.
[8] Kahn-Freund (1977) at 51 the author notes the view that the labour law allow for the parties to determine their own relationship without interference. He states that "[t]hrough being countervailing forces, management and organised labour are able to create by autonomous action a body of rules, and thus to relieve the law of one of its tasks".
[9] *Schierhout v Minister of Justice* (1926) AD 99 at 107.

Labour law has as its main purpose the regulation of the employment relationship. This regulation, amongst other, applies to the regulation of the employer's power over its employees and to balance it with the power of organised labour to engage in collective bargaining.[10] Van Niekerk *et al* explains that:

> "[w]hile the focus of labour law is the workplace its subject matter is built from a complex and intertwined body of law, constantly being developed, and drawn from a number of diverse legal sources".[11]

2. The Main Approaches to Labour Law

The nature of the employment relationship has changed dramatically post the industrial era. As an unavoidable consequence the role of labour law has also been re-evaluated.[12] In South Africa though, labour law remains a system reactive to political and social ideologies borne from the struggles between different social actors and power relationships in the social and political sphere.[13]

The labour law, with its nature and the extent thereof debateable, has two main views and approaches namely the libertarian or free market; and the social justice perspectives.[14]

2.1. The Libertarian or Free Market Approach

South African labour law, which was initially based on the common law, was focused on achieving commercial good sense which would make fairness an unnecessary addition to the employment agreement. Common law concerned itself only with the rights and obligations of the parties towards each other. If there is an express term governing the matter, it defers to it however irrational it may be. Brassey confirms that "sanctity of contract [was] its abiding ethic".[15]

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[10] Kahn-Freund (1977) 4. See also Kriek (2018) LLM UP at 10.
[11] Van Niekerk *et al* (2019) at 3.
[12] Weiss (2003) at 45-46 remarks that the manufacturing and mining industry, to a great extent, is replaced by the service sector. The factory as place to work is more and more replaced by network structures, the workforce is fragmented and segmented in core groups and periphery groups, the demarcation line between an employment relationship and self-employment can no longer be drawn by simple reference to the criterion of subordination.
[13] Thompson C (2004) 25 *ILJ* at iv.
[14] Van Niekerk *et al* (2019) at 8.
[15] Brassey (1996) at 2.

The libertarian or free-market approach to the employment relationship regards the contract of employment as the only "legitimate mechanism to regulate the employment relationship".[16] The principle features of this approach include the aim of competitive economic goals, the doctrine of freedom of contract and minimum legal intervention in the employment relationship.[17] Followers of the libertarian, or free- market, perspective consider legislation regulating the employment relationship as unwanted and imposing on the freedom[18] of the parties to contract. The only way an employee's terms and conditions of employment may be advanced or become more beneficial, according to this approach, will be by default where employers compete against each other for labour by providing more beneficial and lucrative terms to the employees.[19]

The supporters of the libertarian perspective argue that abolishing labour legislation will have a beneficial effect for employees and the broader society. Effectively, they support the deregulation of the South African labour market alleging a linkage between lower labour standards and competitive advantage in the global market.[20] This approach emphasizes the individual contract of employment as the best means to ensure the greatest possible degree of flexibility and competitiveness in the economic sphere. It follows then that according to this approach the only means of dealing with the pre-mature termination of the fixed-term contract is in terms of the contract itself and the contractual remedies associated therewith.

According to Brassey the deregulation of the labour market is the only way in which an equilibrium can be achieved between the rights of the employer and the employee.[21] Protection for the employee will be in terms of the common law which is both effective and adequate. Van Niekerk describes this as a "seller's market in which employers will be required to compete for labour by providing ever-improving terms and conditions of employment".[22] Followers of the libertarian or free-market approach believe that a benefit to the broader society will be achieved by abolishing labour

[16] Van Niekerk *et al* (2019) at 8.
[17] Aletter (LLD 2016) UP at 28.
[18] Van Niekerk *et al* (2019) at 8 explains that "they argue that laws intended for the protection of employees have the unintended consequence of protecting the employed at the expense of the unemployed".
[19] Brassey (2012) 33 *ILJ* 1; Van Niekerk (2013) 34 *ILJ 28.*
[20] Van Niekerk *et al* (2019) at 8.
[21] Bassey (2013) *ILJ* 827.
[22] Van Niekerk *et al* (2019) at 8 referring in fn 22 to Louw L (2005); Brassey (2012) *ILJ* 1; Van Niekerk (2013) 34 *ILJ* 28.

legislation as it will enhance foreign investment.[23] Although Davies does not support libertarianism she explains the motivating factor of the free-market approach as follow:[24]

> "If employers are allowed to run their businesses as they see fit, with a minimum of outside intervention, they will be able to compete on a global scale. If firms in other countries can operate more cheaply, employers will respond by finding ways to cut their own costs. And if firms are profitable, society as a whole – and the employees of those firms in particular – will reap the benefit".

Accordingly the followers of the free-market approach consider legal regulation of the employment relationship as problematic due to the limitation of employers' options and the additional costs, such as mandatory minimum wages, which is imposed on them resulting in reduced competitiveness.[25]

It is submitted that Davies makes a strong argument in as far as she states that "[u]ltimately, this harms the very workers the legislation was seeking to protect".[26] The employers may be forced to reduce costs by effecting redundancies in employment and this will obviously be to the detriment of the employees.

The supporters of the free-market approach further believe that an employer should be allowed to terminate employment at will as this insecurity and *threat* will lead to greater productivity by the workforce.[27] This notion in the context of a democratic and constitutional state such as South Africa is quite evidently unsupported.

The fundamental objection to this approach is that in general South African labour law is tainted by historical inequality between employers and employees but similarly between different classes of workers. The greater part of the employment sector of the South African employment society is only partly educated. Furthermore if companies become more profitable due to the deregulation of the labour law there is no

[23] Baskin (1998) *ILJ* 991.
[24] Davies (2009) at 27.
[25] Davies (2009) at 27.
[26] Davies (2009) at 27.
[27] Davies (2009) at 33; Aletter (LLD 2016) UP at 31.

mechanism in place that will allow for, or ensure, that increased wealth of the employer is distributed to the employees.[28]

Added to this, as correctly pointed out by Van Niekerk, there is no substantive proof that the deregulation of labour law will result in either an increase in productivity, or foreign investment, in the economy.[29]

Lastly, the principles of fairness in the employment context prohibit arbitrary actions against the employee.[30] Therefore the premature termination of the fixed-term contract of employment cannot only be regulated by the contract and its terms. It is submitted that the parties cannot be left to self-regulate the employment relationship and in particular the premature termination of the fixed-term contract with the only repercussion being the payment of damages for the breach of the contractual terms. It is therefore evident that the Libertarian or Free Market approach is not suitable for a country such as South Africa.

2.2. The Social Justice Approach to Labour Law

The social justice perspective supports the notion that legislation must be interpreted to promote social justice. It regards the law as a tool to further the interest of social justice to address the inadequacy of the contract of employment as a mechanism to regulate the employment relationship. Despite this perspective being a wide and somewhat illusive concept without a clear and succinct definition it is obvious that this perspective proposes the upliftment of all individuals in the employment context. Van Niekerk explain that:

> "In this approach, the law plays a secondary role – it regulates, supports and constrains the power of management and organised labour, but leaves the

[28] Davies (2009) at 27.
[29] Van Niekerk *et al* (2019) at 9 states that "[c]ore labour standards do not play a significant role in shaping trade performance"; Flanagan (2003) at 17 concludes that poor labour conditions often signal low productivity or are one element of a package of national characteristics that discourage FDI inflows or inhibit export performance; Hepple (2012) at 2 and 3 asserts that the South African labour laws are not overly regulated but flexible.
[30] Van Niekerk *et al* (2019) at 10. The adoption of the Constitution and South African membership of the ILO advances the decent work agenda and extensive protection against arbitrary action as briefly discussed further in this study.

> process of bargaining and its outcomes to be determined by the interests and power of the parties themselves".[31]

The aim of the social justice approach is to benefit not only the majority but also the minority, for all men are equal before the law and similarly all men's rights are equal. The social justice approach according to Davies is the idea of "redistributing wealth from employers to the workforce and in ensuring the fair treatment of those who are discriminated against or socially excluded".[32] This perspective lays emphasis on the aim of "social justice above economic considerations".[33] In this context the fairness of the premature termination of the contract of employment will rank supreme irrespective of the reasons or economic rationale.

Sir Otto Kahn-Freund held the view that the purpose of labour law was to maintain the balance between the employer and the workers through voluntary collective bargaining whilst acknowledging the outside interests of the public to an uninterrupted supply of goods and services. It is with this public interest in mind where government and the regulation of labour law may play a role to limit interruption of production.[34] Kahn-Freund's view of regulation of the labour law through collective bargaining is in contrast with the social justice approach of detailed labour regulation.[35]

In the South African context the social justice approach means that every person is entitled to fair treatment under the law and include "the realisation by every worker of their rights created under the LRA"[36] and the Constitution.

The social justice perspective further requires that each person tasked with the interpretation of labour legislation whether attorney, advocate or members of the judiciary must develop and interpret the legislation equitably and equally to give effect to the advancement and protection it offers to all involved.[37] It is therefore evident that the social justice perspective presuppose that all individuals' rights be promoted, and

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[31] Van Niekerk *et al* (2019) at 11 referring to Davies and Freedland (1983) at 15.
[32] Davies (2009) at 17-18 referring to Collins "The productive disintegration of labour law" at 306.
[33] Aletter (LLD 2016) UP at 33.
[34] Kahn-Freund (1977) 8.
[35] Van Niekerk *et al* (2019) at 11 the author notes that "By the end of the 1970s, Kahn-Freund himself expressed the view that the system he had called "collective laissez-faire" was in need of adjustment". Referring in fn 35 to Davies and Friedland (1983) at 2-3.
[36] Matlou (2016) *SA Merc LJ* at 545; Geldenhuys (2016) *SA Merc LJ* 401.
[37] Matlou (2016) *SA Merc LJ* 547; Kriek (LLM 2018) UP at 15.

uplifted where required whether it is the majority or the minority, whether individuals or the collective. To this effect the dispute resolution forums of South Africa plays an ever increasing and crucial role in the mechanism through which labour rights are enforced but more importantly by which competing rights of the employee and the employer are balanced.[38]

It is, therefore, not surprising that in South Africa the concept of advancement of the employee's rights (fairness of dismissal) in circumstances where the employer's operational requirements leads to the premature termination of the fixed-term contract of employment in terms of the social justice approach would be favoured. However, the rights of the employer in the circumstances is equally important and needs to be balanced. A slavish adoption of the social justice approach in the premature termination of the fixed-term contract of employment due to the employer's operational requirements may not pass muster in the balancing of the competing rights.

3. The Human Rights Approach to Labour Law

3.1. Introduction

In the beginning of the industrial revolution labour laws sought to protect the most vulnerable workers against physical and moral extortion and later to ensure that they worked in acceptable conditions wherein they received a fair remuneration which was sufficient to meet their daily needs. Such normal needs being classified as the needs of the average employee regarded as *a* human being living in a civilized community.[39]

From the end of the 19th century to the 20th century the focus was on collective issues promoting concerted worker action and regulating and or resolving union management conflict ideally operating by way of abstention so that the employer and worker representatives could maintain a "collective *laissez faire*"[40] in the workplace.[41] The intended beneficiaries of this protection were the individuals working together in a

[38] Van Niekerk *et al* (ed) (2019) at 12.
[39] Davidov *et al* (ed) (2011) 3 at 44 and 4 at 59.
[40] Kahn-Freund (1972).
[41] Davidov *et al* (ed) (2011) 1 at 14.

central location or workplace where they, at the very least, had periodic contact with each-other.[42]

Globalization has radically changed the workplace and expanded the world supply of labour thereby creating a transnational labour market.[43] With globalization also came a universal and international set of rules and standards accepted by most countries and organisations as a collective. Countries have similarly developed legislation acknowledging human rights which flows through their labour laws creating a purposeful interpretation and implementation of human rights in the labour market.

3.2. The Constitutional Function of Labour Law

In liberal democracies the domination of the worker by the employer under the right to control (inherent in the ownership of capital (property)) was obscured by the freedom of persons of full legal capacity and being the bearers of legal rights to contract as they pleased.[44] This notion was generally applied in the South African context under common-law principles. In social democracies however, the subordination of the worker was recognised, and steps were taken to limit the exercise of power by the employer over the employee. That is exactly where labour law functioned and what emerged in South Africa. Dukes argues[45] that the regulation of working relationships cannot usefully be considered in isolation from the broader constitutional context.

Decisions and aspects which previously fell within the employer's prerogative would be decided in the community of labour where the employers' and workers' organisation would work together, through collective bargaining, to govern and regulate working conditions and production.[46]

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[42] Arthurs (2011), Davidov *et al* (ed) 1. Arthurs argues at 21 that collective agreements gave workers the experience of working together under the rules they had collectively negotiated and enforcing same through grievance procedures they collectively controlled.
[43] Arthurs (2011), Davidov *et al* (ed) 1. Arthurs argues further that this change in the labour market "facilitated the development of global supply chains whose links to the core enterprise are often obscure and sometimes covert. Consequently even workers who in fact work for the same ultimate employer often do not even know of each other's existence".
[44] Dukes R (2011), Davidov *et al* (ed) 4 at 59.
[45]Dukes R (2011), Davidov *et al* (ed) 4 at 65. Dukes contends that "thinking about labour law in terms of its constitutional function allows for important lines of analysis including highlighting the importance of considering the contribution of labour law to the constitutional task of establishing a particular economic and social order".
[46] Davidov *et al* (ed) 4 at 60.

Hugo Sinzheimer[47] considered the labour law "as a tool to be employed in the process of democratizing the economy".[48] Dukes explains that[49] Sinzheimer argued for the law, amongst other, to be used to, institute or recognize a system of bi-partite regulation of the economy, to create workers' councils and bi-partite industrial councils and endow these bodies with the capacity to legislate and perform other administrative acts in regulation of the economy, creating the legal framework within which regulation should proceed.

The state law that fulfilled these functions should have the status of fundamental norms. The aim of the economic constitution was to allow for self-determination within the economic sphere by virtue of state fundamental norms or laws.[50] The state therefore had to act as the ultimate guarantor of the public interest in this self-determination.[51]

The goal, therefore, of labour law according to Sinzheimer was the protection of employees (including the unemployed), reducing personal dependency, fighting for human dignity and lastly it must cover all the needs and risks that must be met in the employee's life (material needs, of their health and safety as well as human dignity) including the law on job opportunities.[52] The acknowledgment of the human dignity and fundamental laws of the state, it is submitted, corresponds with the human rights approach of the labour law in regulating the economy.

In South Africa the government stands central in the development of labour law in compliance with the Constitution.[53] The state's role is of tantamount importance to

[47] Hugo Sinzheimer is widely regarded as one of the most prominent founding fathers of the German labour law.
[48] Dukes R (2011), Davidov *et al* (ed) at 59.
[49] Dukes R (2011), Davidov *et al* (ed) 4; Dukes at 62 explains that Sinzheimer proposed the democratization of the economy through the institution of an economic or labour constitution, referring to H Sinzheimer, "Das Rätesystem and Rätebeweguing und Gesellschaftsverfassung" both in H. Sinzheimer *Arbeitsrecht und Rechtssoziologie* (Europaïsche Verlagsanstalt, 1976).
[50] Dukes R (2011), Davidov *et al* (ed) 4. Dukes at 62 – 63 describes the goal of the constitution, for Sinzheimer, lied with the furtherance of the public interest where the public interest would be best served by "the unmitigated emancipation of individuals".
[51] Dukes R (2011), Davidov *et al* (ed) 4. Dukes at 60 – 61 refers to Sinzheimer (1976) where he explained this concept.
[52] This is also expressed in the goal of the ILO's present Decent Work agenda.
[53] Sinzheimer's prescriptions for the institution of an economic constitution relied heavily on the involvement of the State. He referred to 'state law' being used to distinguish norms created by the legislature from norms created autonomously for instance by trade unions and employers' organisations, both were equally law.

serve as guarantor of the protection of the public interest and to facilitate the exercise of regulatory power by employers, trade unions and bargaining councils. The state must set the correct limits to the exercise of that power through the institution of a constitutional framework. This was echoed in the adoption of the Constitution where the right to fair labour practices was adopted as a fundamental right.[54]

3.3. The South African Labour Law

3.3.1. Introduction

South African labour law went through various developments from the beginning of the 19th century. Workers were always subordinate to the employer's right of control[55] and the notion of common-law rights of freedom of contracting between individuals of full legal capacity were the paramount measure being applied between employer and employee in the premature termination of the fixed-term contract of employment and the labour law in general.[56]

The labour market, and especially the unskilled, was controlled and to a certain extent held at bay through the adoption of legislative measures such as the Native Labour Regulation Act of 1911, the Native Affairs Act of 1920 and the Industrial Conciliation Act of 1924.[57] As a result hereof skilled work in South Africa amongst other in the mining, metal and engineering industries remained almost exclusively within the white preserve[58] until the late 1960s.

The continued economic growth of South Africa was being threatened by a series of strikes which originated in Durban at the end of 1972 and continued through 1973 and

[54] S 23 of the Constitution.
[55] Jordaan (1990) *Acta Juridica* 73 at 80-81.
[56] Van Niekerk *et al* (2019) at 8.
[57] Act 11 of 1924; The act was repealed by the Industrial Conciliation Act 36 of 1937 and the Industrial Conciliation Amendment Act 28 of 1956. S 77 of the latter legalized job reservation according to the race of the worker (white only) and provided that whenever it appears to the Minister that measures should be taken to safeguard the economic welfare of employees of any race, he may, by notice in the Government Gazette, decide that, as from a given date and, in any area, specified by him, employment in any undertaking, industry, trade or occupation shall be reserved for persons of a specified race. In defining the nature of the work to be performed by employees of a specified race, the Minister may have recourse to any method of differentiation or discrimination as may seem to him desirable.
[58] Hepple (1963) at 7-8 .

into 1974. This was a serious concern to the government. South Africa also faced growing international pressure over apartheid and racial domination in the form of sanctions as well as the continuous possibility of disinvestment in South Africa and a consequent disruption in trade.[59]

As a result, the state appointed two commissions of inquiry[60] into labour legislation. Although the appointment of these two commissions must be considered as part of a wider state strategy designed to re-establish economic and political stability it unknowingly ventured into the realm of creating a labour market in compliance with international standards and constitutionalism.[61]

3.3.2. Wiehahn Commission Reports

The Commission of Inquiry into Labour Legislation ("The Wiehahn Commission" or "the Commission") was established in 1977 partly because of the growing labour unrest and the increasing international and commercial pressure against discriminating and restrictive labour legislation.[62]

Some of the most notable recommendations of the Wiehahn Commission related to: The right to organise,[63] work reservation,[64] and dispute resolution. The Commission recommended that the principle of dispute resolution be adopted,[65] rather than dispute

[59] Maree & Budlender (1987) at 187:119.
[60] The Wiehahn Commission was appointed to examine the state of labour legislation; Maree & Budlender (1987) at 118. The aim of the Riekert Commission was to investigate and make recommendations in relation to the influx control system and other matters relating to labour; De Clercq (1979) at 74.
[61] De Clercq (1979) at 74.
[62] Visser (2011) at 50. The Wiehahn Commission reports represent a rubicon in South African labour law.
[63] Maree & Budlender (1987) at 119; Maree (1985) at 296; De Clercq (1979) at 75-76; Terreblanche & Nattrass (1994) at 199. The Commission observed that full involvement in the free enterprise system with as little government intervention as possible would give all groups a stake in the system and ensure a common loyalty to the system and to the country. See also Wiehahn Commission Reports Para 1.19.1 to 1.19.4. This observation would be in line with the social justice perspective on labour law but will eventually be adapted to be more in line with the constitutional perspective and fairness.
[64] Statutory work reservation was introduced in terms of s 77 of the Industrial Conciliation Act in 1956 to protect the economic security of white workers however the economic growth of the late 1960s resulted in the movement of whites from reserved occupations to other categories and these vacancies was then filled by black workers. See also Wiehahn Commission reports para 3.126 and 3.127. It was further noted that work reservation was untenable in consideration of the developments in the labour front and harmed the country's international image. See also the Wiehahn Commission Reports Para 3. 129.3 and 3.129.5.
[65] Recognizing the need for dispute resolution instead of dispute prevention and the establishment of a specific dispute resolution body is a telling observation or conclusion in the context of the constitutionalizing of the South African Labour law.

prevention, through specific machinery for dispute resolution.[66] The adjudication of allegations of unfair dismissals were to be heard by the Industrial Court with the Minister being empowered, through provisions of the Act, to reinstate employees or restore their terms and conditions of employment in the case of a dispute.[67]

It was also noted by government that a very wide definition of "unfair labour practice" was included in the Industrial Conciliation Amendment Bill but the introduction of specific fair employment practices legislation was postponed with the Industrial Court to rule over unfair labour practices. The Industrial Councils were to decide and rule, by unanimous decision, over disputes about unfair labour practices with the Industrial Court determining those matters where no decision were made through compulsory arbitration.[68]

3.3.3. The Industrial Court

One of the most important and fundamental recommendations of the Wiehahn Commission was the institution of an Industrial Court. The Commission noted the need for a special judicial body to deal with labour issues based on, amongst other:

- "the complexity of labour law as it placed an additional burden on civil courts already overloaded and demanded the presence of labour law specialists.
- Rapid developments in industrial relations and labour disputes generally needed quick action which general courts could not provide.
- The legal costs of the general courts were too high and often beyond the means of litigants".[69]

It would thus develop a body of case law contributing to the formulation of fair employment guidelines.[70]

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[66] Wiehahn Commission Reports para 4.3.
[67] Wiehahn Commission Reports para 3.159.2.1 to 3.159.2.11.
[68] Howe (1984) at 2 - 5.
[69] Kooy *et al* (1979) at 28.
[70] Kooy *et al* (1979) at 27-29. The Commission recommended that the president of the Industrial Court should be appointed from the ranks of judges or former judges of the Supreme Court, senior magistrates or lawyers of not less than ten years standing. This recommendation, it can be argued, is a further shift closer to the social justice perspective of the labour law and constitutionalising thereof as jurists and those applying the law would be required to develop and interpret the law purposefully with the view of achieving social justice. See also Kriek (LLM 2018) UP at 14.

The government accepted these recommendations and with section 17 of the Industrial Conciliation Amendment Act,[71] the powers of the old Industrial Tribunal was expanded through the creation of an Industrial Court which would specialize in the adjudication and arbitration of labour disputes of rights and interests respectively.

Unfortunately there was no opportunity to develop judicial precedents as the Industrial Court[72] had restricted civil jurisdiction concurrent with ordinary civil courts[73] and could accordingly not lay down labour law guidelines. The status and jurisdiction of the Industrial Court in respect of unfair labour practices were initially ambiguous and quasi-judicial derived from equity rather than formal legal jurisdiction based on its interpretation of and evaluation of fairness in the interpretation of an unfair labour practice.[74]

Brassey quite fittingly remarked on the purpose of the Industrial Court noting:

> "But there were issues that the parties did not want to fight over and yet could not back away from: dismissals, for instance or the mechanics of collective bargaining. Having them solved by an outsider was an ideal way of getting them out of the arena of industrial conflict. Hence the unfair labour practice jurisdiction".[75]

The Labour Relations Amendment Act[76] further renamed and amended the Industrial Conciliation Amendment Act and revised the functions of the Industrial Court flowing from further recommendations made in the 5th and penultimate report of the Wiehahn Commission. The departure from a pure libertarian approach to a more social justice approach to the labour law was evident in the adoption of this legislation.

[71] Act 94 of 1979.
[72] Even though the Industrial Court was a court of law and applying the content of established law from the previous labour acts it had concurrent jurisdiction with ordinary civil courts and not that of the High Court as a specialist court.
[73] For instance the LRA amendment Act 51 of 1982 allowed for an appeal of the Industrial Court decisions to the relevant provincial division of the Supreme Court like a Magistrates Court Order being appealed against before the High Court.
[74] Howe SA (1984) at 2.
[75] Brassey *et al* (1996) at 9.
[76] Act 57 of 1981 (LRA).

3.3.4. The Human Rights Approach in South African Labour Law

As discussed above the recommendations of the Wiehahn Commission paved the way for South African labour law to evolve from relying only on the common law (libertarian approach) to a legal system regulated by the Constitution where the protection of the employee on various labour and socialistic levels are guaranteed[77] (social justice approach).

The effect of the Constitution was explained by Chaskalson J in the judgment of the Constitutional Court[78] where he held that:

> "Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control".

Section 8(3) of the Constitution[79] provides that the Courts are obligated by the Constitution to apply, or if necessary develop, the common law to the extent that legislation does not give effect to a fundamental right as provided for in the Bill of Rights, and "may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)".[80]

Section 39(2) of the Constitution further 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 objects of the Bill of Rights."

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[77] Protection of the rights of employees are guaranteed in the Constitution, the LRA, the EEA, the BCEA etc.
[78] *Pharmaceutical Manufacturers Association of SA; in re Ex Parte Application of President of RSA* (2000)(2) *BCLR* 674 (CC) at para 45.
[79] S 8(3) of the Constitution provides for The Bill of Rights to apply to all law, and binds the legislature, the executive, the judiciary and all organs of state.
[80] *Pharmaceutical Manufacturers Association of SA; in re Ex Parte Application of President of RSA* (2000)(2) *BCLR* 674 (CC) at para 46. S 36(1) of the Constitution makes provision for the limitation of rights. The limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In the labour law context the Constitution, and the Bill of Rights, makes specific provision for the protection of labour practices in section 23 which states that "Everyone has the right to fair labour practices".[81] Landman[82] correctly states that this right to fair labour practices, as enshrined in the Constitution, "is driving current developments in labour law". The importance of this fundamental right to fair labour practice is echoed in the purpose of the LRA.[83]

Landman[84] further argues that: "[T]he notion that labour practices must, in addition to being lawful, be fair is spreading across the world of work in our country" but that the "growth and development" of the right to fair labour practices "is taking place outside the jurisdiction of the specialist courts".[85]

The constitutionalisation of labour rights in section 23 of the Constitution, it is argued, extends to both the employer and the employee.[86] This was confirmed in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others*[87] where the Constitutional Court remarked that:

> "Our Constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice 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. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment".

and that "Fairness is not confined to workers only". [88]

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[81] S 23(1) of the Constitution.
[82] Landman (2004) 25 *ILJ* at 807.
[83] S 1 of the LRA determines that "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are – (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996; …"
[84] Landman (2004) 25 *ILJ* at 808.
[85] Landman (2004) 25 *ILJ* at 808 refers to *Key Delta v Mariner* (1998) 6 BLLR 647 (E) to illustrate how the concept of unfair labour practice "has influenced the common law regarding the contract of employment without apparent or express reliance on the Constitution". The overlapping jurisdiction of the High Court and the Labour Court is discussed in detail in Chapter 4 of this study.
[86] *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (2002) ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC).
[87]2003 (3) SA 1 (CC) at para 33.
[88]2003 (3) SA 1 (CC) at para 38 and cited with approval the remarks in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* where Smalberger JA held at 589 C–D that: "Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment." Nienaber JA, who wrote the majority judgment expressed a similar

The Court concluded that the interests of both the employer and the employee must be accommodated to achieve "the balance required by the concept of fair labour practices".[89]

Considering the South African landscape,[90] as briefly referred to above, it is easy to understand the rationale for South Africa leaning to the social justice perspective. In the first instance the protective approach of the labour law has been adopted by the Courts.[91] In the second instance South Africa is a member of the ILO and has the duty to ensure that fundamental rights are observed such as the rights of freedom of association, collective bargaining, equality at the workplace and the elimination of child labour.[92] In the third instance South Africa is a constitutional state and the Constitution, as discussed above, recognising labour rights as fundamental rights and in particular the right to fair labour practices. This has been echoed in the LRA.[93] Van Niekerk [94] correctly remarks that:

> "The constitutionalisation of labour rights implies that social justice is a necessary precondition for creating a durable economy and society, and places obvious limitations on the policy choices open to those who seek to regulate the labour market".

However, considering the continued reliance on the contractual terms and the availability of contractual recourse to parties in the premature termination of a fixed-term contract of employment it is argued that such contractual reliance is a deviation from the social justice approach to labour law.

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view and held at 593G–H that: "The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs."

[89] 2003 (3) SA 1 (CC) at para 40 the Constitutional Court held through Ngcobo J that "In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed."

[90] Hepple (2012) at 2 states "[t]here can be no doubt that the most striking feature of South Africa's labour market is the extreme level of unemployment". See also Benjamin (2006) *Transformation 2* at 37 describing the increase in non-standard employment as "the motor for the development of externalisation in South Africa."

[91] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) *ILJ* 2405 (CC) at para 72.

[92] Van Niekerk *et al* (2019) at 10. The ILO conventions as well as the Declaration on Fundamental Principles and Rights at Work is discussed in detail further in this study.

[93] S 1 of the LRA.

[94] Van Niekerk *et al* (2019) at 10.

4. Conclusion

The very purpose and aim of labour law has been debated quite extensively. The inclusion of the different labour perspectives in this study is specifically required to set the background to answer the research questions. We must fully understand where our labour law originated from and what its role is to conclude on the determination of the remedies and forums where the premature termination of the fixed-term contract of employment due to the employers' operational requirements are to be considered.

Firstly, it was concluded that previously, protection for the premature termination of the fixed-term contract of employment was only found in common-law contractual remedies. The Wiehahn Commission reports and recommendations broadened the scope of statutory governance of the employment relationship through the dispute resolution forums recommended. This led to the development of the fairness concept by the Industrial Court in the employment context which was sanctified in the Constitution. The premature termination of the fixed-term contract of employment accordingly will be addressed through statute based on the fairness requirement and the contractual terms.

However, the fairness requirement supersedes the contractual terms and employers should possibly have the right to retrench the employee before the termination date of the fixed-term contract of employment.[95] This aspect will be explored in the next chapter.

Secondly, it is evident that the South African labour market requires a level of flexibility in the adherence of and implementation of the fundamental human rights in the workplace. The human rights function and approach to labour law in South Africa is a functional approach considering the constitutionalising of the labour law, and the ever-changing nature of the contract of employment.[96] This approach accepts and gives

[95] Giving effect to the interpretation of s23(1) of the Constitution; 2003 (2) BCLR 154 at para 38.
[96] We have seen an increasing number of various models of the employment contract being applied in the workplace whether through temporary employment services, temporary contracts of employment or fixed-term contracts of employment.

effect to the rights of both parties to the fixed-term contract of employment and the premature termination thereof by virtue of the right to fair labour practices.[97]

In the following chapters the accepted grounds for the termination of employment as well as the termination of the fixed-term contract of employment will be considered together with the remedies available to the parties. The study will also consider whether parties to the fixed-term contract of employment can rely on the unlawful premature termination of the fixed-term contract of employment and, or the unfairness of such premature termination. Is it perhaps not one and the same concept in consideration of the constitutionalising of the South African labour law? The remainder of this study will aim to address these questions.

CHAPTER 3

[97] 2003 (3) SA 1 (CC) at para 40.

PREMATURE TERMINATION OF FIXED-TERM CONTRACTS OF EMPLOYMENT ON GROUNDS OF OPERATIONAL REQUIREMENTS

1. Introduction

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".[1]

The abovementioned is contained in article 4 of the Termination of Employment Convention of the ILO entered into force on 24 November 1985. This article is regarded as critical in the employment relationship between the employer and employee.[2] Even though South Africa has not ratified the Convention, compliance with this convention is to be found in sections 185[3] and 188 of the LRA and in the Code of Good Practice: Dismissal ("the Code").[4] The termination of the employment relationship at the instance of the employer is specifically regulated by the LRA.

The regulation of the employment relationship and the termination thereof is a clear indication of South Africa not only following international norms and standards in relation to permissible grounds for termination of employment,[5] but also of it subscribing to the fairness requirement as envisaged in the human rights approach to labour law.

It is submitted that strong arguments can be made that the common-law principles that apply to the termination of the contract of employment[6] should be replaced by a specific regulated arena of legislative measures focused on fairness and equity with the aim of protecting both employer and employees.[7]

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[1] Article 4 of ILO Convention 158 of 1982.
[2] Recommendation 166 of the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") of the ILO has commented that the need to base termination of employment on a valid reason "is the cornerstone of the Convention's provisions".
[3] S 185 of the LRA mirrors s 23 of the Constitution by providing that "Every employee has the right not to be- a) unfairly dismissed; and b) subjected to unfair labour practice".
[4] Schedule 8 to the LRA.
[5] Article 4 of ILO Convention 158 of 1982.
[6] Brassey *et al* (1996) at 2. Brassey remarks that "common law gives effect to commercial good sense only by default. If there is an express term governing the matter, it defers to it however irrational it may be. For sanctity of contract is its abiding ethic".
[7] Van Eck (2005) (Part 1) *Obiter* 549-560. At 554 the author summarizes the most pertinent developments identified and addressed by the Industrial Court being that employees need special protection; the law of contract (and the common law) is not suited to regulate the employment relationship without the creation of a floor of rights for workers and the common law is largely ignorant as to the rights to freedom of association and organization and the right to strike.

This chapter will address the permissible grounds for the termination of a fixed-term contract of employment together with the remedies available to the parties with reference to the LRA and the common law. The premature termination of the fixed-term contract of employment based on operational requirements will be addressed in detail with the aim of providing the basis for law reform. However, termination based on misconduct and incapacity will also be covered briefly to provide context.

2. Permissible Grounds for Termination of Employment

2.1. Introduction

The only permissible grounds for termination of employment, as contemplated by the LRA, are in relation to the employee's conduct, relating to the employee's capacity, or based on the employer's operational requirements.[8] Dismissal is defined in section 186 to mean, amongst other, that – "(a) an employer has terminated employment with or without notice".[9]

The LRA also defines employment, employed and employee in section 213 by stating that employee means:

> "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer."[10]

Dismissal of the employee by the employer will be unfair, as contemplated by section 188 of the LRA, unless the employer is able to prove that the dismissal was for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements, and the dismissal was effected in compliance with a fair procedure.[11] It has further been accepted that at common law a contract of employment may only be terminated in the event of a repudiation or material breach

[8] Section 188 (1) of the LRA. Article 4 and 7 of ILO Convention 158.
[9] The meaning of dismissal and various forms thereof is defined in s 186(1)(a) to (f). For purposes of this study the remaining definitions of 'dismissal' is excluded. See also reference to exclusions in chapter 1 para 7.2.
[10] S 213 states that: "[E]mployed' and 'employment' have meanings corresponding to that of 'employee'".
[11] Van Niekerk *et al* (2019) at 295.

of the contract by the other party.[12] In the parts that follow both the position in terms of the LRA and the common law will be covered.

2.2. Misconduct

In following the international norms and standards of the ILO[13] in relation to the termination of a contract of employment, guidelines have been set by the LRA in cases of dismissal for misconduct.[14] The employer's decision to terminate the employee's services based on his or her misconduct (malfeasance) can be scrutinized by the CCMA as not all misconduct will warrant dismissal.

The determination of whether dismissal will be a fair sanction for committing misconduct will involve a value judgment.[15] The employer must, amongst other, be able to prove, on a balance of probability, whether dismissal was an appropriate sanction for the contravention of the rule or standard.[16]

To satisfy this burden of proof employers have adopted more sophisticated measures to substantiate their decision/s to terminate the services due to misconduct.[17] Numerous employers accordingly adopt policies and procedures[18] in identifying conduct which is unacceptable in the workplace and the appropriate sanction for contravention thereof.[19] The purpose of these policies and procedures is to ensure fairness at the workplace in accordance with the human rights approach to labour law.

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[12] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at para 9 the LAC per Jafta AJA confirmed this to also be applicable in the termination of a fixed-term contract of employment.
[13] Section 39(1)(b) of the Constitution expressly enjoins the Courts to have regard to international law when interpreting the Bill of Rights; see also *NUMSA & Others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 95 (CC) and *Nehawu v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) for the importance of international law principles attached by the Constitutional Court when interpreting the LRA.
[14] Schedule 8 to the LRA: Code of Good Practice: Dismissal Item 7.
[15] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 12 BLLR 1097 (CC). See also Van Niekerk *et al* (2019) at 295.
[16] Item 7 of the Code.
[17] Le Roux P (2004) *ILJ* at 869.
[18] Item 3(2) of the Code. The Code is not a substitute for disciplinary codes and procedures for employers where aspects of discipline in the workplace can be agreed upon in collective bargaining. Item 1(1) to 1(3) of the Code also confirms that each case is unique.
[19] Item 3(4) of the Code confirms that dismissal for the first offense may be appropriate if the misconduct is serious and or of such gravity that it makes a continued employment relationship intolerable such as gross dishonesty, willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, customer or client and gross insubordination.

It has been held by the Courts that the employer may exercise the prerogative of workplace discipline when the employee's misconduct adversely affects the employment relationship.[20] The employer is however obligated to, before dismissing an employee for misconduct, also consider the employee's personal circumstances such as the length of service, the nature of the job and circumstances of the infringement as well as the employee's previous disciplinary record.[21] Each case is to be considered on its own merits even if the employer's rules or policies makes provision for a particular sanction.[22] It is trite that these policies and procedures of the employer is merely a guideline.[23] However, the employer's disciplinary codes must also be interpreted flexibly[24] as despite being a guideline it should generally be followed so as to ensure consistency in the application of discipline in the workplace.[25]

The constitutional rights of both the employer and the employee must be considered in the evaluation of the termination of the employment due to the employees' misconduct. To this effect the right to fair labour practices[26] remain applicable in the absence or existence of a clearly adopted rule, policy, or procedure applicable within the employer's workplace.[27] Certain forms of misconduct, however, will justify dismissal, subject to the principles of fairness.[28] Such forms of misconduct, at common

[20] *NUM & others v East Rand Gold &Uranium Co Ltd* (1986) 7 *ILJ* (LAC); *Van Zyl v Duva Opencast Services (Edms) Bpk* (1998) 9 *ILJ* 905 (IC); *Nehawu obo Barnes v Department of Foreign Affairs* (2001) 6 BLLR 539 (P).
[21] Van Niekerk *et al* (2019) at 312 referring to *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 12 BLLR 1097 (CC). See also Item 3(5) of the Code.
[22] In *Oerlikon Electrodes S v CCMA & others* (2003) 24 *ILJ* 2188 (LC) at para 31 the Court considered the questions of whether the employer may implement a sanction for misconduct which is more severe than what is proposed in the disciplinary policies.
[23] *Riekert v Commission for Conciliation Mediation and Arbitration and Others* (2006) 4 BLLR 353 (LC) at para 17 citing with approval the dictum of Murphy AJ in *Black Mountain v CCMA & Others* (2005) 1 BLLR 1 (LC). In the *Black Mountain* case, the employer argued that the status of a disciplinary code is that of a guideline not requiring slavish adherence. Murphy AJ commented that the matters referred to all dealt with relatively minor departures from procedural aspects of the prevailing disciplinary code such as the failure of the chairperson to appoint a prosecutor on appeal or the appointment of a presiding officer not strictly in accordance with the prescribed guidelines. Murphy AJ went on to say that "… Where the employer's disciplinary code and policy provide for a particular approach it will generally be considered unfair to follow a different approach without legitimate justification. Justice requires that employers should be held to the standards they have adopted".
[24] *SACCAWU and Pick 'n Pay Hypermarket (Northgate)* (2004) 25 *ILJ* 1820 (ARB).
[25] *Riekert v Commission for Conciliation Mediation and Arbitration and Others* (2006) 4 BLLR 353 (LC); *Black Mountain v CCMA & Others* (2005) 1 BLLR 1 (LC).
[26] S23 of the Constitution; see also Chapter 2 para 3.3.4 above with reference to *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC).
[27] *Denel (Pty) Ltd v Vorster* (2004) 25 *ILJ* 659 (SCA) at para 16 the Court found that the employer was contractually bound to follow its disciplinary procedure despite the Constitutional dispensation of reciprocal duty to act fairly. Such implied duty does not deprive a fair contract of its legal effect and to say that the alternative procedure adopted by the employer is just as good was not accepted.
[28] Van Niekerk *et al* (2019) at 296 to 304.

law, will amount to a material breach of the terms of the contract and therefore be a justifiable basis upon which the contract, whether permanent or a fixed-term, may be terminated.[29]

2.3. Incapacity

The second permissible ground for termination of the employment relationship in terms of the LRA relates to the employee's incapacity or ability to perform the services to the employer for which he was employed for. This ability is associated with the employee's performance or competence to render the services he promised or the employee's health whether physical or psychological.[30] The Code[31] provides guidelines in cases of dismissal for poor work performance and incapacity due to ill health or injury. These guidelines are based on the content of Article 7 of the ILO Convention.[32]

In essence the Code, and Article 7, stipulate that the employee is entitled to the opportunity to either address his alleged poor work performance or an opportunity to state a case in response to the investigation relating to the extent of his or her incapacity or injury.[33]

The concept of incapacity my include any form of inability of the employee to fulfil the duties or services for which he has been employed for. It may even include a form of disability or handicap.[34] Landman reasons as follows:

> "The concept of incapacity is a broad one. It embraces just about any inability arising from any cause ... Which gives rise to the performance of work which is below the appropriate or expected standard".[35]

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[29] In *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at para 12 the LAC confirmed the general principles of the common law that a fixed-term contract may not be cancelled unilaterally during its currency in the absence of a material breach of such contract.
[30] Christianson (2004) 25 *ILJ* at 879 to 895.
[31] Schedule 8 to the LRA: Code of Good Practice: Dismissal item 9 and 10.
[32] Article 7 of ILO Convention 158 of 1982 states as follows: "The employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".
[33] Cameron (1988) 9 *ILJ* 147 also identifies the so-called crisis zone cases where the employee refuses to attend a hearing and two instances in which an employer might not be required to conduct a hearing.
[34] The termination of employment because of a disability or a handicap, however, is one of the impermissible grounds for dismissal related to discrimination and automatically unfair as contemplated in section 187(1)(f) of the LRA.
[35] Landman A (1995) *CLL* at 49.

The LRA does not define capacity or incapacity.[36] The Code only distinguishes between incapacity due to ill health or injury and incapacity due to poor work performance.[37] The Code sets out guidelines for determining the fairness of dismissal and the procedures to be followed in each case. In addressing incapacity due to ill health or injury the employer bears the duty to investigate all alternative possibilities to accommodate the employee and effect dismissal only as a last resort.[38]

It is submitted that the wide definition of incapacity, as noted by Landman, clearly make provision for additional circumstances which may be considered as incapacity and where dismissal may also be permissible due to the repudiation of the contract and if it is fair in the circumstances.[39]

This was recognized by the LAC in the matter of *Samancor Tubatse Ferrochrome v MEIBC and others*[40] where a form of incapacity was accepted and referred to as operational incapacity based on the employee's inability to tender his service due to incarceration. This should not be confused with dismissal related to the employer's operational requirements as the termination of service is effected by the employer because the employee is unable to perform his or her services in terms of the contract of employment. The LAC found in *Samancor*[41] that the scope of incapacity as contemplated in the LRA is not limited to the narrow confines of ill health, injury, or poor performance but extends to incapacity occasioned by factors beyond the control of the employee such as imprisonment, military call up or a prohibition on employment.

Operational incapacity as referred to in *Samancor* will include the following scenarios:

- where an employee's ability to perform in terms of the employment relationship is prohibited; or
- where the employee is prohibited to perform in a specific function.

[36] Du Toit *et al* (2015) at 461 – 462. In contractual terms incapacity amounts to a species of supervening impossibility of performance that might be permanent or temporary.
[37] Schedule 8 items 8 to 11 of the LRA.
[38] Item 10(4) of the Code.
[39] Letchwano A (2013) 34 *ILJ* 38 to 56.
[40] (2010) 31 *ILJ* 1838 (LAC).
[41] (2010) 31 *ILJ* 1838 (LAC) at para 10.

It may be impossible for the employee to perform, and the employer may be entitled to dismiss the employee after satisfying and following the procedural requirements as contemplated in the Code and explained in *Samancor.*[42]

It is submitted that the distinction drawn by the LAC in *Samancor* in identifying a further form of incapacity as contemplated in the Code is correct. There are instances where the capacity of the employee to comply with his or her contractual obligation is interrupted or severely impacted and, in most instances, fatal to the continued existence of the contract of employment.[43] When the interruption of service continues or is likely to continue for an unreasonably long time the other party may exercise an option to accept the reduced performance in exchange for counter reduced performance.[44] In general it is accepted that the termination of employment is justified in circumstances of continued impossibility of performance however, the key question will remain whether it is reasonable and fair in the circumstances.[45] It has been held that adjustments could be made to ensure that the performance continues to the extent possible.[46]

The impossibility of performance may take on various forms and or might be caused by various factors such as statutory imposed impossibility,[47] self-created

[42] (2010) 31 *ILJ* 1838 (LAC) at para 14.
[43]The concept of incompatibility between the employer and employee or between the employee and his co-workers was recognised as a permissible form of termination of service under the previous LRA but is not recognised as such in either the Code or Article 7 of the ILO; *Jabari v Telkom SA (Pty) Ltd* (2006) 27 *ILJ* 1854 (LAC) at 1868; Du Toit *et al* (2015) at 469- 471; *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit* (1999) 7 BLLR 713 (LC) at para 76 – 77; The Labour Court held that there are three main potential causes or aggravators of incompatibility among employees: inability of employees to fit in, despite attempts by colleagues and the employer to accommodate them and remedy the situation; unacceptable conduct or unreasonable expectations of others; or the fact that the employer has no mechanisms to address and resolve problems of incompatibility.
[44] Christie (2011) at 492.
[45] Govindjee *et al* (2021) 18 at 285.
[46] *World Leisure Holidays (Pty) Ltd v Georges* 2002 (5) SA 531 (W) 534 H.
[47] Grogan (2020) at 63. Statutory imposed impossibility will be where legislation makes partial or complete performance illegal, rendering performance under a contractual obligation legally impossible. However in *Bosch v THUMB Trading (Pty*) (1986) 7 *ILJ* 341 (IC) an employee who had been dismissed after being detained without trial under emergency regulations was reinstated by the Industrial Court.
[47] Bradstreet (2021) 42 *ILJ* at 26 referring to *Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd* (2020). *ZAGPJHC* 136.

impossibility[48] and supervening impossibility[49] through vis major.[50] It is submitted that these grounds for termination of the contract of employment due to the impossibility of performance or the repudiation thereof by the employer coincides with the requirements for termination of the contract as contemplated by section 188(1)(a) of the LRA and Article 7 of the ILO Convention 158. However, the difference between dismissal for incapacity related reasons and operational requirements must be kept in mind.[51]

It may therefore be argued that the employer's impossibility of performance may also be requirements based on the economic, technological, structural or similar needs of the employer.

We can foresee that these principles may become applicable in consideration of the Covid-19 regulations preventing the employer from legally performing contractual

[48] In *Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd* (2020) *ZAGPJHC* 136 it was argued that the tendering of service by the employees was rendered impossible by the decision of management not to continue business, to the extent possible, by providing the essential services permissible under the regulations. The Court in *Brand Kitchen* cited with approval the dictum in *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) 198D that "[i]mpossibility is … not implicit in a change of financial strength or in commercial circumstances which cause compliance with a contractual obligation to be difficult, expensive, or unaffordable" at para 38.

[49] Christie (2011) citing old authorities as well as *Spolander v Ward* (1940) CPD at *30-32.* Commercial contracts commonly contain clauses typically defining what will constitute *force majeure* and thus enable parties to escape their contractual obligations. Du Toit *et al* (2015) at 461- 462. Incapacity, being an aspect not generally classified as a *force majeure* event, amounts to a species of supervening impossibility of performance that might be permanent or temporary, partial or absolute. Hutchison & Pretorius (2010) at 207. *Boyd v Stuttaford & Co* (1910) AD 101. *Myers v Sieradzki* (1910) TPD 869. This is because of 'the principle that counter-performance may be reduced in exchange for interrupted performance'.

[50] Brassey (1990) *Acta Juridica.* The author explains the nature of Operative Impossibility including Supervening impossibility caused by a superior force which could not have been guarded against such as Vis major and casus fortuitus, both having the same consequences. Furthermore physical impossibility which includes accidents of nature destroying the employer's enterprise by, for instance fire or flood, illness or death, acts of the state or acts of third parties such as strikes. The first rule the author notes is "that the impossibility of performance must be absolute and not merely personal. Therefore, the employer cannot plead impossibility of performance as a defense if it consists only in his or her impecuniosity". Mere difficulty in performance will not be acceptable. The second rule states that the impossibility must not be attributable to the fault of either party as "at fault there is a breach of the contract that falls to be dealt with accordingly". The final rule holds that impossibility to perform will not be operative if the debtor has assumed the risk of its occurrence.

[51] In *Solidarity and Another v Armaments Corporation of South Africa (SOC) Ltd and Others* (2018) *ZALAC* 39 the LAC confirmed that: "Dismissals for operational requirements are effected by reason of some external factor relating to the employer's undertaking which results in the loss of employment rather than any inherent inability on the part of the employee to do the job". Le Roux & Van Niekerk (1994) at 219. Govindjee *et al* (2021) 18 at 289.

obligations which could, in principle, excuse it from performing its obligations as same is rendered impossible[52] through natural catastrophes or events of *vis major*.[53]

Unless the other party elects to abandon the contract of employment, the terms thereof and its operation is merely suspended until the party becomes capable of complying with the contractual terms or the party raising supervening impossibility can again perform in terms of the contract. The trite contractual requirements must however be present to rely on the principle of impossibility of performance whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care.[54] It may well be that the impossibility survives the term of the contract in which case the employee will only be entitled to the remuneration until the time when the impossibility occurred and suspended the operation of the contract of employment.[55]

2.4. Operational Requirements

2.4.1. Introduction

The third and last permissible ground for termination of the employment relationship,[56] relates to the termination of service due to the employer's operational requirements. Termination of the employment relationship is implemented with no fault on the part of the employee. For this reason, the LRA is more prescriptive[57] in the process to be

[52] Bradstreet (2021) 42 *ILJ* at 26 referring to *Mohsen & another v Brand Kitchen Hospitality (Pty) Ltd* (2020). *ZAGPJHC* 136.
[53] *Vis major* is an "act of God" or an irresistible force which includes events such as natural catastrophes or unavoidable occurrences which no ordinary care or oversight could prevent.
[54] Brassey (1990) *Acta Juridica* at 29 the author states that: "It is by operation of law, not by implication in the contract that a party is relieved of an obligation made impossible to perform by superior force".
[55] *Windrush Intercontinental SA v UACC Bergshav Tankers as the Asphalt Venture* (2016) JDR 2288 (SCA). In dealing with Admiralty law and a claim for payment of the crew's wages the Court per Maya DP confirmed at para 33 to 35 that: "The doctrine of impossibility of frustration is applicable to contracts of employment where supervening events rendered the performance of the contract impossible or radically different from what had been undertaken when the contract was entered into. There is nothing special about the contract of employment that precludes such a contract from being subject to the ordinary principles of frustration of contracts". At para 35 the Court found that: "[t]he performance of the employment contract was rendered impossible by a supervening event. To continue to pay and support a crew not on board the vessel and not rendering service to the vessel, which contracts of employment had terminated and were held in captivity by intransigent pirates who had been paid a ransom but demanded an exchange that was not within Concord's power, could hardly have been contemplated by the employment contracts".
[56] As set out in Article 4, as well as section 188(1)(a)(ii) of the LRA.
[57] Van Niekerk et al (2019) at 339.

followed[58] as well as the reasons for the said termination of employment. In common law however, there is no provision for operational requirements as an accepted or permissible reason for the termination of the contract of employment. It is submitted that the common law in terms of this accepted form of termination of the contract of employment should be replaced by the principles and guidelines as effectively addressed in the LRA.

2.4.2. The LRA

The LRA defines operational requirements as meaning requirements based on the economic, technological, structural or similar needs of an employer.[59] The Code on Dismissal based on Operational Requirements state as follows:[60]

> "As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer's enterprise".

Termination of the contract of employment due to the operational requirements of the employer requires the employer to meaningfully engage with the employees or their representative trade union (if any).[61] Throughout this consensus seeking process it is required of the employer to, in good faith, keep an open mind and seriously consider proposals put forward from the employee or his representative as alternatives to termination of employment due to the employer's operational requirements.[62]

The employer's commercial rationale was previously accepted by the Courts when it was stated that the Courts will not second-guess what was termed as commercial and

[58] S 189 of the LRA.
[59] S 213 of the LRA.
[60] Item 1 of the Code.
[61] Section 189 of the LRA requires the parties to engage each other. This engagement, (consultation) between the employer and employee is to enable the parties, in a form of joint consensus seeking problem solving exercise, to reach consensus on various aspects as listed in section 189(2) of the LRA.
[62] Item 3 of the Code.

business efficacy of the decision[63] unless it was not genuine. In essence it was believed that it is not a fact-finding mission for the Court in respect of the reasons for the termination of employment due to the employer's operational requirements but rather a review of the reasons or specific operational outcome which the employer is seeking to achieve.[64]

This position was rejected in later developments when it was accepted by the LAC that the termination of employment for operational requirements must be a measure of last resort and can only be operationally justifiable on rational grounds if the dismissal is suitably linked to the achievement of the end goal for rational reasons.[65] This may even include retrenchments by the employer in order to become more competitive and profitable but the employer must be able to satisfy the Court that the dismissal was substantively fair.[66] The process adopted by the employer in the termination of employment due to its operational requirements must be compliant with the requirements of the LRA.[67]

The termination of employment due to the employer's operational requirements for reasons which would infringe upon impermissible grounds of termination of employment such as contemplated in section 187 will always be substantively unfair. It is thus of tantamount importance that the principles of fairness be satisfied by the employer in the termination of the employee's services in relation to the process adopted and the reason for the termination of employment.

It is argued that the LRA makes no distinction in section 189 between different categories of employees. Section 189 accordingly applies to all employees, whether they are employed on a fixed-term contract of employment or on a permanent basis, in prescribing the requirements for a fair termination of employment on grounds of

[63] Van Niekerk *et al* (2019) at 341 referring to *SACTWU & others v Discreto- a Division of Trump & Springbok Holdings* (1998) 12 BLLR 1228 (LAC). The Court held that the question is "whether the ultimate decision arrived at by the employer is commercially and objectively justifiable on rational grounds, having regard to what emerged from the consultation process".
[64] Todd & Damant 2004 *ILJ* at 342.
[65] Van Niekerk *et al* (2019) at 342 with reference to *National Mineworkers Union v Black Mountain Mining (Pty) Ltd* (2014) *ZALAC* 78.
[66] Van Niekerk *et al* (2019) at 343 with reference to *National Union of Metalworkers of SA & another v Aveng Trident Steel (A Division of Aveng Africa Property Limited) & and others* (2019) 9 BLLR 899 (LAC) at para 70.
[67] S 189 of the LRA.

operational requirements of the employer. Furthermore the definition of 'employee' in the LRA[68] refers to all employees, including those employed on a fixed-term contract of employment.

2.4.3. The Common law

The LRA has altered the common-law position on lawful termination of the contract of employment. Govindjee correctly remarks that:

> "The codified definition of dismissal, together with its focus on fairness, has shifted the focus away from the principles underpinning the common-law termination of the contract of employment…Most of the defined instances of 'dismissal' require conduct on the part of the employer, and a contract terminated by operation of law has been found not to be a 'dismissal' as defined".[69]

This notion similarly applies, as discussed in more detail below, to fixed-term contracts of employment which may terminate through the effluxion of time and or operation of law.

3. Termination of Fixed-term Contracts of Employment

3.1.The LRA

The LRA protects employees against unfair dismissals giving effect to the general right to fair labour practices as provided for in section 23(1) of the Constitution.[70] Section 188(1) of the LRA stipulates that a dismissal should be both for a fair reason and in following a fair procedure.

In consideration of the nature of the fixed-term contract of employment in the common law the considerations of fairness and equity of the employment relationship must also be followed. This development was quite aptly argued by Hock as follows:[71]

> "[T]he employment relationship brings together the common law and labour law as uneasy bedfellows and it is largely because of the limitations of the common

[68] S 213 of the LRA. See also para 2.1 above.
[69] Govindjee *et al* (2021) 18 at 288.
[70] S 23(1) of the Constitution provides that "[e]veryone has the right to fair labour practices".
[71] Hock (2003) 24 *ILJ*.

> law in recognizing the nature of the relationship, that labour law has developed. The two have however remained independent of each other and this has been reinforced in the jurisprudence".

The LRA, recognizing the potential abuse of utilizing a fixed-term contract of employment in successive terms by the employer[72] included amendments to the meaning of dismissal in section 186(1)(b) with the Labour Relations Amendment Act.[73] The purpose of the amendment is to provide greater protection to workers engaged in temporary employment services[74] and better regulation of the employment of fixed-term and part-time employees who earn below the earnings threshold.[75] Furthermore the requirement of good faith is implied in all contracts of employment.[76]

In *Pecton Outsourcing Solutions CC v Pillemer B*[77] the Labour Court found that the true reason for the termination of the fixed-term contract must be determined. If the true reason amounts to the employee's conduct, capacity or operational reason of the employer the said termination may amount to a dismissal as contemplated by the LRA and the employee will be entitled to the associated protection.

3.2. Fairness Requirement

The LRA confirms that any dismissal, if not automatically unfair as contemplated by section 187, will be unfair unless the employer can prove that the termination of services was effected for one of the permissible grounds of dismissal and in following a fair process.

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[72] Huysamen 2019 *PER*. Where these employees held a different status, remuneration and benefits as those afforded to permanent employees. Promotion and training opportunities are often available to permanent members of staff only.
[73] Act 6 of 2014.
[74] Preamble of the LRAA 6 of 2014.
[75] In *SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC) at para 46 the LAC confirmed that parties concluding contractual terms having the effect of contracting out of the protection against unfair dismissal in terms of section 5 of the LRA is prohibited. The Court found that automatic termination clauses, typically agreed to in fixed-term contracts, are undesirable in the labour relations context as they could undermine the developments in progressive disciplinary measures provided for in the LRA and render the legislation ineffective.
[76] There is a common-law duty of trust and confidence between employers and employees; *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) 20B-D; The interpretation of the Constitution has caused the common-law to develop to such extent that an implied term that the employer will treat the employee fairly is included in every contract of employment; *Barkhuizen v Napier* (2007) 5 SA 323 (CC) paras 21, 80; *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 (SCA); *Nakin v MEC, Department of Education, Eastern Cape Province* (2008) 29 *ILJ* 1426 (E).
[77] (2016) 37 *ILJ* 693 (LC) at para 44. In *South African Post Office v Mampeule* 2010 31 *ILJ* 2051 (LAC) at para 24 the LAC confirmed that the parties cannot contract outside the terms of the LRA providing the employee with the necessary protection against unfair dismissal such as automatic termination clauses typically agreed to in fixed-term contracts. Geldenhuys J *PER* 2017 (20) at 11 and 25 - 26.

The procedural fairness of a dismissal based on misconduct and incapacity centres around the trite principle of *audi alteram partem.* Whether the employer alleges misconduct[78] or whether the employee is unable to perform his work[79] the employer must afford the employee the opportunity to state his version in response to the employer's case.[80]

The Code[81] provides some guidance to employers on how to satisfy the procedural fairness requirement[82] in effecting termination of the permanent or fixed-term employee's service.[83] Should the employer adopt a disciplinary policy and procedure the employer will be held to compliance therewith.[84] The Code does not provide for an appeal procedure after the determination of the sanction for the allegations raised against the employee at the workplace.[85]

[78] The employer allege the employee has committed a breach of the employer's rules or policies or even a practice in the workplace.
[79] Whether the employee can perform his work satisfactorily in accordance with the employer's accepted and known standards or is physically or psychologically able to perform the services which he was employed for.
[80] Van Niekerk *et al* (2019) at 314.
[81] Item 4 of the Code; The Code require from the employer, in circumstances of misconduct, to investigate whether there are grounds for dismissal (which need not be a formal enquiry), informing the employee of the allegations raised against him, providing the employee with a reasonable opportunity to respond thereto either personally or with the assistance of a trade union representative or fellow employee and communicate the decision made to the employee in writing.
[82] Van Niekerk *et al* (2019) at 314; *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* (2006) 27 *ILJ* 1644 (LC).
[83] Item 4(3) of the Code; Should the employee be dismissed he must be reminded of the right to refer the dismissal to the CCMA; Van Niekerk *et al* (2019) at 313; Van Niekerk correctly argues that the LRA attempts to reduce the level of formality and cost in the dispute resolution process starting at the workplace through to the final determination of a dispute.
[84] *Riekert v Commission for Conciliation Mediation and Arbitration and Others* (2006) 4 BLLR 353 (LC); *National Mineworkers Union v Black Mountain Mining (Pty) Ltd* (2014) *ZALAC* 78. However, non-compliance may be cured even after a summary dismissal has been implemented if the new process is impartial and the determination of the allegations against the employee is made by an independent person. *Semenya v CCMA & others* [2006] 6 BLLR 521 (LAC).
[85] Van Niekerk *et al* (2019) at 313-314. This likely is to keep in compliance with the scope, purpose, the aim of informality, and cost effectiveness of application of discipline in the workplace.

The reasons for termination of service have been addressed in detail earlier in this chapter with specific reference to the permissible grounds for the termination of the contract of employment due to the employee's conduct, incapacity or the employer's operational requirements. If the reason for the termination of employment is not in accordance with either of these three permissible grounds the termination of employment will amount to an unfair dismissal.[86]

3.3. The Common law

The individual employment relationship is founded on contract with the general approach being that it is possible to adapt the contract doctrine to cater for the interests of the individual employee.[87] Szakats remarked as follows:[88]

> "The legal basis for the employment relationship remains and cannot be anything else than … contract. The law of contract, however, should be regarded not as a straight-jacket but as a loose garment which must be fitted do the special character of the employment relationship, as distinct from purchase and sale transactions".

The common law in respect of regulating, to a large or lesser degree, the employment relationship between employer and employee remains relevant in fixed-term contracts and is to be developed to align with the Constitution.[89]

The parties to a fixed-term contract enter the contract and clearly specify the duration of their contract which, generally, automatically terminates upon the occurrence of a clearly specified date or event, or the completion of a specified task or project unless it provides for earlier termination by notice. The latter will be akin to an escape clause[90] and has been referred to by the Courts as a maximum duration contract.[91] Jordaan

[86] S 188(1) of the LRA.
[87] Jordaan (1990) *Acta Juridica* at 73.
[88] Szakats "Law of Employment" (1983) 3.
[89] Grogan 2020 at 1 describes the common law referring to the law inherited in South Africa during colonial times, as developed by the Courts since South Africa became a fully sovereign state. It consists of mainly rules and principles emanating from Roman, Roman Dutch and English law. Since 1994, South Africa has operated under a Constitutional dispensation. The Courts are enjoined to develop the common law to bring it into line with the Constitution.
[90] *Carter v Value Truck Rental (Pty) Ltd* (2005) 1 BLLR *88 (SE).*
[91] *Mafhila v Govan Mbeki Municipality* (2005) 4 BLLR *334 (LC).*

correctly argues that the contract model under the common law in the employment context has certain shortcomings.[92]

The termination of a fixed-term contract of employment can only be effected, under the common-law principles, should either of the parties commit an act of material breach and repudiate the terms of the contract. A material breach would arise if either of the contracting parties breached its material contractual obligations or deliberately neglected its duties and responsibilities (serious misconduct).[93]

It has been accepted that a material breach will occur in circumstances where the employee commits an act of misconduct such as theft.[94] The repudiation of the contract as the second permissible and lawful ground for the termination of the fixed-term contract in the common law may occur through the impossibility of performance or may be caused by various factors as discussed in paragraph 2.3 above.

The termination of a fixed-term contract may also be determined by stipulating a particular event or occurrence which will bring the said contract to an end. In these circumstances the employer must prove that the agreed upon event occurred and that the contract has in fact completed. The fixed-term contract of employment in the common law could be terminated by providing the necessary or agreed upon notice which would render such termination lawful and the reasons for the termination being of no consequence.[95]

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[92] Jordaan (1990) *Acta Juridica* at 75 to 79. The author argues that the law, with employment as a market transaction, presents a picture of that relationship as an abstract, impersonal arrangement demanding only a limited commitment from the parties involved. However the contractual model conceals the fact of the employees' generally weak bargaining position and dependence on the employer who has the right to terminate the contract at will. The standard contract model is furthermore geared towards specific, short term and more or less static arrangements. The employment relationship, by contrast, is of an associational nature and is characterized in practice by a more open-ended commitment and ongoing relationship. The author states that "The common law knows nothing of a balance of collective forces. It operates between individuals only thereby ignoring the collective nature of labour disputes".

[93] In *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at para 12 the LAC confirmed the general principles of the common law that a fixed-term contract may not be cancelled unilaterally during its currency in the absence of a material breach of such contract.

[94] Van Niekerk *et al* (2019) at 296 to 304; Item 3 of the Code of Good Practice. See also para 2.2 above.

[95] Cohen (2007) *SA Merc LJ* at 30 referring to *Buthelezi* v Municipal Demarcation Board (2004) 25 *ILJ* 2317 (LAC); *Sun Packagings (Pty) Ltd and Another v Vreulink* (1996) 17 *ILJ* 633 (A). *Carter v Value Truck Rental (Pty) Ltd* (2005) 1 BLLR 88 (SE). *Mafhila v Govan Mbeki Municipality* (2005) 4 BLLR 334 (LC).

4. Remedies

It has been held by the Courts that the fixed-term contract of employment reaching its conclusion or end date will not be a dismissal as contemplated by the LRA.[96] Should either party commit a material breach (repudiation of the terms of the contract) the other party may accept the breach and claim damages or reject the breach and enforce the terms of the agreement through a claim for specific performance.[97] However, prior to the adoption of the LRA it was generally accepted that it would not be feasible to grant a claim for specific performance and re-instatement is undesirable as the employee will be forced onto an unwilling employer.[98]

Employees will have a choice whether to argue dismissal as contemplated by the LRA,[99] or claim damages. The damages which a party to the fixed-term contract of employment may claim in the event of a material breach or repudiation and acceptance thereof shall be limited to the amount the repudiating party would have had to pay for the remaining period of the contract.[100]

5. Premature Termination of Fixed-term Contracts of Employment

5.1. Introduction

Having investigated the LRA and common-law grounds for the permissible grounds for termination of fixed-term contracts of employment, the premature termination of a fixed-term contract of employment remains a debateable matter.

In *Fedlife Assurance Ltd v Wolfaardt* the majority of the SCA held that:

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[96] *Enforce Security Group v Fikile & others* (2017) 38 *ILJ* (LAC). See also *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) at para 16.
[97] *National Union of Textiles Workers and others v Stag Packings (Pty) Ltd and another* (1982) 151 (T) at paras 156 H– 157C the Court held that: "As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. There is in my view, no reason why this general rule should not also be applicable to contracts of employment".
[98] (1982) 151 (T) at paras 156 H – 157 C the Court held that: "Firstly, the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship and, secondly, the absence of mutuality, for (so it was held) no Court could by its order compel a servant to perform his work faithfully and diligently. These are practical considerations and not legal principles".
[99] S 186(1)(b)(i).
[100] *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC).

> "There can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of a fixed-term contract of employment. Thus, irrespective of whether the 1995 Act was declaratory of rights that had their source in the interim Constitution or whether it created substantive rights itself, the question is whether it simultaneously deprived employees of their pre-existing common-law right to enforce such contracts, thereby confining them to the remedies for unlawful dismissal as provided for in the 1995 act".[101]

The SCA considered whether the 1995 LRA should be construed to the effect of limitation or deprivation of common-law rights. The presumption that the legislature did not intend to interfere with existing common-law rights of employees or that it did not intend to deprive parties of existing remedies was re-iterated.[102] It was accordingly held that the continued common-law right of employees employed on a fixed-term contract to be fully compensated for damages, which they can prove, is not in conflict with the spirit, purport and objects of the Bill of Rights nor does the 1995 LRA expressly abrogate the common-law entitlement to enforce contractual rights.[103]

The majority of the SCA in *Fedlife* assumed that the LRA set out to create separate regimes for employees on fixed-term contracts and those on permanent contracts and only the latter is limited to the statutory remedies laid down for unfair dismissal. The majority assumed that the premature termination of a fixed-term contract (unlawful termination) is manifestly unfair. Unlawfulness in terms of the common law is accordingly equated with unfairness of the LRA irrespective of whether there was a fair reason for the dismissal, or a fair procedure followed.[104]

Du Toit[105] correctly argues that it seems as if the Court is of the opinion that the common law will take preference over statute by ringfencing certain contractual remedies against remedies created by the legislature in giving effect to the Constitution unless the latter expressly or by necessary implication overrides them. Du Toit argues that:[106]

[101] (2001) 22 *ILJ* (SCA). (2001) 12 BLLR 1301 (SCA) at para 15.
[102](2001) 22 *ILJ* (SCA). (2001) 12 BLLR 1301 (SCA) at para 16.
[103] (2001) 22 *ILJ* (SCA). (2001) 12 BLLR 1301 (SCA) at para 16.
[104] Du Toit (2010) *ILJ* at 22 and 24. *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* (SCA).
[105] Du Toit (2010) *ILJ* at 24.
[106] Du Toit (2010) *ILJ* at 24.

> "The view of the SCA of enacting a policy driven remedy in an area where a common-law remedy already exists, in the view of the SCA, evinces no constitutional purpose or legislative intention of superseding the latter; on the contrary, it is assumed, the purpose as well as the intention is that two overlapping or competing remedies should continue to exist side by side".

The LRA was amended with effect from January 2015 providing for the non-renewal of a fixed-term contract under certain circumstances to be regarded as a dismissal. Following the reasoning of the SCA, as held in *Fedlife,* this will mean that the legislature, by broadening the scope of dismissal, effectively preserved the common-law remedies available to employees whose fixed-term contracts of employment was terminated prematurely regardless of fairness.

More importantly the SCA, through the majority in *Fedlife,* regarded the proposition that an employee on a fixed-term contract who is dismissed for a fair reason and in accordance with a fair procedure should not be entitled to compensation for unfair dismissal as an absurdity.[107] Such a result, it was held, could never have been the intention of the legislature. Du Toit argues that the majority in *Fedlife* seemingly lost sight of the Constitutional Court finding, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* where it was held that:[108]

> "[T]here are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution".

It is submitted that Du Toit[109] correctly argues that we could expect that the exact same principle, as confirmed in *Bato Star,*[110] should apply to the provisions of the LRA in relation to pre-existing common-law remedies. This is particularly so in circumstances when consideration is had to section 210 off the LRA which states that:

> "if any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail".[111]

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[107] Du Toit (2010) *ILJ* at 22 - 23.
[108] 2004 (4) SA 490 (CC).
[109] Du Toit (2010) *ILJ* at 24.
[110] Louw A (Part 1) *PER/ PELJ* 2018 at 8.
[111] S 210 of the LRA.

The constitutional development of the common-law contract of employment in respect of the importation of fairness into the contract, outside of the influence of the provisions of the labour legislation, was addressed in the *Fedlife* minority judgment by Froneman AJA where he remarked as follows:[112]

> "In my view the Constitution has a material impact on [the] particular conceptual distinction between the proper domain of contract and that of the statute, namely that the former has little to do with fairness, whilst only the latter has… .Section 23(1) of the Constitution provides that everyone has the right to fair labour practices. It seems to me almost incontestable that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the expressive object to give effect to the constitutional right to fair labour practices (amongst others), the Courts would have been obliged, in my view, to develop the common law to give expression to this constitutional right in terms of section 39(2) of the Constitution. To the extent that the act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remains."

It is submitted that this right to fair labour practices include both the employer and employee as parties to the fixed-term contract of employment.[113] This is especially so with consideration of the case law on the termination of fixed-term contracts of employment due to the employers' operational requirements. The LRA, it is submitted, not only deals fully with these competing rights to fair labour practices of the employer and the employee employed on a fixed-term contract, but also with the regulatory system and remedies for breach thereof. Froneman AJA in his minority judgment confirmed that:[114]

> "I would imagine that our law of employment, infused with these values, would make provision both for a system that guarantees that employees may be entitled to claim as their financial due that which they bargained for, over and above basic statutory entitlements, as well as for a right not to be unfairly dismissed. I happen to think that this is what the Act [LRA] (and the BCE Act in a different context) achieves, albeit perhaps not to the fullest extent possible".

It is, accordingly, submitted that there is no need to further develop the common law as the contractual remedy and LRA remedies for unfair termination of the fixed-term

[112] (2001) 12 BLLR 1301 (SCA) at para 4. Louw A (Part 1) *PER/ PELJ* (2018) at 15 -16.
[113] See also the discussion in support hereof in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC) in Chapter 2 para 3.3.4 above.
[114] (2001) 12 BLLR 1301 (SCA) at para 14.

contracts of employment co-exist, exclusive and in unison with each other and may be applied in terms of section 195 of the LRA.

5.2. Permissible Grounds for Premature Termination of Fixed-Term Contracts of Employment

Not all premature terminations of a fixed-term contract will be regarded as a dismissal in terms of the LRA or unlawful in terms of the common law. The LRA[115] in general recognises three primary reasons for the termination of employment. It is submitted that this also applies to the premature termination of the fixed-term contract of employment subject to the employee's right to fair dismissal as provided for in section 186(1).[116] However a fixed-term contract of employment may also terminate lawfully by effluxion of time, upon completion of a project or on the occurrence of a specific event.[117]

In *Nogcantsi v Mnquma Local Municipality*,[118] the parties agreed to an automatic termination clause that the appointment was subject to a screening process of the employee and a 6-month probationary period. Should negative aspects arise relating to the employee in the screening process the contract will automatically terminate. Negative information was revealed of the employee in the screening process and the Municipality terminated the employment relying on the automatic termination clause. The CCMA, Labour Court and the LAC agreed that no dismissal took place.[119]

[115] S 188 of the LRA.
[116] Geldenhuys *PER* (2017) (20) at 2.
[117] Geldenhuys *PER* (2017) (20) at 4. See also *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) at para 16.
[118] (2017) 4 BLLR 358 (LAC) at para 33. In *Pecton Outsourcing Solutions CC v Pillemer B* (2016) 37 *ILJ* 693 (LC) the Court held that generally if the termination of the employment relationship is triggered by an "event" and not by the employer's decision, no dismissal occurs. However, Whicher J found at paras 21 and 35 that if the automatic termination clause was invalid or unenforceable as it was in this case the terminations would constitute dismissals affected by the TES, because the TES had the choice between following the dismissal procedure or invoking the automatic termination clause.
[119] Geldenhuys *PER* (2017) (20) at 5-6.

5.3. Operational Requirements – *Buthelezi* Judgment

Section 188 of the LRA provides for the permissible ground of dismissal based on operational requirements of the employer. The premature termination of a fixed-term contract in compliance with the requirements of section 188 of the LRA ought to satisfy the fairness obligation resting upon the employer as enshrined in the Constitution. However, as found by the LAC in *Buthelezi v Municipal Demarcation Board,*[120] in the absence of a material breach the premature termination of a fixed-term contract of employment is unlawful.

In *Buthelezi* the employee, was employed on a 5-year fixed-term contract running from 24 January 2000 to 23 January 2005. On 13 December 2000 the employee was served, by the employer, with a notice of dismissal, with effect from 28 February 2001, based on the employer's operational requirements. The employer had followed the prescribed retrenchment process. The appellant challenged his dismissal as unfair and referred the dispute to the Labour Court.

The Court held that[121] while the termination of the employment contract during the currency of the fixed-term contract was substantively unfair, in other respects it was substantively fair as the respondent had established that a fair reason existed to restructure the business. Compensation was denied.

In a unanimous decision of the LAC it was held that a premature termination of a fixed-term contract of employment on the grounds of operational requirements was substantively unfair.[122] The LAC found that at common law a party to a fixed-term contract has no right to terminate such contract, in the absence of repudiation or a material breach by the other party unless the contract makes provision for the early termination of such contract on notice.[123]

The LAC found that it is not unfair to the employer that faces genuine operational requirements as the employer chooses to enter a fixed-term contract and deciding to

[120] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC).
[121] (2004) 25 *ILJ* 2317 (LAC) at para 6.
[122](2004) *ILJ* 2326 at para 16.
[123] (2004) 25 *ILJ* 2317 (LAC) at para 16.

do so he undertakes the risks incumbent therein.[124] Should the employer have foreseen the possibility of the need to terminate the employee's services, the Court found, it ought to have concluded an indefinite duration contract instead. While labour legislation has made significant inroads into the common law, the principle that a fixed-term contract might not be unilaterally cancelled remains unchanged in the absence of express legislative erosion of this principle.[125] This was based on the finding of the SCA in *Fedlife* where the SCA held that the LRA does not expressly or impliedly "abrogate an employee's common-law entitlement to enforce contractual rights".[126]

Such premature termination was substantively unfair based on its unlawfulness and constituted an unfair dismissal.[127] Accordingly compensation of three months remuneration was awarded. This was based on the actual loss suffered by the respondent for the unexpired period of the contract less any remuneration earned.[128]

It is submitted that, the LAC in *Buthelezi*, confused the difference between unlawful and unfair dismissals. The Court held that an unlawful breach of a fixed-term contract of employment constitutes a substantively unfair termination of the contract of employment.

It may be argued that the LAC, by placing reliance on the *Fedlife* judgment, ignored the fact that the Court held that:

> "[t]here can be no suggestion that the constitutional dispensation deprived employees of the common-law right to enforce the terms of the fixed-term contract of employment".[129]

The SCA in *Fedlife* also remarked that in the absence of a contractual remedy employees may be deprived of any remedy at all for an unlawful breach if the dismissal was found to be substantively and procedurally fair.[130] The SCA in *Fedlife*[131] inadvertently conceded that it is possible for a premature termination of a fixed-term

[124] (2004) 25 *ILJ* 2317 (LAC) at para 11.
[125] (2004) 25 *ILJ* 2317 (LAC).
[126] (2004) 25 *ILJ* 2317 (LAC); The LAC referred to para 17 of *Fedlife Assurance Ltd v Wolfaardt* (2002) (1) SA 49 (SCA); 22 *ILJ* 2407 (SCA).
[127] (2004) 25 *ILJ* 2317 (LAC) at para 16.
[128] (2004) 25 *ILJ* 2317 (LAC) at para 20.
[129] (2001) 22 *ILJ* (SCA) at para 15.
[130] (2001) 22 *ILJ* (SCA) at para 18.
[131] (2001) 22 *ILJ* (SCA) at para 18.

contract to be substantively and procedurally fair. It is therefore submitted that the Court misdirected itself in *Buthelezi* by concluding that the applicant's dismissal was substantively unfair purely by virtue of it being unlawful.

The Court's notion, therefore, that the employer could conclude an indefinite duration contract instead of a fixed-term contract if the risk existed, seems controversial. It is submitted that it is virtually impossible for any employer to be able to second guess or speculate what the future will hold. There are various reasons, as discussed above, which would be applicable in the economic and commercial world upon which an employer may lawfully terminate a fixed-term contract of employment, including but not limited to, the doctrine of supervening impossibility.

The implication of the LAC's finding is that employees employed on a fixed-term contract of employment may not be included in the selection criteria considered for retrenchment and may not be included in, or consulted with, during the consultation process as envisaged in section 189 of the LRA. The fixed-term employee will be afforded preferential protection when retrenchment is required by the employer. For obvious reasons, this scenario would clearly conflict with the requirements of fair and objective selection criteria and procedural fairness of the retrenchment process.

Grogan quite aptly addresses this notion by stating that "had the LRA intended to create such an exception to the general right to retrench, the legislature could have simply stated so in express terms".[132]

It is further submitted that the *Buthelezi* judgment creates inequality between employees on a fixed-term contract of employment and those employees employed on an indefinite or permanent contract by instituting an unintentional guarantee to the former against dismissal based on operational requirements of the employer.[133] The permanent employee may be retrenched, and the fixed-term employee may not be. It may be argued that this selection criteria may amount to a form of discrimination against those permanent employees and in contravention of section 187 of the LRA.[134]

[132] Grogan (2005) at 368.
[133] S188 contemplates that the termination of employment based on the employer's operational requirements is considered as a permissible and fair reason.
[134] Du Toit (2010) *ILJ* at 25.

Inequality will be established because employees employed on a fixed-term contract of employment seeking to pursue its contractual remedy and enforce its rights in terms thereof will not be required to do so within the associated 30 days afforded by the LRA for dispute referrals. They will have 3 years to institute their claim before prescription applies.[135] and is not limited to the statutory restricted compensation amounts as contemplated in section 194 of the LRA. The employee may claim any amount of remuneration, as damages, it can prove in respect of the unexpired period of the contract irrespective of the fairness of the employer's actions.

The constitutional conundrum created by this judgment is evident. The LRA in giving effect to the Constitution and more particularly section 23 thereof which affords the employer and the employee the right to fair labour practices as a counterbalance will not be realised. It is submitted that by implementing the exclusion of the employer's right to dismiss an employee on a fixed-term contract of employment under any circumstances except for fundamental breaches of the contract, the LAC is effectively limiting the employer's right to fair labour practices.[136]

To this effect the common law appears to be a source of limitation in respect of employer's rights in the face of the LRA's provision allowing for the termination of service of a fixed-term employee by the employer. Du Toit[137] further correctly argues that the majority judgment in *Buthelezi* flies in the face of established principles of constitutional interpretation and the system by which the legislature sought to give effect to the right to fair labour practice. He correctly states that:

> "it provides litigants the opportunity to circumvent that system at will and worse it may have inadvertently laid the basis for separate systems of labour dispute resolution, one for the rich and one for the poor".[138]

[135] S 11 of the Prescription Act, Act 68 of 1969 (as amended) determines that a civil debt will prescribe 3 years from the date when the debt arose. Du Toit (2010) *ILJ* at 25 that this flies in the face of quick and effective dispute resolution.
[136] (NEHAWU) v University of Cape Town and Others 2003 (3) SA 1 (CC) at para 38; See also the discussion in Chapter 2 para 3.3.4.
[137] Du Toit (2010) *ILJ* at 26.
[138] Du Toit (2010) *ILJ* at 26 – 27.

This submission by Du Toit is correct because, it is submitted, the common-law remedies effectively can only be pursued by employees who have access to the resources to litigate in the Courts. But for most employees the system created by the LRA offers the only redress.

The uncertainty that has been created in *Buthelezi* has the effect of extending the incursion of the common law into the domain of the LRA beyond what was initially envisaged. This uncertainty arising from a series of later judgments was confirmed by Van Niekerk J in *Mogothle v Premier of the Northwest Province & another*[139] as follow:

> "In a trio of recent decisions by the Supreme Court of Appeal, that court has emphasised the mutual relationship of trust and confidence that the common law contract of employment imposes on both employers and employees. In *Old Mutual Assurance Co SA v Gumbi* [2007] 8 BLLR 699 (SCA), the SCA ruled that the common law contract of employment should be developed in the light of the Constitution, specifically to include a contractual right to a pre-dismissal hearing.[140] The court reasoned as follows:
>
> > 'It is clear however that coordinate rights are now protected by the common law: to the extent necessary, as developed under the constitutional imperative (s39(2)) to harmonize the common law into the Bill of Rights (which itself includes the right to fair labour practices (s23(1))' (at par 5 of the judgment)".

and:

> "More recently, in *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA), the SCA derived a contractual right not to be constructively dismissed from what it held to be a duty on all employers of fair dealing at all times with their employees (at 517C). This obligation, a continuing obligation of fairness that rests on an employer when it makes decisions that affect an employee at work, was held by the court to have both a procedural and a substantive dimension."[141]

Van Niekerk J noted that this development of the common law by the SCA[142] has been criticised, amongst other, because it may be opening the door to a dual

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[139] (2009) 30 *ILJ* 605 (LC) para 21.
[140] The *Gumbi* judgment was confirmed in *Boxer Superstores v Mthatha & another* [2007] 8 BLLR 693 (SCA) where the SCA held that: "This court has recently held that the common-law contract of employment has been developed in accordance with the Constitution to include a right to a pre-dismissal hearing (*Old Mutual Life Assurance Co SA Ltd v Gumbi*). This means that every employee now has a common -law contractual claim - not merely a statutory unfair labour practice right - to a pre-dismissal hearing" (at para 6 of the judgment).
[141] (2009) 30 *ILJ* 605 (LC) at para 23.
[142] Van Niekerk J stated "see, for example, Halton Cheadle "Labour Law and the Constitution" a paper given to the annual SASLAW conference in October 2007 and published in current labour law 2008, the comments by P.A.K. le Roux at 3 of the same publication, and the article by Paul Pretorius SC & Anton Myburgh "A Dual

jurisprudence[143] in which common-law principles are permitted to compete with the protection conferred by the unfair dismissal and unfair labour practice provisions of the LRA.

It is apparent from the case law referred to by Van Niekerk J in *Mogothle*[144] that the SCA has unequivocally established and confirmed the existence of a contractual right to fair dealing that binds all employers, and which may be enforced by all employees both in relation to substance and procedure. This right, according to the SCA, exists independently of any statutory protection against unfair dismissal and unfair labour practices.

It is submitted that what the SCA ought to have done, is to distinguish between unlawful termination due to the operational requirements of the employer and the unfairness thereof. In consideration of the unlawful termination of the fixed-term contract of employment the sanctity of the contract should be the abiding factor. The common law is clear on the reasons upon which a fixed-term contract of employment may be terminated, which include a material breach of the terms and conditions of the contract.

The second aspect that must be considered is the process that should be adopted in respect of the termination of the fixed-term contract of employment. The test would be whether the procedure followed by the employer in effecting the premature termination

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System of Dismissal Law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 *ILJ* 2209 (SCA). (2007) 8 BLLR 693 (SCA)" published in (2007) 28 *ILJ* 2127. The authors of the latter article acknowledged that the SA Constitution contemplates the development of the common-law, but they note that the English courts, for what appears to be policy related reasons, have adopted a rather different course. the authors quote Lord Millet in *Johnson v Unisys Ltd* (2001) 2 All ER 801 (HL) who said:" But the creation of a statutory right [unfair dismissal] has made any such development of the common-law both unnecessary and undesirable… the coexistence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos, all coherence in our employment laws would be lost." (At para 80.)' (Footnote 2 in the original.)

[143] Pretorius (2007) *ILJ* at 2177. (2001) 22 *ILJ* (SCA) at para 42 in the minority judgment in *Fedlife* Froneman AJA remarked that: "I am of the view that the common-law contract of employment must then give some form of expressions to that fundamental right not to be unfairly dismissed. As soon as the common-law does give expression to that right I have the same difficulty as Nienaber JA had in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* [(1996) (4) 17 *ILJ* 455 (A)] .namely, to conceive how an unlawful dismissal would not also be an unfair dismissal. And if such a dismissal is unfair any dispute about it falls within the opening words of s 191(1) of the [LRA]. In short, one of the demands of the Constitution on our common-law of employment is that it includes a right to fair dismissal. Dismissal upon an unlawful breach of contract by an employer is un unfair dismissal. And the Act deals fully with the consequences of an unfair dismissal."

[144] (2009) 30 *ILJ* 605 (LC) at para 21- 24.

of the fixed-term contract will pass muster in terms of the fairness requirement of the LRA. It is two distinct concepts of law and two distinct tests to be applied.

In following the minority judgment of *Fedlife*[145] the employee, employed on a fixed-term contract of employment, challenging the said termination will be entitled to claim compensation in terms of section 194 of the LRA for the unfairness, if any, of the premature termination of the contract. Furthermore the said employee may also claim any amount to which he or she may be entitled to in terms of the common law, and which can be proven, as damages. That is for the premature termination of the fixed-term contract due to the employer's operational requirements as provided for in section 195 of the LRA.[146]

In following this approach, it may be argued, that the constitutional guarantee of fair labour practices for both the employer and employee will be complied with as well as the purpose, scope and ambit of both the Constitution and the LRA. Du Toit eloquently remarks that "[t]he contract of employment and statutory labour law… together form the heart of individual labour law".[147]

The Constitutional Court confirmed the nature and interaction of the common law and the administrative law, as discussed above, and the words of O' Reagan J in *Bato Star Fishing v Minister of Environmental Affairs and Tourism an Others*[148] remains of pertinent importance being: "to the extent to which the common law remains relevant". Interpreting and applying the common-law principles in a statutory regulated labour sphere would be uncalled for and only lead to a further confusing array of caselaw as remarked by Van Niekerk J.[149]

It is submitted that the Constitution's vision of developing the common law is respectfully limited to aspects where the statutory regulation of the labour law does

[145] (2001) 22 *ILJ* (SCA) at para 14 of the minority judgment of Froneman AJA.
[146] S 195 determines that the compensation awarded to the employee in terms of the LRA is in addition to and not a substitute for any amount to which the employee may be entitled to in terms of any law, collective agreement, or contract of employment. This will include an amount due in terms of the common law.
[147] Du Toit (2008) *SALJ* 95.
[148] (2004) (4) SA 490 (CC); Louw A (Part 1) *PER/ PELJ* 2018 at 8.
[149] (2009) 30 *ILJ* 605 (LC) at paras 21- 24.

not address a specific matter. This is supported by the judgment of Wallis AJA in *SAMSA v McKenzie*[150] where the SCA[151] held that:

> "Where a statute creates both a right and a means for enforcing that right the position is that: 'We must look at the provisions of the Act in question, its scope and its object, and see whether it was intended when laying down a special remedy that that special remedy should exclude ordinary remedies. In other words, we have no right to assume, merely from the fact that a special remedy is laid down in a statute as a remedy for a breach of a right given under statute, that other remedies are necessarily excluded".

He remarked further that the relevant feature of legislation of this type is that it also provides a mechanism for the enforcement of those rights.[152] This, it is submitted, is exactly what the LRA provides for. Furthermore, the common law need not be developed as the LRA already provides for the Constitution's vision in terms of fairness and equity to be applied in the premature termination of fixed-term contracts of employment due to the employer's operational requirements.

Wallis AJA unequivocally stated[153] that if the legislature has confined the person harmed by a breach of the right conferred therein to the statutory remedy, then resort to other means of enforcement is excluded.[154] Therefore should an employee wish to enforce the statutory rights not to be unfairly dismissed as embodied in section 185 of the LRA he must resort to the tribunals established under the LRA. The best reference to the question whether the common law ought to be developed where a statutory right already exist was stated by Wallis AJA as follow:[155]

> "Where the common law, as supplemented by legislation, affords to employees the Constitutional right to fair labour practices there is no Constitutional

[150] (2010) ZASCA 2 at para 16.
[151] The SCA per Wallis AJA quoted at para 42 with approval from Skweyiya J in *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC). "The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the *audi alteram partem* principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions, through substantive fairness requirements and a right not to be subjected to unfair labour practices". See also *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) paras 16 to 18.
[152] Louw A (Part 1) *PER/ PELJ* 2018.
[153] (2010) ZASCA 2 at para 16. Louw (Part 2) *PER/ PELJ* (2018) at 2 – 9.
[154] Referring to *Coetzee v Fick and Another* (1926) T.P.D 213 at 216 approved in *Da silva and another v Coutinho* 1971 (3) SA (A) at 135.
[155] (2010) ZASCA 2 at para 35.

> imperative for the common law to be developed. Indeed, to duplicate rights that exist by statute does no more than to create the jurisdictional quagmire".[156]

He concludes by referring, with approval, to Du Toit[157] that "inferring the existence of a common-law right duplicating a statutory right is to call into question the purpose of enacting the statutory right". The judgement of *Mohlaka v Minister of Finance*[158] confirms that: "Courts may not embark on an "independent exercise" to develop the common law in every case where the common law is at issue'.

It is submitted that the premature termination of a fixed-term contract of employment due to the employer's operational requirements may be determined with consideration of the legislative protection of the LRA and if found to be complied with by the employer it does not prohibit or encroach upon the employee's common-law right of lawfulness of the premature termination of the fixed-term contract of employment due to the employer's operational requirements. Unlawfulness therefore cannot be or result in being regarded as *ipso factu* substantive unfairness.

Nugent J in *Fedlife*[159] remarked that:

> "a dispute falls within the terms of the LRA only if the fairness of the dismissal is the subject of the employee's complaint. Where it is not, and the subject in dispute is the lawfulness of the dismissal, then the fact that it might also be, and probably is, unfair is quite coincidental for that is not what the employee's claim is about".

Nugent J, it is submitted, did not unequivocally state that unlawfulness would imply unfairness.[160] The reliance then and conclusion in *Buthelezi*, with respect cannot be sustained.

An employee whose fixed-term contract of employment is prematurely terminated on grounds of operational requirements may challenge the termination on grounds of fairness or lawfulness. A dispute about the fairness of the premature termination of the

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[156] Referring to Cohan (2009); Grogan J who stated "[T]he distinction between the causes of action in claims for enforcement of rights emanating from the contract of employment and rights emanating from the LRA becomes very difficult, perhaps in some cases impossible, to distinguish"; Pretorius & Myburgh (2007).
[157] Du Toit (2008) *SALJ* at 97.
[158] (2009) 30 *ILJ* 622 (LC) at para 23.
[159] At para 27.
[160] Louw A (Part 3) *PER/ PELJ* (2018) at 8 – 11.

fixed-term contract of employment due to the operational requirements, in accordance with the LRA, must follow the dispute resolution procedures as determined by the LRA. However, the employee may also refer the lawfulness of the premature termination of the fixed-term contract of employment based on the employer's operational requirements to the Labour Court in accordance with the provisions of section 195 of the LRA.

5.4. Remedies for Premature Termination of Fixed-Term Contracts of Employment due to Operational Requirements.

5.4.1. The LRA

If an unfair premature termination of a fixed-term contract of employment due to the employer's operational requirements is classified as a "dismissal" in terms of the LRA then the remedies established by the LRA will apply. The LRA clearly defines dismissal.[161]

Section 188 confirms that a dismissal, which is not automatically unfair, will be unfair unless the employer is able to prove that it was for a fair reason relating to the employee's conduct, capacity or its own operational requirements and effected in accordance with a fair procedure.

Should it be found that the premature termination of the fixed-term contract of employment amounts to a dismissal and was unfair either due to the reason therefore, not being based on the permissible grounds for termination, or the process applied was unfair the employee will be entitled to the remedies as contemplated by the LRA for the unfair dismissal. This dispute will may be referred by the employee to the Labour Court, as contemplated in section 191(12) for adjudication.[162]

[161] S186(1)(a) of the LRA.
[162] S 191(12) of the LRA determines that: "An employee who is dismissed by reason of the employer's operational requirements may elect to refer the dispute either to arbitration or to the Labour Court if -
a. the employer followed a consultation procedure that applied to that employee only, irrespective of whether that procedure complied with section 189;
b. the employer's operational requirements lead to the dismissal of that employee only; or
c. the employer employs less than ten employees, irrespective of the number of employees who are dismissed."

Section 193 of the LRA envisages that the Labour Court, as the forum of first instance, may order reinstatement, re-employment, or compensation,[163] which compensation is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement, or contract of employment.[164] The legislature accordingly clearly envisaged that an employee may approach the Labour Court for an order of monetary value in terms of a contractual or legislative claim such as severance pay.

This section makes it clear that the legislature envisaged that both contractual as well as unfair dismissal claims may be brought to the Labour Court. The concurrent jurisdiction of the Labour Court and the High Court will be examined and addressed in the following chapter of this study.

5.4.2. The Common law

The remedies for the unlawful premature termination of a fixed-term contract of employment under the common law remain consistent with the contractual remedies for breach of contractual terms. It is submitted that there need not be an inferred obligation of fair dealing as envisaged in *Murray.*[165] The premature termination of a fixed-term contract of employment due to the employer's operational requirements will be regarded as a material breach by the employer of the terms of the contract.

The employee may therefore reject the employer's repudiation of the terms of the contract of employment and claim specific performance, alternatively accept the breach and repudiation by the employer, cancel the contract, and claim damages.[166] The damages would be limited to those damages which the employee may be able to prove.[167]

[163] S 193 of the LRA.
[164] S 195 of the LRA.
[165] *Murray v Minister of Defense* (383/2006) (2008) ZASCA 44.
[166] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 22 the SCA per Nugent AJA confirmed that: "A contract of employment for a fixed is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law".
[167] *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC).

In claiming specific performance, in terms of the contract of employment, the employee will effectively be claiming reinstatement as defined in the LRA. Should the employee challenge the lawfulness of the premature termination of the fixed-term contract of employment by accepting the employer's repudiation of the contract and claim damages such dispute may be referred to the Labour Court[168] in terms of section 195 for "any other amount to which the employee is entitled in terms of any law, collective agreement, or contract of employment".[169]

The employee challenging the lawfulness and the fairness[170] of the premature termination of the fixed-term contract of employment due to the operational requirements of the employer will have to refer the dispute to the Labour Court.[171] The employee will then claim damages due to the unlawfulness of the premature termination, in terms of section 195 of the LRA, and compensation due to the unfairness of the premature termination in terms of section 194 of the LRA.

6. Conclusion

This chapter traversed the permissible grounds for termination of contracts of employment as contemplated by the ILO and the LRA.

Several key findings are made. Firstly, this chapter concludes that within the South African legal framework it is permissible to prematurely terminate a fixed-term contract of employment on grounds of operational requirements. There is no exclusion of employees employed on fixed-term contracts of employment from being retrenched in terms of section 189 of the LRA. Section 188 makes specific provision for the termination of service due to operational requirements subject to following a fair process. The definition of employee in section 213 will include a fixed-term employee

[168] Section 77(4) of the BCEA emphasises the exclusive jurisdiction of the Labour Court, as referred to in section 77(1) to adjudicate whether a basic condition of a contract of employment constitutes a term of the contract in proceedings before a civil court or arbitration. See Chapter 4 for a complete discussion of the jurisdiction of the Labour Court and the High Court to determine labour disputes emanating from the contract of employment in terms of the common law.
[169] S 195 of the LRA determines that: "An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any amount to which the employee is entitled in terms of any law, collective agreement or contract of employment".
[170] See para 5.4.1 above.
[171] See section 191(12) of the LRA.

and the definition of dismissal will include circumstances where the employer terminates the fixed-term contract of employment on grounds of operational requirements.

The LRA provides for the same permissible grounds of termination of the employment relationship as accepted by the ILO. However, neither the ILO nor the LRA excludes the premature termination of a fixed-term contract of employment. The LRA makes specific provision for fairness and should the services of an employee, employed on a fixed-term contract of employment, be terminated for a permissible reason in terms of the LRA it must comply with the fairness requirement as prescribed in the human rights approach to labour law.

Secondly, the remedies for an unfair premature termination of the fixed-term contract of employment due to the employer's operational requirements will be dependent upon whether the premature termination of the fixed-term contract is regarded as a dismissal or not. If same is regarded as a dismissal, the remedies as contemplated in section 193 of the LRA will be available, which incorporates the common-law remedies as well, to the employee whose fixed-term contract of employment was prematurely terminated due to the employers' operational requirements. The LRA also provides for a form of solatium payable in circumstances of termination on grounds of operational requirements to the employee as "severance pay". Whether these remedies comply with international standards and foreign law will be evaluated in chapter 5.

Thirdly, it was found that the common-law grounds for termination of employment due to a material breach or repudiation of the contract is sufficiently incorporated in the LRA with reference to the permissible grounds for termination of employment with the LRA requiring the termination of employment to be fair as determined by the Constitution.

Fourthly, the right to fair labour practices extend to both the employer and the employee. An employee employed on a fixed-term contract of employment whose services are terminated has the same remedies in terms of the LRA than employees employed on a permanent basis. Similarly, an employer has the same rights to termination of service for permissible reasons of an employee employed on a fixed-

term contract of employment than a permanent employee. This right should extend to operational requirements as well.

Fifthly, it was found that the South African Courts accept that the unlawful premature termination of the fixed-term contract of employment may be substantively unfair in terms of the LRA due to the unlawfulness thereof. The premature termination of a fixed-term contract of employment due to the employer's operational requirements may be regarded as a material breach by the employer of the terms of the contract in terms of the common law but may still be fair in terms of the LRA requirements.

It is submitted that where the common law, as supplemented by legislation, affords to employees the constitutional right to fair labour practices there is no constitutional imperative for the common law to be further developed. The LRA already provides for the Constitution's vision in terms of fairness and equity to be applied in the premature termination of fixed-term contracts of employment due to the employer's operational requirements and applies to the employee as well as the employer.

This chapter concludes that the premature termination of a fixed-term contract of employment may give rise to a challenge in terms of the common law for a material breach of the terms of the contract, or the lawfulness of thereof, as well as the LRA due to the fairness thereof. The employee may challenge both in accordance with the wording of section 195 of the LRA at the Labour Court. The employee challenging the lawfulness and the fairness[172] of the premature termination of the fixed-term contract of employment due to the operational requirements of the employer will have to refer the dispute to the Labour Court.[173] The employee will then claim damages, in terms of section 195 of the LRA, and compensation in terms of section 194 of the LRA.

While the Courts have endorsed the use of common law contractual remedies to deal with the premature termination of fixed-term contracts of employment the correctness of such approach will be further investigated in Chapter 4.

[172] See para 5.4.1 above.
[173] See section 191(12) of the LRA.

CHAPTER 4
OVERLAPPING JURISDICTION OF THE LABOUR COURT AND THE HIGH COURT

1. Introduction

> "An employee facing the premature termination of a fixed-term contract of employment can elect to pursue a claim for dismissal in the Labour Court, or one for an unlawful breach of the employment contract in the High Court or the Labour Court".[174]

The Labour Court, and LAC, was established with the goal of being superior courts with exclusive jurisdiction to decide matters arising from the LRA.[175] However, the jurisdiction of the Labour Court is clearly addressed in section 157 of the LRA and section 77 of the BCEA to be concurrent with the High Court.[176] This concurrent

[174] Cohen (2007) *SA Merc LJ* at 37 - 38. The nature of the breach claimed by the employee and the remedies available for such breach will dictate the choice of the forum the employee may choose.
[175] Preamble to the LRA. See also s 157(1) of the LRA and Van Eck (2014) *ILJ* at 863.
[176] *SAMSA V Mckenzie* (017/09) [2010] ZASCA 2 (15 February 2010). The SCA confirmed that a claim for damages for breach of contract falls within the ordinary jurisdiction of the High Court, albeit that the contract is one of employment. Referring with approval to the *Wolfaardt* matter and *Tsika v Buffalo City Municipality* 2009 (2) SA (ECD) where Grogan AJ found that "[t]his court and other civil courts retained their common-law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment". See also s 157 of the LRA and s 77(3) of the BCEA which provides for concurrent jurisdiction to the Labour Court and civil courts in determining matters concerning contracts of employment. This will be addressed further in this chapter.

jurisdiction results in forum shopping by litigants especially in circumstances where the overlap between the common-law remedies for the premature termination of a fixed-term contract of employment and the statutory remedies of the LRA converge.[177]

In *Langeveldt v Vryburg Transitional Local Council,*[178] Zondo JP confirmed that a claim of unlawful dismissal could either be decided by the High Court or the Labour Court based on the common law. However, if the same dismissal is claimed to be "unfair", it must be dealt with in terms of the LRA before the CCMA or Labour Court.

In *Langeveldt* the LAC found that the various courts have different jurisdictions and powers in relation to virtually the same dispute. For Zondo JP, the solution lied in the creation of a single hierarchy of courts with jurisdiction in respect of all employment and labour matters. To this end, he urged that employment and labour disputes should be transferred to the Labour Court and all such jurisdiction as the Supreme Court of Appeal may have in employment and labour disputes to be transferred to the LAC.[179]

The foregoing remarks remain a burning issue in relation to the premature termination of a fixed-term contract of employment for operational requirements. Zondo JP's remarks in *Langeveldt* is of particular importance in addressing this problematic area. He remarked that:

> "Through the new system with its specialist institutions and courts which are run by experts in the field, the stakeholders and Parliament sought to ensure a certain, efficient, cost-effective and expeditious system of resolving labour disputes. The fact that the High Courts also have jurisdiction in employment and labour disputes completely undermines and defeats that very important and laudable objective and thereby undermines the whole Act".[180]

Added to this in *Old Mutual Life Assurance Co SA Ltd v Gumbi*[181] and *Boxer Superstores Mthatha & another v Mbenya,*[182] the SCA held that employees could refer disputes regarding pre-dismissal procedures to the High Court based on contractual

[177] Van Eck (2014) *ILJ* at 868.
[178] (2001) 22 *ILJ* 1116 (LAC) para 41.
[179] (2001) 22 *ILJ* 1116 (LAC) at para 43. See also paras 61 and 64 where Zondo JP remarked on the unacceptability of the situation of dismissal disputes being dealt with by different courts of first instance depending on the grounds of the dismissal being challenged.
[180] (2001) 22 *ILJ* 1116 (LAC) at para 65.
[181] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA).
[182] *Boxer Superstores Mthatha & another v Mbenya* (2007) 8 BLLR 693 (SCA).

grounds. Such disputes would relate to the unfair termination of the contract of employment.

The Constitutional Court in *Transnet Ltd & others v Chirwa*[183] through Ngcobo J, reconciling sections 157(1) and (2) of the LRA, remarked that:[184]

> "the drafters of the LRA proposed "a comprehensive framework of law governing the collective relations between employers and trade unions in all sectors of the economy".

Further that:

> "The clear intention of the legislature was to create specialised forums to deal with labour and employment matters and for which the LRA provides specific resolution procedures".[185]

The Constitutional Court emphasized the specialist nature of the Labour Court and the LRA's aim. Ngcobo J remarked that the judgment of *Boxer Superstores,*[186] where the SCA observed that what mattered was the form of the employee's complaint rather than the substance, would permit an "astute litigant to bypass the whole conciliation and dispute resolution machinery created by the LRA and rob the Labour Courts of their need to exist".[187]

It is submitted that this observation by the Constitutional Court confirms that the LRA provide adequate remedies for unfair dismissal without the need for "further development of parallel remedies by the civil courts".[188] It further emphasises the remarks of Froneman AJA in the minority judgment of *Fedlife Assurance Ltd v Wolfaardt*[189] where it was held that a common-law termination of an employment dispute relates to an unfair dismissal and should therefore be dealt with in accordance with the LRA.

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[183] *Chirwa v Transnet Limited and Others* (2008) 29 ILJ 73 (CC).
[184] *Chirwa v Transnet Limited and Others (2008) 29 ILJ 73 (CC)* at para 101.
[185] *Chirwa v Transnet Limited and Others (2008) 29 ILJ 73 (CC)* at para 110.
[186] *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA) at para 11.
[187] *Chirwa v Transnet Limited and Others (2008) 29 ILJ 73 (CC)* at para 95. See also Van Niekerk *et al* (2019) at 502.
[188] Van Eck (2014) *ILJ* at 871.
[189] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 10.

It is submitted that the contractual claim of unlawfulness of the premature termination of the fixed-term contract of employment may be instituted at the Labour Court under the provisions of section 195 of the LRA being a claim for "an amount under any law", as permitted by section 195.[190] The result of this practice may alleviate a possible duplication of remedies in respect of the same cause of action.[191] An employee can therefore claim compensation for unfair dismissal and damages simultaneously rather than to later approach the High Court to claim damages under either the law of contract or delict.[192]

2. Dispute Resolution Under the LRA

2.1. Introduction

The LRA has created a set of forums and tribunals for the resolution of employment disputes. Greater protection of labour rights are accorded to, amongst others, an employee employed on a fixed-term contract of employment.[193] However, these forums and tribunals have consistently been bypassed in favour of the High Court in contractual disputes emanating from the contract of employment thereby creating uncertainty.

The High Court, initially, had some reluctance to deal with labour disputes and has accepted in *Mondi Paper (A division of Mondi Ltd) v Printing Wood and Allied Workers Union & Others*[194] that if the factual context was one of a labour dispute the Labour Court had exclusive jurisdiction.[195] The Court held that section 157(1) confers exclusive jurisdiction on the Labour Court in respect of matters that are to be

[190] Section 195 provides that an award or order of compensation awarded in terms of the LRA is in addition to, not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.
[191] *SA Maritime Safety Authority v Mckenzie* (2010) *ILJ* 529 (SCA). The SCA allowed a claim for damages for breach of contract notwithstanding the fact that the respondent had already claimed compensation for unfair dismissal under the LRA.
[192] *Archer v Public School- Pinelands High School & others* (2020) 41 *ILJ* 610 (LAC).
[193] Ngcukaitobi (2007) 28 *ILJ* at 767.
[194] *Mondi Paper (A division of Mondi Ltd) v Printing Wood and Allied Workers Union & Others* (1997) 18 *ILJ* 84 (D). See also (2001) 22 *ILJ* 1116 (LAC) at para 23.
[195] (1997) 18 *ILJ* 84 (D) at p 85 . See further Van Niekerk *et al* (2019) at 501.

determined by the Labour Court and therefore the High Court's jurisdiction is ousted.[196]

However, as explained further in this chapter, after the *Mondi* judgment there were several judgments by the SCA[197] which, it is submitted, moved away from the reasoning in *Mondi*.

2.2 Section 157(1) of the LRA

Section 157(1) of the LRA provides as follows:

> "Subject to the Constitution and section 173, and except where *this* Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of t*his* Act or in terms of any other law are to be determined by the Labour Court."

The jurisdictional question arise whether Section 157(1) ousts the jurisdiction of the High Court in deciding labour matters as found by the High Court in *Mondi.*[198]

The SCA in *Fedlife Assurance Ltd v Wolfaardt*,[199] considered the meaning of section 157(1) and held that this section does not confer exclusive jurisdiction generally on the Labour Court to deal with matters concerning the relationship between an employer and an employee. Accordingly, the exclusive jurisdiction of the Labour Court arises only in respect of "matters that elsewhere in terms of this Act (the LRA) or in terms of any other law are to be determined by the Labour Court".[200]

The interpretation in *Fedlife* was also followed by the Constitutional Court in *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*.[201] The Constitutional Court had to decide whether the Labour Court had exclusive jurisdiction to determine disputes concerning alleged infringements of constitutional rights by the state acting in its capacity as employer in such a manner that it either expressly or by necessary implication has excluded the jurisdiction of the High Court. The Court held,

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[196] (1997) 18 *ILJ* 88 paras H- J.
[197] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA); *United National Public Servants Association of SA v Digomo & Others* (2005) 26 *ILJ* 1957 (SCA); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA); *Boxer Superstores Mthatha v Mbenya* (2007) (5) SA 450 (SCA).
[198] See Mathiba (LLM 2012) chapter 3 for a further discussion on section 157 of the LRA.
[199] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 25.
[200] (2001) 22 *ILJ* 2407 (SCA) at para 25.
[201] (2002) 2 BLLR 119 (CC).

amongst other, that there is no general jurisdiction afforded to the Labour Court in employment matters. The Court importantly held as follows:[202]

> "[t]he jurisdiction of the High Court is not ousted by Section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction will only be ousted in respect of matters that "are to be determined" by the Labour Court in terms of the Act".

The Constitutional Court in *Chirwa*[203] however, implied that the jurisdiction of the High Court was ousted in labour matters by section 157(1). In the first majority ruling the Court confirmed that sections 157(1) and 157(2) must be interpreted purposively to give effect to the objects of the LRA. The Court, per Skweyiya J, noted that the purpose of the LRA is to provide a comprehensive system of dispute resolution mechanisms and forums "tailored to deal with all aspects of employment" and "even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes".[204]

The Court referred to section 210 of the LRA[205] and found through the first majority judgment of Skweyiya J that the LRA is the pre-eminent legislation in labour matters that are dealt with by the LRA.[206] Only the Constitution itself or legislation that expressly amends the LRA can take precedence over such labour matters.

In the second majority judgment, Ngcobo J held that LRA caters for all employees, whether employed in the public sector or private sector. Accordingly, the powers given to the Labour Court under section 158(1)(h) to review the executive or administrative acts of the state as an employer is a manifestation of the intention to bring public sector

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[202] (2002) 2 BLLR 119 (CC) at par 40. See also *United National Public Servants Association of SA v Digomo NO & others* (2005) 12 BLLR 1169 (SCA). At para 4 the Court held: "The remedies that the Labour Relations Act provides against conduct that constitutes an unfair labour practice are not exhaustive of the remedies that might be available to employees in the course of the employment relationship". The decisions in both *Fedlife* and *Fredericks* were followed in *Boxer Superstores*.
[203] (2008) 29 ILJ 73 (CC). The judgment comprised of two majorities and a minority judgment. See also Mathiba (LLM 2012) at chapter 2 at 36.
[204] (2008) 29 ILJ 73 (CC) at para 47.
[205] Section 210 provides: "any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law, save the Constitution or any other Act expressly amending this Act, the provisions of this Act will prevail".
[206] (2008) 29 ILJ 73 (CC) at para 50.

employees under the ambit of "one comprehensive framework of law" regulating employees from all sectors.[207]

In a dissenting judgment,[208] Langa J approached the matter from the grounds of policy. According to him, important constitutional rights are protected by both PAJA and the LRA and a presumption should not be made that one right should be more protected than the other. He concurred[209] with Cameron JA of the SCA: "that while it may be possible for the legislature to prefer one right over another it must do so much more explicitly than it has in the LRA and PAJA".

In the SCA, *Transnet Limited v PNN Chirwa,*[210] Cameron JA found that:

> "We must end where we began: with the Constitution. I can find no suggestion that, where more than one right may be in issue, its beneficiaries should be confined to a single legislatively created scheme of rights. I can find in it no intention to prefer one legislative embodiment of a protected right over another; nor any preferent entrenchment of rights or of the legislation springing from them".[211]

The effect of this reasoning is that there is no reason in the Constitution to suggest that in a claim that constitutes both a dismissal and administrative action, the law under the LRA should be preferred. For reasons which are apparent from the reading of section 157 of the LRA this finding creates immense uncertainty.

However, following the interpretation in *Chirwa* a court has to assess its jurisdiction based on the pleadings and not the substantive merits. This reasoning has the effect of allowing litigants to carefully plead their cases in a manner that puts those cases outside the exclusive jurisdiction of the Labour Court.

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[207] (2008) 29 ILJ 73 (CC) at para 102.
[208] (2008) 29 *ILJ* 73 (CC) at paras 154 – 196.
[209] (2008) 29 *ILJ* 73 (CC) at para 175.
[210] *Transnet Limited v PNN Chirwa* [2006] SCA 131 (RSA).
[211] (2006) SCA 131 (RSA) at para 65.

In *Gcaba v Minister for Safety and Security and Others*[212] the Constitutional Court had to distinguish between the interpretations adopted in *Fredericks* and *Chirwa* to decide whether the High Court is ousted of jurisdiction by section157(1) of the LRA.[213] The Court echoed the sentiments in *Chirwa* to find that the Labour Court and other structures have been created as a special mechanism to settle labour disputes such as alleged unfair dismissals grounded in the LRA and not, for example, applications for administrative review. The Court held that:

> "Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That includes, amongst other things, reviews of the decisions of the CCMA under section 145. Section 157(1) should, therefore, be given an expansive content to protect the special status of the Labour Court, and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well".[214]

Van Niekerk[215] correctly argues that the Constitutional Court in *Gcaba,*[216] provided the SCA with the backdrop to make an about-turn on the judgment of *Boxer Superstores.* The SCA confirmed in *SA Maritime Safety Authority v Mckenzie*[217] that:

> "Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed".

2.3 Section 77 of the BCEA

The concurrent jurisdiction of the Labour Court with the High Court as contemplated in section 157(1) of the LRA is echoed in section 77(1) of the BCEA.[218]

The Labour Court and the LAC have on several occasions held that the provisions of section 77(1) of the BCEA do no more than confer a residual exclusive jurisdiction on

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[212] (2009) 12 BLLR 1145 (CC).
[213] (2009) 12 BLLR 1145 (CC) at para 3.
[214] (2009) 12 BLLR 1145 (CC) at para 70.
[215] Van Niekerk *et al* (2019) at 503.
[216] (2009)12 BLLR 1145 (CC). Van der Westhuizen J confirmed that section 157(2) must be accorded a narrow meaning, and section 157 (1) an expansive interpretation.
[217] (2010) 5 BLLR 488 (SCA) at par 35.
[218] Section 77 of the BCEA states as follows: "*(1)* Subject to the Constitution and the jurisdiction of the Labour Appeal Court and except where this Act provides otherwise. the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.".

the Labour Court to deal with those matters that the BCEA requires to be dealt with by the Labour Court.[219]

However section 77(3) of the BCEA, like section 157(1) of the LRA, confirms that the Labour Court has concurrent jurisdiction with the civil courts to hear or determine any matter concerning a contract of employment "irrespective of whether any basic condition of employment constitutes a term of that contract". In *Baloyi v Public Protector and Others*[220] the Constitutional Court confirmed that section 77(4) of the BCEA emphasises that the exclusive jurisdiction of the Labour Court, as referred to in section 77(1), does not prevent any person, relying upon the BCEA, to establish that a basic condition of a contract of employment constitutes a term of the contract in proceedings before a civil court or arbitration.

The Constitutional Court further found in *Amalungelo Workers' Union and Others v Phillip Morris South Africa (Pty) Ltd and Another*[221] that matters arising from the BCEA must be dealt with by the Labour Court as the exclusive Court to deal with same. The exclusivity is subject only to the Constitution if there is a conflict and the jurisdiction of the Labour Court is conferred in its widest form.

It is therefore clear from a proper conspectus of the interpretation of section 77 of the BCEA in its totality, by the Constitutional Court, that the exclusivity of the Labour Court's jurisdiction is only in relation to matters arising out of or from the BCEA. The jurisdiction of the Labour Court, if not exclusive as regulated by the BCEA, is shared with the Civil courts.

2.4. Section 157(2) of the LRA

2.4.1 Introduction

Section 157(2) of the LRA states as follows:

> "The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in

[219] *Lewarne v Fochem International (Pty) Ltd* (2019) ZASCA 114; (2019) JDR 1750 (SCA) at para 9. *Baloyi v Public Protector and Others* (2020) ZACC 27 at para 26.
[220] *Baloyi v Public Protector and Others* (2020) ZACC 27 at par 28 – 29.
[221] (2019) ZACC 45 at para 21 -23.

> Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -
> a) employment and from labour relations;
> b) any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as an employer; and
> c) the application of any law for the administration of which the Minister is responsible."

This section has resulted in complex jurisdictional disputes in so far as determining where the jurisdiction of the Labour Court ends and where that of the High Court begins.

Van Niekerk[222] argues that section 157(2) of the LRA was enacted to confer limited constitutional jurisdiction on the Labour Court but also to empower the Labour Court to deal with causes of action that are founded on constitutional challenges arising from the employment relationship or employment disputes. Van Niekerk correctly argues that section 157(2) was not necessarily enacted to confer jurisdiction on the High Court to deal with labour disputes.

2.4.2. The View of the High Court, SCA and LAC

In *Fourways Mall (Pty) Ltd & Another v SA Commercial Catering & Allied Workers Union,*[223] Classen J, commented as follows:

> "It is common cause in the present instance that labour relations exist between the members of the two respondents and Edgars Ltd. However, no such labour relation exists between the respondents and/or its members on the one side and the applicants on the other. It is also common cause that the individuals whose conduct is complained of are in fact all members of the two respondents. The applicants in this case are common-law owners of the shopping centres. They have no relationship whatsoever with the members of the two respondents, either in contract or by statute. The nature of the dispute between them arises out of the law of delict as well as the law of contract".[224]

The Court observed that the protection of an owner's common-law property rights does not feature anywhere in the LRA, neither is the owner's right included in this exposition.[225] The purpose of the LRA is based on the relationship between the

[222] Van Niekerk *et al* (2019) at 502-503. Van Niekerk summarizes the remarks of Ngcobo J in *Chirwa* in respect of the interpretation and meaning of ss 157(1) and (2) and will be addressed in detail further in this study.
[223] (1999) 20 *ILJ* 1008 (W).
[224] (1999) 20 *ILJ* 1008 (W) at 1012 para G-I.
[225] (1999) 20 *ILJ* 1008 (W) at 1013 para C- E.

employer and employee (the direct relationship) and with such a relationship being absent, the High Court has jurisdiction to decide the dispute.

The direct relationship as a test for determining jurisdiction was however, questioned by the Court in *Langeveldt v Vryburg Transitional Local Council*.[226] Zondo JP submitted that if the conclusion that there was no direct relationship between the conduct of the parties and the objectives of the LRA was correct, then there would rather be inconsistencies between the conduct of the parties and the objectives of the LRA.[227]

The Labour Court would therefore be well-placed to deal with the conduct of the employees,[228] at least in so far as they did not constitute criminal offences, but for acts such as intimidation, physical and verbal abuse and damage to property, the High Court's jurisdiction is unquestionable.

In *Fedlife Assurance Ltd v Wolfaardt*[229] the SCA had to answer two questions: (i) whether the remedies under the LRA abolished the employee's common-law claim for breach of contract and (ii) whether the premature termination of the employment contract in this matter falls under the exclusive jurisdiction of the Labour Court. The majority of the SCA, through Nugent AJA (as he then was), held that the LRA neither expressly nor by necessary implication abrogate an employee's common-law claim to enforce contractual rights.[230] According to the Court this is supported by the LRA in

[226] (2001) 22 *ILJ* 1116 (LAC).
[227] (2001) 22 *ILJ* 1116 (LAC) at para 29-30.
[228] (2001) 22 *ILJ* 1116 (LAC) at para 26 -30. Zondo JP referred to the conclusion on jurisdiction that Levinsohn J made in *Minister of Correctional Services and Another v Ngubo and Others* (2000) 21 *ILJ* 313 (N).The question arose to the Jurisdiction of the High Court or the Labour Court where there was no strike but employees engaged in acts of intimidation and assault against either their employer or the management or one or more of their co-employees in order to resolve an employment or labour dispute or in order to put pressure on the employer to agree to certain demands. "Is it the High Court or the Labour Court that has jurisdiction to grant the employer an interdict or similar relief in such a case or do the two Courts have concurrent jurisdiction?"
[229] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA).
[230] The Court relied on *Stadsraad van Pretoria v Van Wyk* (1973) 2 SA 779 (A) in holding that the presumption against the deprivation of existing rights is applicable in this matter. Accordingly, it is presumed that the legislature did not intend to interfere with existing law and not to deprive parties of existing remedies for wrongs done to them. This will be the case only if the legislature states expressly or by necessary implication. See also *SA Breweries Ltd v Food & Allied Workers Union & Others* (1990) 1 SA 92 (A) where the Court applied the presumption and further held that in the case of ambiguity an interpretation which serves the existing rights of employees will be favoured.

section 186(b) which extends the meaning of dismissal to include non-renewal of the contract of employment against the reasonable expectations of the employee.[231]

The Court held further that although the legislature dealt in particular with fixed-term contracts, it did not include the premature termination of such contracts notwithstanding that such termination would be unfair. The very reference to fixed-term contracts makes it clear that the legislature recognised their continued enforceability and any other construction would render the definition absurd.[232]

Froneman AJA held, in a minority judgment, that the issue was rather about the unfairness of the dismissal (as opposed to unlawfulness) which must be dealt with in accordance with the procedure set out in section 191 of the LRA, "a procedure which in one way or another ends up with the Labour Court having the final say".[233] Since the LRA allows the Labour Court to award damages (in Section 195), the respondent's demands could have been easily met in that regard.

Du Toit[234] argues that the role of common law is not to usurp the role of the legislature, and submits that areas such as dismissal are not areas where the development of the common law is called for. The interaction between the common-law contract and labour law has led to various courts (and sometimes the same court) making different pronouncements on the jurisdictional debate, thus inciting forum shopping and delaying legal certainty.[235]

The decision in *Fedlife* set a precedent for a series of cases that followed. In *United National Public Servants Association of SA v Digomo & Others*[236] the SCA, relying on *Fedlife*, held that the remedies that the LRA provides against conduct that constitutes an unfair labour practice are not exhaustive of the remedies that might be available to

[231] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 18.
[232] Nugent J refers to two forms of absurdities: Firstly, if the employee in this case is compelled to exhaust the statutory remedies, the result would be that the employee must rest content with "compensation" which may be ludicrously small in comparison with the true loss. Secondly, if it were so that a plaintiff such as this is confined to a claim for "compensation" in terms of section 194, where the employer proves that "the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements" and "that the dismissal was effected in accordance with a fair procedure", the plaintiff would not be entitled to any compensation. The Court concluded that such a result could not have been intended by the legislature.
[233] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at para 14.
[234] Du Toit (2010) 31 *ILJ* at 24. Du Toit argues that the upholding of common law at the expense of labour statutes in *Fedlife* was uncalled for.
[235] Du Toit (2010) 31 *ILJ* 21.
[236] *United National Public Servants Association of SA v Digomo & Others* (2005) 26 *ILJ* 1957 (SCA).

employees in the course of the employment relationship. Particular conduct might therefore not only constitute an unfair labour practice, but may give rise to other causes of action such as a contractual claim.[237] In *Fedlife* the majority judgment was informed by the role of labour law in protecting employees against the employer's common-law right to terminate the contract at will.[238] It is on this basis that *Buthelezi v Municipal Demarcation Board*[239] was decided.

The Court in *Buthelezi*, relying on *Fedlife*, held that in the absence of a clear indication from the LRA that the legislature intended to alter the rule relating to premature termination of fixed-term contracts during their currency, it cannot be argued that the LRA had such an effect.[240] It was concluded therefore that the employer cannot dismiss the fixed-term contract employee for operational reasons.

In *Old Mutual Life Assurance Co SA Ltd v Gumbi*[241] the SCA took matters even further. According to the SCA, the common-law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing. As a result, the employee now has a common-law contractual claim and not merely a statutory unfair labour practice right to a pre-dismissal hearing.[242]

In *Boxer Superstores Mthatha & Another v Mbenya*[243] Cameron JA, comparing this case to those that preceded it, held that the *Boxer* case "pushes the boundary a little further".[244] According to the SCA, this case raised the question whether an employee may institute action in the High Court for relief on the basis that the disciplinary proceedings and the dismissal were "unlawful", without alleging any loss apart from the salary. Drawing from the *Gumbi*[245] decision, the Court answered in the affirmative.

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[237] (2005) 26 *ILJ* 1957 (SCA) at para 4.
[238] (2001) 22 *ILJ* 2407 (SCA) at para 13.
[239] *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).
[240] (2004) 25 *ILJ* 2317 (LAC) at para 14.
[241] *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA).This decision (and the one in *Boxer Superstores*) was followed by the Eastern Cape High Court in *MEC, Department of Roads & Transport, Eastern Cape & Another v Giyose* (2008) 29 *ILJ* 272 (E), where the Court held that the common-law contract of employment has also developed to include the right to a pre-transfer hearing for a public service employee and the High Court has jurisdiction to entertain the dispute in relation to the transfer on that basis.
[242] (2007) 8 BLLR 699 (SCA) at paras 4 -8.
[243] *Boxer Superstores Mthatha v Mbenya* (2007) (5) SA 450 (SCA).This decision came two weeks after the *Gumbi* judgment was handed down.
[244] (2007) (5) SA 450 (SCA) at para 6.
[245] In *Gumbi* the Court held that the common-law contract of employment has been developed in accordance with the constitution to include the right to a pre-dismissal hearing. This means therefore that every employee has a common-law contractual claim, not merely a statutory unfair labour practice right to a pre-dismissal hearing.

The Court concluded that the fact that contractual claims may also be decided by the Labour Court, through that court's unfair labour practice jurisdiction, does not detract from the High Court's jurisdiction.[246]

Garbers[247] differs from this view: Firstly, the principal reason for the introduction of unfair dismissal rules, as currently evidenced by section 186 (a) of the LRA, has been the recognition of the reality that lawful dismissals are not necessarily fair, rather than the assumption that unlawful dismissals are always unfair. Secondly, he argues that one of the cornerstones of fairness, is that it cuts both ways-in favour of both employer and employee.[248] The principles laid down in these judgments remain open to criticism.

Pillay J observed in *Mohlaka v Minister of Finance & others*[249] that the scope for developing the common-law of employment is practically confined to situations where there is no legislation implementing the right to fair labour practices or where "a mechanical application of the text of legislation has the effect of denying or diminishing rights in conflict with the Constitution".[250] Pillay J further remarked that to go further than this will be unnecessary as well as impermissible.[251]

Du Toit correctly argues that:

> "There can be no basis for a litigant to ignore legislation such as the LRA by seeking a contractual remedy where a statutory remedy has expressly been created, or for a court to bypass such legislation by reverting to the underlying constitutional right and then developing the common law to give effect to it".[252]

With consideration of what is contemplated in section 210 of the LRA,[253] it is submitted that the Court in *Fedlife* had more than enough reasons to decide in favour of statutory

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[246] (2007) (5) SA 450 (SCA) at para 5.
[247] Garbers (2002) (1) *Law Democracy and Development*.
[248] Garbers (2002) (1) *Law Democracy and Development* at 97.*Numsa v Vetsak Co-operative Ltd & Others* at 461 B; *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571; (LAC) at para 599 H-I (per Willis JA); *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* (2002) ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC). See also the discussion in Chapter 2 para 3.3.4 above.
[249] (2009) 30 *ILJ* 622 (LC).
[250] (2009) 30 *ILJ* 622 (LC) at paras 14 and 29. See also Du Toit (2010) *ILJ* at 36 – 37.
[251] (2009) 30 *ILJ* 622 (LC) at paras 34 -36.
[252] Du Toit (2010) 31 *ILJ* at 38.
[253] Section 210 of the LRA reads: "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail".

remedies instead of common law. Further as Du Toit[254] correctly argues the approach in *Fedlife* was "too narrow and the outcome it yielded was at odds with the purpose of the LRA".

The approach to section 157(2) was eloquently summarized by the SCA in *Motor Industry Staff Association v Macun NO & others*[255] and confirmed that when the Constitution prescribes legislation in promotion of specific constitutional values that legislation will be the point of entry rather than the constitutional provision.[256] The Court further held as follows:[257]

> "Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and Labour Relations rather than to restrict or extent the jurisdiction of the High Court",

and;

> "[t]he Labour, and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged".

It is submitted that this approach may also be in line with what Du Toit calls for,[258] being:

> "[t]he development of a coherent system of labour law that is consistent not only with the Constitution but also with the broader institutional framework of labour market regulation".

2.4.3. The View of the Constitutional Court

In interpreting this section there remains tension between the judgments of the Courts in *Fredericks* and in *Chirwa*.

In *Fredericks* the Court adopted a literal approach and held as follows:[259]

> "There is no express provision of the Act affording the Labour Court jurisdiction to determine disputes arising from an alleged infringement of constitutional rights by the state acting in its capacity as an employer, other than section 157(2). That

[254] Du Toit (2010) *ILJ* at 40.
[255] (2016) 37 *ILJ* 625 (SCA).
[256] (2016) 37 *ILJ* 625 (SCA) at para 20.
[257] (2016) 37 *ILJ* 625 (SCA) at para 20.
[258] Du Toit (2010) *ILJ* at 40.
[259] (2002) 2 BLLR 119 (CC) at para 41.

> section provides that challenges based on constitutional rights arising from the state's conduct in its capacity as employer is a matter that may be determined by the Labour Court, concurrently with the High Court. Whatever else its import, section 157(2) cannot be interpreted as ousting the jurisdiction of the High Court since it expressly provides for a concurrent jurisdiction".

In *Chirwa*,[260] the applicant relied on section 157(2) arguing that the High Court has concurrent jurisdiction with the Labour Court in respect of her claim, thus requesting the Court to consider the extent of this section.[261] The Constitutional Court held that section 157(2) must be given a purposive interpretation. The Courts must be guided by the primary objectives of the LRA when deciding whether the High Court has concurrent jurisdiction with the Labour Court to decide a particular dispute.

In *Makhanya v University of Zululand*[262] Nugent JA criticised *Chirwa* observing the two findings in Chirwa to be "mutually destructive".[263] After deciding that the High Court lacks jurisdiction to hear the matter, the Court in *Chirwa* could not have proceeded to hold that the appellant's claim was bad in law. To do so the Court must have had jurisdiction. He further held that where a litigant has two separate claims, such as in *Chirwa* and in *Makhanya*, one under the LRA and another under administrative law, there is nothing wrong with the bringing of both claims in one court (under the concurrent jurisdiction of the Labour and High Courts) or each in one of these Courts.[264]

It is submitted that section 157(2) should be understood as not giving the High Court jurisdiction to deal with employment matters, but rather as conferring limited constitutional jurisdiction to the Labour Court in respect of matters involving alleged violations of the rights in the Bill of Rights. It is submitted that the main purpose of section 157(2) was to confer constitutional jurisdiction on the Labour Court.

In *Gcaba v Minister of Safety and Security & Others,*[265] the Constitutional Court held that the purpose of section 157(2) is to extend the jurisdiction of the Labour Court to embrace disputes arising from employment involving violations of fundamental

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[260] (2008) 29 ILJ 73 (CC).
[261] (2008) 29 *ILJ* 73 CC; [2008] 2 BLLR 97 (CC) at paras 41 and 124.
[262] (2009) 8 BLLR 721 (SCA). This judgment came exactly a year after the decision in *Makambi* was handed down.
[263] (2009) 8 BLLR 721 (SCA) at para 29.
[264] (2009) 8 BLLR 721 (SCA) at para 27.
[265] *Gcaba v Minister of Safety and Security & Others* (2009) 12 BLLR 1145 (CC).

rights.[266] However, the Court warned that section 157(2), so interpreted, does not mean that the High Court is divested of jurisdiction where a cause of action and remedy lies within its jurisdiction.[267]

In *Gcaba* the Constitutional Court attempted to address the inconsistencies between *Fredericks* and *Chirwa*. The Court held firstly that while the claim in *Fredericks* "removed it from the purview of labour law",[268] that could not be the case with *Chirwa*. *Chirwa* was a labour matter and it had to be resolved through specialised processes under the LRA.[269] Secondly, it was held that the failure by the National and Provincial Commissioners of the SA Police Service to promote Mr Gcaba did not amount to an administrative action because it has few or no direct implications for other citizens.[270] Lastly, to the extent that this judgment may be taken to differ from *Fredericks* and *Chirwa*, it purported to be the most recent authority.[271] This authority was accepted by the SCA in *Mkumatela v Nelson Mandela Metropolitan Municipality & Another*.[272]

The conclusions reached in *Chirwa* and *Gcaba* corresponds with an observation made by Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape*[273] that:

> "[i]t would not only be jurisprudentially inelegant and functionally duplicatory to permit remedies under constitutionalised administrative law, and remedies under common law, to function side by side. It would be constitutionally impermissible".[274]

However, as the law currently stands the Constitutional Court in *Baloyi v Public Protector and Others*[275] confirmed that the High Court has jurisdiction over the alleged unlawful termination of a fixed-term contract of employment.

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[266] (2009)12 BLLR 1145 (CC) at para 72-73.
[267] (2009) 12 BLLR 1145 (CC) at para 73. The Court held that the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court or the Equality Court, Section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as such.
[268] (2009) 12 BLLR 1145 (CC) at para 30.
[269] (2009) 12 BLLR 1145 (CC) at para 31.
[270] (2009) 12 BLLR 1145 (CC) at para 68.
[271] (2009) 12 BLLR 1145 (CC) at para 77.
[272] (2010) 2 BLLR 115 (SCA).
[273] (2007) (3) SA 121 (CC).
[274] (2007) (3) SA 121 (CC) at para 99.
[275] *Baloyi v Public Protector and Others* (2020) ZACC 27.

The Court was called upon to interpret sections 157(1) read with section 157(2) of the LRA.[276] The Court confirmed[277] that the concurrent jurisdiction afforded to the Labour Court and the High Court in section 157(2) of the LRA and section 77(3) of the BCEA "adds to, rather than diminishes their jurisdiction".[278] The Court referred, with approval, to the SCA judgment in *Makhanya*[279] confirming that a contractual claim arising from breach of a contract of employment falls within the ordinary jurisdiction of the High Court, "notwithstanding the fact that the contract is one of employment".[280] Accordingly the Court held that the High Court retains its jurisdiction in respect of claims of breach arising from the enforcement of contractual rights in the employment context based on "whether the *specific causes of action* relied on by Ms Baloyi fall within the jurisdiction of the High Court or the Labour Court (or both)".[281]

The Court further confirmed that the reliance of the party on the fairness principle would invoke the meaning of section 157(1) and the matter would have to be heard by the Labour Court.[282] The Court held that absent any reliance on any provision of the LRA "[t]he LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof",[283] such as the premature termination of the fixed-term contract of employment.

From the reasoning of Theron J in the unanimous judgment of the Constitutional Court in *Baloyi* it is thus clear that the jurisdictional debate has been settled on the law as it stands now and need not be further entertained as the choice of forum will depend on the cause of action the parties rely upon.

It is submitted however, that the Constitutional Court could very easily have held that the legislature ought to consider amending section 157 of the LRA to provide for more clarity on the exclusive jurisdiction of the Labour Court to determine disputes arising

[276] (2020) ZACC 27 at para11.
[277] Referring to the judgements of *Gcaba v Minister of Safety and Security & Others* (2009) 12 BLLR 1145 (CC) at para 71, *Motor Industry Staff Association* v Macun N.O (2015) ZASCA 190 at para 20 and *Mbayeka v The MEC For Welfare, Eastern Cape* (2001) JDR (TkH) at par 19.
[278] (2020) ZACC 27 at para 31.
[279] *Makhanya v University of Zululand* (2009) ZASCA 69 at paras 11 and 71.
[280] (2020) ZACC 27 at para 41.
[281] (2020) ZACC 27 at para 43.
[282] (2020) ZACC 27 at para 38.
[283] (2020) ZACC 27 at para 48.

from employment and labour relations. The Labour Court is a Court of fairness and equity and is best placed to determine disputes in relation to the fairness of a premature termination of a fixed-term contract of employment as well as the lawfulness thereof by utilising the provisions of section 195 of the LRA.

3. Conclusion

In this chapter the interaction between jurisdictional provisions of the LRA and the common law were investigated. The background to the exclusive jurisdiction of the Labour Court, as developed through case law was investigated and considered in respect of the provisions enacted in the LRA and the BCEA. Specific reference was made to the relevant sections of each act.

Firstly, it was found that the legislature did not intend to create a multiplicity of laws and competing jurisdictions and therefore created specialised forums to deal with employment matters.[284]

However, the SCA initially differed from this view by concluding that section 157(1) does not confer exclusive jurisdiction generally on the Labour Court to deal with matters concerning the relationship between an employer and an employee.[285]

The Constitutional Court had to clarify this aspect due to various conflicting SCA judgments.[286] The Constitutional Court noted that the purpose of the LRA is to provide a comprehensive system of dispute resolution mechanisms and forums "tailored to deal with all aspects of employment" and "even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes".[287] This view, to a certain extent, was already raised, and decided by the LAC[288] much earlier.

[284] *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC) at para 120.
[285] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA).
[286] *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA); *United National Public Servants Association of SA v Digomo & Others* (2005) 26 *ILJ* 1957 (SCA); *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA); *Boxer Superstores Mthatha v Mbenya* (2007) (5) SA 450 (SCA).
[287] *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC) at para 47.
[288] *Langeveldt v Vryburg Transitional Local Council* (2001) 22 *ILJ* 1116 (LAC) at 1138-1139A.

Secondly, the Constitutional Court confirmed that section 157(1) confirms the Labour Court's exclusive jurisdiction over any matter that the LRA prescribes should be determined by it and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.[289] The purpose of section 157(2) is to extend the jurisdiction of the Labour Court to embrace disputes arising from violations of fundamental rights in the employment context. However, the Constitutional Court warned that Section 157(2), so interpreted, does not mean that the High Court is divested of jurisdiction where a cause of action and remedy lies within its jurisdiction.[290]

Thirdly, the LAC held that in the absence of a clear indication from the LRA that the legislature intended to alter the rule relating to premature termination of fixed-term contracts during their currency, it cannot be argued that the LRA had such an effect.[291] This is the law, as matters stand, pertaining to the premature termination of fixed-term contracts of employment on grounds of operational requirements. It is submitted that this approach should be revised and be amended.

Fourthly, the Constitutional Court cleared the jurisdictional debate and confirmed that the High Court does have jurisdiction over the alleged unlawful termination of a fixed-term contract of employment.[292] The Court held that absent any reliance on any provision of the LRA does not oust the High Court's jurisdiction to hear contractual disputes nor the remedies available to employees following a breach of their contract of employment, or unlawful termination thereof.[293] There is accordingly, as matters stand, no need to involve both the Labour Court and Civil Courts in determining disputes about the pre-mature termination of employment resulting from the employer's operational requirements as both courts will have jurisdiction to determine such dispute subject to their inherent jurisdiction as explained by the Constitutional Court.

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[289] *Gcaba v Minister for Safety and Security and Others* (2009) 12 BLLR 1145 (CC) at para 70.
[290] (2009) 12 BLLR 1145 (CC) at para 74. The Court held that the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court or the Equality Court, Section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as such.
[291] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at para 14.
[292] *Baloyi v Public Protector and Others* (2020) ZACC 27.
[293] (2020) ZACC 27 at para 48.

It is submitted that, considering the specialist nature of the Labour Courts, it is best placed to determine the lawfulness and unfairness of the premature termination of a fixed-term contract of employment due to the employer's operational requirements. However, to dispel any further uncertainty, it may be appropriate to amend section 157 of the LRA by reserving the exclusivity of the Labour Court's jurisdiction in matters of any alleged or threatened violation of any fundamental right and arising from employment and from labour relations.[294]

[294] Van Eck (2014) *ILJ* at 878. Van Eck concluded that: "The legislature could have resolved the complexities by opting to follow one, or a combination, of a number of avenues". Firstly s 157(2) of the LRA could have been amended to read: "…[T]he Labour Court has exclusive jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution…"

CHAPTER 5
SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS AND COMPARITIVE STUDY

1. Introduction

The Constitution[1] of South Africa provides that when any person or Court is required to interpret the Bill of Rights, international law must be considered. This is re-iterated in section 1 of the LRA[2] stating amongst other that the purpose of the LRA is to give effect to obligations incurred by South Africa as a member of the ILO.

[1] Ss 39(1), 232 and 233. See also *S v Makwanyane* (1995) (3) SA 391 (CC) at para 35 where the Constitutional Court stated that reports of specialized agencies such as the ILO may provide guidance on the correct interpretation of provisions. Van Niekerk *et al* (2019) at 33; Aletter (LLD 2016) UP at 48.
[2] Act 66 of 1995. Section 3 of the LRA further provides as follows: "Any person applying this Act must interpret its provision-
(a) …

The purpose of this chapter is therefore to consider the establishment and functioning of the International Labour Organisation ("ILO") with reference to the relevant conventions, and recommendations made by the ILO in as far as they apply to the premature termination of a fixed-term contract of employment due to the employer's operational requirements.

From the perspectives of foreign law, the principles applied to the premature termination of a fixed-term contract of employment in England and the Netherlands will be investigated. The aim of this chapter is to determine whether South Africa is aligned with international norms and standards and whether foreign law perspectives may be applied in law reform of the South African approach to the premature termination of fixed-term contracts of employment on grounds of the employer's operational requirements.

2. Establishment and Functioning of the ILO

In 1919 World War 1 came to an end with the signing of the Treaty of Peace as part of the Treaty of Versailles between the Allied and Associated Powers and Germany.[3] The Treaty of Versailles established the League of Nations which would become the United Nations after the Second World War.[4] All members of the League of Nations became founder members, including South Africa, of the ILO.[5] The ILO was the League of Nations' separate and independent labour branch with the express goal of promoting social justice, prosperity and peace.[6] The ILO has been a specialised branch of the United Nations since 1946[7] tasked with an oversight role over its member

(b) …
(c) in compliance with the public international law obligations of the Republic".

[3] The founding document of the ILO is the Treaty of Peace between the Allied and Associated Powers and Germany, Part XIII Labour (1919). See also Van Staden (2012) *TSAR* 94; Erasmus G (1993/94) at 65 and 68.
[4] Kriek (LLM 2018) UP at 36.
[5] Van Niekerk *et al* (2019) at 23.
[6] Kriek (LLM 2018) UP; Van Staden (2012) *TSAR* at 96 explains that the initial drive to create international labour standards was to curtail competition between countries. It was the post-first World War social circumstances which led to the formation of the ILO to avoid revolution and another war.
[7] Van Niekerk *et al* (2019) at 23. The ILO was the United Nations' first specialized agency. See Hepple (2005) for an overview of the foundation and formative years of the ILO at 29 – 33.

states in relation to labour and social norms.[8] The purpose of the ILO is amongst other:[9]

> "[t]o provide for the international regulation of Labour standards, based on the principle that universal and lasting peace can be established only if it is based upon social justice".[10]

The ILO comprises of three bodies being the International Labour Conference, the Governing Body and the International Labour Office.[11] The Conference is the highest policy-making body with the primary function of adopting new labour standards.[12]

The executive body of the ILO is the Governing body comprising of 56 members made up from 28 governments, and 14 members from employer and employee representatives respectively. The Governing Body determines what is placed on the agenda of the Conference, makes policy decisions and manages the ILO's budget.[13]

The ILO's original objectives included establishing global standards of social justice regarding work matters.[14] The Labour Standards agreed to by the ILO partners is regarded as minimum standards ensuring that member states do not lower their labour standards in order to create a competitive edge in the international sphere.[15] The most important standards are conventions and recommendations adopted by the International Labour Conference[16] through a majority of votes cast by two thirds of the delegates present.[17]

The Conference may also adopt declarations which is formal instruments seeking to articulate universal and significant principles. One of the most important declarations

[8] Kriek (LLM 2018) UP at 36; The United Nations consists of 15 specialised agencies, and the ILO was the first specialised agency to join the United Nations in 1946.
[9] Du Toit *et al (*2016) at 76.
[10] Preamble to the Constitution of the ILO.
[11] Van Niekerk *et al* (2019) at 24.
[12] Van Niekerk *et al* (2019) at 24.
[13] Van Niekerk *et al* (2019) at 24 - 25.
[14] Kriek (LLM 2018) UP remarks that the ILO constitution includes the following principles: Labour is not to be regarded as a commodity; the right of association for all lawful purposes; the payment of a wage adequate to maintain a reasonable standard of life; the adoption of an eight hour day or forty-eight hour week; the adoption of a weekly rest of at least twenty-four hours; the abolition of child labour and the imposition of such limitations on the labour of young persons to ensure their proper physical and educational development; equal remuneration between women and men for work of equal value.
[15] Van Niekerk *et al* (2019) at 25.
[16] Van Niekerk *et al* (2019) at 25.
[17] Van Niekerk *et al* (2019) at 25 remarks that Conventions are not automatically binding on member states, not even those who voted in favour of its adoption. The rationale for this is found in the ILO's Constitution providing for voluntary assumption making the convention and only binding when same is ratified by the member state.

is the Declaration on Fundamental Principles and Rights at Work, 1998. This Declaration is a consolidation of eight fundamental conventions into one binding document and passed because of the low number of ratifications of core conventions.[18] All these conventions set out a minimum standard in relation to the activities dealt with.

Ratification of a convention by Member States places an obligation on the Member State to implement its terms through national law and practice. The Member State is also monitored and supervised by the ILO and subject to scrutiny of its reports, which must be submitted regularly to the ILO, on the implementation of the convention.[19] The enforcement mechanisms adopted by the ILO for implementation of conventions by Member States has been criticized based on the lack of a sanction-based approach.[20] However, Van Nierkerk correctly remarks that the "ILO depends largely on its influence and status to convince member states to give effect to international labour standards".[21] The imposition of this approach, by way of broad conventions and the use of standards, according to Van Niekerk, is a response to several challenges caused by globalisation and the aim of remaining relevant in a rapidly changing world.[22]

3. South Africa as a Member of the ILO

3.1. Conventions and Recommendations

The importance of international standards in the South African labour law is emphasized by the LRA with its primary object to give effect to obligations of the Republic which it incurred as a Member State of the ILO.[23]

[18] Kriek (LLM 2018) UP at 27; Van Niekerk *et al* (2019) lists the 8 Core Conventions as freedom of association and the Right to Organize Convention, 1948 (No.87); Right to Organize and Collective Bargaining Convention, 1949 (No.98); Forced Labor Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 184); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation Convention, 1958 (No. 111).
[19] Kriek (LLM 2018) UP at 38. Van Niekerk *et al* (2019) at 27.
[20] Van Niekerk *et al* (2019) at 27.
[21] Van Niekerk *et al* (2019) at 27 refers in fn 14 to the Standards Initiative: Joint Report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association *Review of ILO Supervisory Mechanism* that "[i]t is generally recognized that the ILO's supervisory system succeeds in promoting the application of Labor standards".
[22] Van Niekerk *et al* (2019) at 31.
[23] *S v Makwanyane* (1995) (3) SA 391 (CC); Aletter (LLD 2016) at 48 – 49.

In addressing the reasons for termination of employment the Committee of Experts on the Application of Conventions and Recommendations ("CEACR") of the ILO[24] has commented that the need to base termination of employment on a valid reason:

> "is the cornerstone of the Convention's provisions. It removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof".[25]

It was further commented by the CEACR that the definition of the manner of termination of employment is of particular importance in determining a dismissal.[26] A fair reason for the dismissal of the employee or justification thereof is widely regarded as a fundamental principle. The employment of a worker shall not be terminated unless there is a valid reason connected with the capacity or conduct of the worker or the operational requirements of the employer.[27]

South Africa, as Member State to the ILO, has not ratified this convention but the international norms and standards is applied as a point of departure and South Africa has committed to give effect to the said convention and in particular Article 4 as well as Article 5,[28] Article 11,[29] Article 12,[30] Article 13,[31] and Article 14[32] thereof[33]. Convention 158 of the ILO was to a certain degree accepted by the introduction of section 188 of the LRA.

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[24] Recommendation 166.
[25] General Survey 1995 at par 76.
[26] General Survey 1995.
[27] CEACR direct request – Luxembourg (2007). See report of the ILC at its 67th Session in which it was stated "Thus, today the justification principle has become the centrepiece of the law governing termination of employment by the employer...", ILC, 67th Session, 1981, Report VIII(1), p. 7. The Committee on Economic, Social and Cultural Rights in its General Comment No. 18 on the Right to Work considered that "violations of the obligations to protect follow from the failure of State parties to take all necessary measures to safeguard persons within their jurisdictions from infringements of the right to work by third parties. They include omissions such as ... the failure to protect workers against unlawful dismissal". General Comment No. 18 on the Right to Work, UN Committee on Economic, Social and Cultural Rights (E/C.12/GC/18), adopted on 24 November 2005, at paragraph 35. See also paragraph 11 of the general comment in which reference is made to Article 4 of Convention No. 158."
[28] Invalid reasons for termination.
[29] Reasonable period of notice.
[30] Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)).
[31] Consultation of workers' representatives.
[32] Notification to the competent authority.
[33] The Code of Good Practice: Dismissal schedule 8 to the LRA is premised on the said articles of Convention 182.

The statutory requirement of procedural fairness as set out in section 188(1)(b) of the LRA confirms South Africa's acceptance and following of international norms and standards as set out in Article 7 of the ILO Convention 158. The process adopted by the employer in termination of employment must be directly related to either one of the permissible grounds of dismissal as discussed above. This applies to the termination of the fixed-term contract of employment due to the employer's operational requirements as well.

Operational requirements as a ground for dismissal or reasons based on the operational requirements of the undertaking, establishment or service is specifically addressed by the ILO.[34] The CEACR confirmed that:[35]

> "the reasons relating to the operational requirements of the undertaking were generally defined by the reference to redundancy or reduction of the number of posts for economic reasons, or due to *force majeure* or accident".[36]

There is no specific prohibition by the ILO in addressing the premature termination of fixed-term contracts of employment due to the operational requirements of the employer apart from guidance on adequate safeguards for abuse.[37] Considering the aim of the Termination of Employment Convention it is clear that the ILO endorses the permissible grounds of termination of employment of an employee including for operational reasons. It is therefore submitted that considering Convention 158 with Recommendation 166 the dismissal for operational requirements applies to all employees and there is no exceptions.

Unfortunately South Africa, like the Netherlands, has not ratified Convention 158[38] but the premature termination of fixed-term contracts of employment is nevertheless highly regulated.[39] Furthermore, The Netherlands is a member state of the ILO and has

[34] ILO 82nd Session 1995. Information and reports on the application of Conventions and Recommendations. General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982. Report of the Committee of Experts on the application of Conventions and Recommendations (articles 19,22 and 35 of the Constitution).
[35] Recommendation (No. 166), 1982 at para 96.
[36] Recommendation (No. 166), 1982 at para 336 the CEACR notes that it was decided that considerable flexibility should be allowed in the selection criteria of employees to be dismissed due to operational requirements to take account of the diverse situations.
[37] https://eplex.ilo.org/fixed-term-contracts-ftcs/ accessed on 28 November 2021.
[38] Termination of employment Convention 158 (1982).
[39] Since 2019 the Netherlands have applied a highly regulated system and incorporated specific provisions pertaining to the premature termination of fixed-term contracts of employment due to operational requirements,

ratified Convention 150.[40] The importance hereof shall be addressed later in this chapter.

4. Premature Termination of Fixed-Term Contracts of Employment Due to Operational Requirements in England

4.1. Introduction

In the English labour market, dismissals is regulated by two primary systems being the common-law rules governing the termination of employment, and the statutory right to claim unfair dismissal in terms of the Employment Rights Act ("ERA").[41] In terms of the ERA, an unfair dismissal requires a two-stage test of fairness and reasonableness. There are six, broadly defined, potentially fair reasons for dismissal including redundancy.[42]

Employees[43] working under fixed-term contracts enjoy protection by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002[44] ("the FTER"), which implemented the provisions of the Fixed-term Work Directive

amongst other relating to redundancy and severance pay upon the termination of the contract for economic reasons. See also https://eplex.ilo.org/country-detail/?code=NLD&yr=2019.

[40] Labour Administration Convention 150 of 1978. Article 6 of the Convention determines that: "The competent bodies within the system of labour administration shall, as appropriate, be responsible for or contribute to the preparation, administration, co-ordination, checking and review of national labour policy, and be the instrument within the ambit of public administration for the preparation and implementation of laws and regulations giving effect thereto". A more detailed comparison of the Netherlands' approach to the premature termination of a fixed-term contract of employment on grounds of operational requirements will be discussed later in this chapter.

[41] S 95 (1) of the Employment Rights Act, 1996.

[42] S 98(3) of ERA. See also Koukiadaki (2010) *JILPT* 9, 1–22.

[43] The definition of employee is specifically provided for under s 230 of the ERA and includes an individual employed on a fixed-term contract of employment amongst other as follow: "Employees, workers etc.
(1)In this Act "employee" means an individual who has entered or works under (or, where the employment has ceased, worked under) a contract of employment.
(2)In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
(3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered or works under (or, where the employment has ceased, worked under)—
(a)a contract of employment, or
(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

[44] Regulations 2002 (SI 2002/2034) as amended by Regulations 2008 (SI 2008/2776). This regulation also replaced section 197 of the ERA through its acceptance by parliament.

(1999/70/EC) into UK law requiring that such employees are treated no less favourably than permanent employees.[45]

Accordingly, in terms of the FTER, fixed-term employees have the right to bring an unfair dismissal claim if they have been employed for two years or more when their employment ends.[46] Although the reason for the dismissal will often be potentially fair such as redundancy or some other substantial reason, employers also need to follow a fair procedure before the contract expires.

The Chartered Institute of Personnel and Development[47] in the United Kingdom notes that:

> "Fixed-term employees who have been continuously employed for four years or more on a series of successive fixed-term contracts will automatically be treated as permanent employees (that is, employed under an indefinite contract), unless the continued use of a fixed-term contract can be objectively justified (see *Change in status from fixed-term employee to permanent employee* in section 5)".[48]

Although the fixed-term employment is largely regulated by the FTER,[49] its termination is regulated by the ERA, provided that the employee complies with the necessary qualifying period of employment of two years.

[45] For example, employers should not refuse fixed-term employees the benefits that they provide to permanent employees, so should they not exclude fixed-term employees from pension or other contractual benefits schemes, unless the employer can objectively justify the difference in treatment (see *Objective justification* in section 4.

[46] The FTER regulation 7 permits the fixed-term employee to refer any alleged infringement of a right as provided for in Regulation 3 to the Employment rights tribunal. Regulation 2 provides insight of which employees will be regarded as fixed-term employees with similar status to permanent employees and includes an employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place, (a)both employees are—(i)employed by the same employer, and(ii)engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and (b)the permanent employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable permanent employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

[47] https://www.cipd.co.uk/#gref accessed on 28 November 2021.

[48] https://www.cipd.co.uk/Images/fixed-term-contracts-guide-web_tcm18-70389.pdf accessed on 28 November 2021.

[49] SI 2002/2034, as amended. The regulatory reforms as introduced by the FTER were designed to implement in Britain the Council Directive 99/70 of the European Commission with the purpose to improve the quality of fixed-term work by ensuring the principle of non-discrimination between fixed-term workers and comparable permanent workers and to establish a framework to prevent abuse arising from the misuse of fixed-term employment contracts and concluding various successive fixed-term contracts. See also Koukiadaki (2010) *JILPT* 9 at 11–12.

4.2. Background and Historical Development

There was very little regulation of fixed-term contracts prior to the introduction of the FTER. The common law had no regulation of the number of times which such contracts could be renewed or the limits on their duration.[50] The contract as agreed to between the parties was the driving force. At the end of the 1970s Hepple and Napier assessed the situation of temporary workers in Britain and suggested a separate Act of Parliament dealing with this category of workers.[51] Koukiadaki remarks that:

> "[i]n practice fixed-term workers were less likely to accumulate the necessary length of service to trigger various statutory employment protection rights due to the nature of their contracts".[52]

However, the regulation of fixed-term work in Britain was addressed in part with the anti-discrimination regimes and to a certain degree a recognition of the nature of these contracts with better regulation implemented through the FTER.[53]

The United Kingdom ("U.K") resolved to withdraw from the European Union ("EU"), with effect from 1 February 2020, and commonly referred to as Brexit. This decision had the potential to overturn all the good work and regulation of fixed-term contracts of employment in the UK and since the acceptance of the FTER.

In order to properly regulate this withdrawal from the European Union the EU-UK Trade and Cooperation Agreement ("TCA"), signed on 24 December 2020, was concluded between the UK and the European Union. The TCA averts some of the post-transition uncertainty by introducing a level playing field for employment standards. The TCA does not change employment law, but it does limit the ability of the EU and the U.K to change their employment laws in the future.[54] The parties further agreed to adhere to the implementation of relevant internationally agreed principles such as Conventions

[50] Koukiadaki (2010) *JILPT* 9 at 8.
[51] Hepple (1978) *ILJ* 84 at 99.
[52] Koukiadaki (2010) *JILPT* 9 at 10. Protection against unfair dismissal or the right to a redundancy payment was likely to be affected depending upon the time which they spend with the employer. workers were also excluded from some contractual terms as permanent employees such as the employers' pension and sick pay schemes, contractual redundancy schemes, and were even paid at a lower rate than comparable to permanent employees.
[53] Koukiadaki (2010) *JILPT* 9 at 11.
[54] This so-called "non-regression clause" aims to prevent one party from seeking a competitive edge by offering a lower cost, or less regulated, employment law regime than the other. See also https://www.allenovery.com/en-gb/global/news-and-insights/publications/brexit-post-transition-q-and-as-for-employers.

of the International Labour Organization (ILO) and the European Social Charter of the Council of Europe.[55]

All of the U.K. employment laws that stemmed from EU law, which was already in effect, were transferred, unchanged, into U.K. law by the European Union Withdrawal Act 2018,[56] which created the concept of "retained EU law".[57] Therefore in the immediate future, U.K. employment law will not change and is unaffected by the agreement. Case law as found by the European Court of Justice ("the ECJ") in existence as of 31 December 2020 remains binding on the UK courts, but any subsequent ECJ judgments are not. This will continue to be the case unless either the underlying legislation is changed by Parliament, or the Court of Appeal or Supreme Court depart from the pre-Brexit ECJ jurisprudence where they consider it "right to do so".[58]

4.3. Employment Rights Act - ERA

Part X of the ERA[59] deals with Dismissals.[60] For a dismissal to be fair, it must be for one of the potentially fair reasons set out in legislation including the employee's capability; the employee's conduct; redundancy; contravention of a statutory obligation; or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.[61]

Generally, the dismissal of an employee[62] employed on a fixed-term contract is likely to be unfair if, provided it is for objective reasons, he or she is being treated differently

[55] Ss 3 and 4 of the European Union Witdrawal Act 2018.
[56] European Union (Withdrawal) Act 2018 chapter 16.
[57] S 6 of the European Union (Withdrawal) Act 2018 provides for what is retained EU law.
[58] S 6(5) provides as follows: "In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law".
[59] ERA (1996). Ss 94 to 110 with Chapter II of Part X addressing the remedies available as contemplated in ss 111 to 134A. Part XI deal with Redundancy Payments as more fully addressed in ss 135 to 181.
[60] https://www.legislation.gov.uk/ukpga/1996/18/part/X/chapter/I/crossheading/dismissal.
[61]Ss 98(2)(a)-(d) of ERA. https://www.legislation.gov.uk/ukpga/1996/18/part/X/chapter/I/crossheading/fairness.
[62] Section 98 of ERA (1996) stipulate as follow: "A reason falls within this subsection if it—
(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b)relates to the conduct of the employee,
(c)is that the employee was redundant, or
(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment".

from permanent employees.[63] The objective reasons is linked only to the employer's business objectives and not to the employee's services vis-à-vis a permanent employee.[64] In many cases, it is submitted, the non-renewal of a fixed-term contract will be potentially fair by reason of redundancy, but will depend on the circumstances. To this effect the reasons for termination of the fixed-term contract must follow section 98 of ERA read with the FTER.

4.4. Fixed-term Employment Regulations

The primary aim of the FTER is to prevent less favourable treatment of fixed-term employees in comparison with permanent employees of the same employer in respect of the terms and conditions of employment amongst other in redundancy situations, in promotion situations, pension schemes, and access to permanent job vacancies.[65] However, employers can justify giving those employees employed on fixed-term contracts less favourable treatment than permanent employees for certain, objective business reasons.[66]

In terms of the FTER, an employee employed on successive fixed-term contracts for four years or more will automatically have permanent status unless there is a justifiable reason for a continued fixed-term contract.[67] The employer can change the time limit

[63] SI 2002/2034. Regulation 3 confirms that a fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee.
[64] SI 2002/2034.Regulation 4 determines as follows:
"Objective justification- 4.(1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment".
[65] SI 2002/2034 Regulation 3.
[66] SI 2002/2034 Regulation 4 provides for Objective justification meaning:" (1) Where a fixed-term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded for the purposes of regulation 3(3)(b) as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment.
(2) Paragraph (1) is without prejudice to the generality of regulation 3(3)(b)".
[67] SI 2002/2034. Regulation 8(2) determines as follows:
"(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—
(a)the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and the employment of the employee under a fixed-term contract was not justified on objective grounds—
(i)where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
(ii)where that contract has not been renewed, at the time when it was entered into".

on notice to the employee if they have a workforce or collective agreement in place to do this.[68] In many cases where a fixed-term contract expires, the reason for dismissal will be redundancy. Therefore the employer must follow a fair redundancy procedure as set out in the ERA and as determined in section 105.[69] Furthermore the FTER determines that if the employee has at least two years continuous service, he/she will be entitled to a statutory redundancy payment.

Other reasons to legitimately end a fixed-term contract is for capability, conduct or some other substantial reason ("sosr").[70] However, appropriate procedures need to be followed including consultation with the individual and looking for alternative jobs.

In *Royal Surrey County NHS Foundation Trust v Drzymala*,[71] the Employment Appeal Tribunal found that the employee had been unfairly dismissed.[72] The employee, a locum consultant, was employed on successive six-month contracts from November 2011. In April 2014, she unsuccessfully applied for a permanent position. The employer stated to her that it might be able to offer her employment as a speciality doctor.[73]

When her contract expired in September 2014, the letter of termination indicated that she had no right of appeal and failed to refer to possible alternative employment. The employee claimed unfair dismissal.[74] The Employment Tribunal found that although there was a potentially fair reason for dismissal (some other substantive reason, on the expiry of the contract) the fact that the employer failed to offer the employee possible alternative positions and not giving her a right of appeal was sufficient to

[68] SI 2002/2034. Regulation 8(5).
[69] ERA (1996) section 105 determines as follows; "Redundancy.
(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—(a)the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
(b)it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c)it is shown that any of subsections (2A) to (7N) applies".
[70] FTER regulation 6 read with ss 95 and 98 of ERA.
[71] UKEAT/0063/17/BA.
[72] UKEAT/0063/17/BA at paras 50 - 56.
[73] UKEAT/0063/17/BA at paras 57 – 58.
[74] UKEAT/0063/17/BA at paras 59-61.

make this an unfair dismissal. The finding of dismissal was confirmed by the Employment Appeal Tribunal (the "EAT").[75]

Therefore, the employee has the right to claim unfair dismissal in the same way as permanent employees. Similarly, employees employed on fixed-term contracts are entitled to receive redundancy pay if they have been employed by the employer for more than 2 years. It is submitted that in general, and in terms of the ERA,[76] read with the FTER[77] a redundancy will occur when the employee, employed on a fixed-term contract, is not being replaced due to the employer's operational requirements needing fewer employees to do work of a particular kind.

Employers, relying on redundancy as a justification for the premature termination of the contract, should look for suitable alternative employment for the employee and will have to make a statutory redundancy payment if the employee has two years' service or more. The employer will also have to ensure that it consults with the individual about their selection for redundancy and ways of trying to avoid it or mitigate its effects to ensure that the redundancy process is fair.[78]

4.5. Comparing England and South Africa

The analysis of the regulation of fixed-term contracts of employment and the premature termination thereof due to the employer's operational requirements provides insight into England's approach and how it may assist in developing a better functioning and adapted model for South Africa. It should be noted that the lessons gained point to measures which South Africa should adopt.

[75] https://assets.publishing.service.gov.uk/media/5a5789c340f0b648ca1e71cb/Royal_Surrey_County_NHS_Foundation_Trust_v_Ms_M_Drzymala_UKEAT_0063_17_BA.pdf.
[76] ERA (1996) s 95(1)(b) read with s 105.
[77] FTER (2002) regulation 3.
[78] UKEAT/0063/17/BA. At para 48 to 51 the EAT held: "Where the employee is on a fixed-term contract, the employer does not have to take any positive step to dismiss; passive non-renewal will cause the contract of employment to cease by lapse of time. But there may still be a need for the employer to exercise judgment, as in this case where the Claimant was competing for a permanent post and the employer must decide which candidate to prefer", and "This was not a conduct or a capability dismissal. It was a "some other substantial reason case". It is well established that to act reasonably under section 98(4) in such a case an employer may, depending on the facts, must engage in some degree of discussion or consultation. In such cases, the emphasis is more on the equity part of the fairness test and less on the substantial merits part of the test….Possible alternatives to dismissal may need to be discussed as a matter of fairness, where such alternatives are or may be available".

In England the fixed-term contract of employment is regulated by the FTER[79] and termination thereof, including premature termination, is addressed in the ERA.[80] Should a fixed-term contract of employment be prematurely terminated it will amount to a dismissal.[81] The employee will then be entitled to the remedies as set out in the ERA.[82] In South Africa there is no provision that classifies the premature termination of a fixed term contract as a Dismissal.

Fixed-term employees may refer the termination of their contract, whether it was terminated prematurely or at the conclusion of the contractual period as an unfair dismissal to the employment tribunal in terms of ERA.[83] The employee may be entitled to the remedies as contemplated by section 112.[84]

Having considered the application of the FTER in the U.K it is evident that should an employee be employed for a continuous period of two years with the employer the employee will be entitled to redundancy payment as will be the case with a permanent employee, should the fixed-term contract of employment not be renewed or pre-maturely terminated due to the employer's operational requirements.

Furthermore the employee, employed on a fixed-term contract in England has a potential claim for both the unfair dismissal[85] and statutory redundancy payment,[86] when the contract is not renewed under the same terms as before or prematurely terminated. The ERA further makes provision for payment of compensation[87] in terms of the unfair dismissal, within the required limits, payment of redundancy payment and

[79] FTER (2002).
[80] ERA (1996). Ss 95 read with 98.
[81] ERA (1996) s 105.
[82] ERA (1996) Part X Chapter ii ss 111 to 132.
[83] ERA (1996) section 111 states as follows: "(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer".
[84] ERA (1996). Section 112 provides for re-instatement or re-engagement in terms of section 113 or compensation in terms of section 118.
[85] ERA (1996) s118 and 123 determines payment of compensation for unfair dismissal consisting of a basic award and a compensatory award.
[86] ERA (1996) Part X1 ss 135 read with 162.
[87] ERA (1996) s 123(1) provides as follow: "(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

additional amounts closely related to damages[88] and expenses[89] the employee has suffered.

It is submitted therefore, through the FTER and ERA, that the regulation of fixed-term contracts of employment in England is favoured to the South African approach to the premature termination of fixed-term contracts of employment due to the employer's operational requirements only in as far as it is better and clearly regulated than the South African legislative framework.

South Africa does have the required legislative framework matching that of England in relation to the remedies for premature termination of a fixed-term contract of employment if same is regarded as an unfair dismissal due to the operational requirements of the employer. It should be permissible for the employer to prematurely end the fixed-term contract of employment on grounds of operational requirements. Should the requirements of the LRA not be complied with same will be regarded as an unfair dismissal to which the employee will have the associated remedies as set out in section 194 (amongst other the payment of compensation). Furthermore the employee has the right to severance pay as set out in section 41 of the BCEA which can be considered, in terms of section 195 of the LRA, as an amount to which the employee is entitled to in terms of other legislation.

It is submitted that this severance pay may be regarded as a form of payment in lieu of prejudice the employee has suffered because of the premature termination of the fixed-term contract on grounds of the employer's operational requirements. Further comparison with England indicates that an employee, in South Africa, accumulates "entitlement" to severance payment from the date of employment and not only after 2 years employed on a fixed-term as in England.

[88] ERA (1996) s 123(3) provides as follow: "(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of— (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or (b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal".
[89] ERA (1996) s 123(2) provides as follows: "(2) The loss referred to in subsection (1) shall be taken to include— (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

In following the English approach to the provision for loss due to the premature termination of a fixed-term contract of employment,[90] severance payment may be expanded to include the number of years "left" on the contract (one week for each uncompleted year) as damages for the "unlawful" premature termination on grounds of operational requirements by the employer.

5. Premature Termination of Fixed-Term Contracts of Employment in the Netherlands

5.1. Introduction

In the Dutch labour law an employment contract may be concluded orally or in writing and the details as contemplated by Chapter 7 of the Dutch Civil Code (*Burgerlike Wetboek* "*BW*")[91] must be adhered to. Furthermore should a fixed-term contract of employment be followed by an open-ended contract and not be terminated in a way as provided by Article 7:677 paragraph 4 of the Dutch Civil Code it will become an open-ended employment contract by operation of law.[92]

5.2. Background and Historical Development

Dismissal law in the Netherlands has been the point of debate for many years. Borghouts,[93] remarks that: "[d]ismissal law was often considered as complicated, costly and unfair". The dismissal law in the Netherlands changed dramatically on 1 July 2015 when the Work and Security Act ("*WWZ*") came into force. The Dutch legislature had the aim to simplify labour law and make it more transparent and less costly.[94] The amendment brought by the *WWZ* further aimed to align with the introduction of employment security and transition payments.[95] The Dutch legislature believed the *WWZ* made the law on dismissal fairer determining that if the

[90] As provided for in section 123(3) of the ERA.
[91] http://www.dutchcivillaw.com/civilcodebook077.htm.
[92] Article 7:668a of the Dutch Civil Code determines that a fixed-term employment contract will automatically convert into an open-ended employment contract if: 1) a chain of temporary employment contracts covers 24 months or more; 2) a chain of three fixed-term employment contracts is continued. This rule is also applicable to employment contracts between an employee and various employers that must reasonably be deemed to be each other's successors with regard to the work performed.
[93] Borghouts (2021) *ELLJ* at 6.
[94] Parliamentary Documents (Kamerstukken II) 2013/14, 33 818, 3 (MvT), p5.
[95] Borghouts (2021) *ELLJ* at 6.

requirements of Article 7:673 of the *BW* have been met, the employee was eligible for transition payment.[96]

Pursuant to Article 7:668a of the Dutch Civil Code, a fixed-term contract of employment will automatically convert into an open-ended (permanent) employment contract if a chain of temporary employment contracts covers 24 months or more or a chain[97] of three fixed-term employment contracts is continued.

Termination of the fixed-term contract of employment[98] is regulated by Directive 99/70 which obliges the Dutch legislator to prevent the abuse of consecutive fixed-term contracts.[99] To this end, article 7:668a *BW* limits the parties' possibilities to conclude successive fixed-term contracts.

In 2014, an employer attempted to circumvent the employment protection rules of art 7:668a *BW* by offering the employee a fourth contract, which had to be a permanent one.[100] The contract was termed as permanent but had inserted a clause which specified that both parties had agreed to terminate this permanent contract at a given date.[101]

This construction of the contract was at first found to be valid by the Court as termination contracts could exclude the applicability of legal provisions to terminate a legal dispute or to clarify an unclear situation.[102] However, the Hoge Raad disagreed and overturned this ruling and declared the construction invalid. Therefore, as the conditions for applicability were not fulfilled, the general civil law provision of the

[96] Transition payment, according to Borghouts: "is intended partly as compensation for the dismissal and partly as compensation for what is referred to as "employment security". The Transition payment further helps to ensure an employee's "employability" and "labour market position". It promotes the transition from one employer to another and contribute to the prevention of unemployment.
[97] A chain is a series of fixed-term employment contracts that succeed each other with no more than six months in between. This rule is also applicable to employment contracts between an employee and various employers that must reasonably be deemed to be each other's successors regarding the work performed.
[98] Section 7.10.9. End of an employment agreement regulates the termination of a fixed-term contract of employment under article 7:667.
[99] Gundt (2015) *Doc. Labor., núm.* at 105.
[100] Eiser (in cassatie) v Verweerster (in cassatie) HR 13/05569 (9 January 2015), ECLI:NL:HR: 2015:39
[101] This is the so-called vaststellingsovereenkomst, a contract that allows the parties to set aside mandatory rules in case of a dispute or insecurity concerning the legal situation. It is regulated in article 7:902 BW.
[102] Article 7:902 BW.

termination agreement could not be used.[103] However, this led to the legislature amending article 7:668a *BW* through the *WWZ* as discussed below.

Where fixed-term contracts of employment are concluded for two or more successive periods, with intervals not exceeding three months, and these employment agreements jointly have covered a total period of 36 months, the last employment agreement for a fixed-term is deemed to be a permanent contract.[104] This will also apply to employment agreements for a fixed-term succeeding one another between an employee and different employers who reasonably must be considered as each other's successor with regard to the work performed by the employee.[105]

Each of the parties is entitled to terminate the fixed-term employment agreement with immediate effect because of an urgent reason with notice to the opposite party. A party who terminates the employment agreement without an urgent reason or without notification of this urgent reason to the opposite party, including premature termination of the employment agreement is liable for damages.[106]

A party is also liable for damages when he has wilfully or blamefully given the opposite party an urgent reason[107] to terminate the employment agreement or the Court has dissolved the employment agreement on that ground pursuant to Article 7:685. An urgent reason may be summarised as acts of misconduct by the employee, among others, dishonesty, or when the employee lack the competence or the capability to perform the work.[108] Similarly there may exist urgent reasons for the employee to terminate the employment agreement.[109]

[103] HR 13/05569 (9 January 2015), ECLI:NL:HR: 2015:39
[104] Article 7:668a. A chain of fixed-term employment agreements.
[105] Article 7:668a. A chain of fixed-term employment agreements includes where the employee is transferred to a new employer as successor of the old employer.
[106] Article 7:677(1) to (2). Liability due to an irregular termination.
[107] Article 7:678 refers to urgent reasons being reasons for the employer to terminate the employment agreement immediately such as acts, characteristics or behaviour on the part of the employee, having the result that the employer reasonably cannot be expected to continue the employment agreement.
[108] However, contractual provisions leaving the decision whether an urgent reason in the meaning of Article 7:677 exists to the discretion of the employer, are null and void. See Article 7:678(3).
[109] Article 7:679. An urgent reason for the employee in the meaning of Article 7:677, paragraph 1, consists of such circumstances which result in a situation in which the employee reasonably cannot be expected to continue the employment agreement.

Each of the parties may approach the Sub-district Court with a written request to dissolve the employment agreement for important reasons.[110] The Sub-district Court may only grant the request if it has ascertained whether the request is made in connection with the existence of a termination ban[111] or another prohibition to terminate the contract of employment.

The remedies for premature termination of the fixed-term employment agreement in contravention of the relevant terms of the agreement (unlawful termination) is, amongst other, a fixed amount of damages[112] and in the event of an obvious unreasonable[113] premature termination a fixed amount of compensation[114] for damages actually suffered[115] or restoration of the employment agreement.[116] This however, do not affect the right of both parties to rescind the employment agreement on the ground of non-compliance with the agreement, nor the right to claim damages. A rescission of the employment agreement, however, can only be effected by a decision of the Court.[117]

Effective from 1 July 2015, employees with a temporary (fixed-term) contract will be entitled to a permanent employment contract much sooner.[118] Employees may be given three fixed-term contracts but only for a maximum period of two years. If six

[110] Article 7:685(2) defines important reasons as: "Important reasons are circumstances which would have produced an urgent reason as meant in Article 7:677, paragraph 1, if the employment agreement would have been terminated with immediate effect and changed circumstances of such a nature that the employment agreement in fairness should end at once or after a short while".
[111] As provided for in Articles 7:647, 7:648, 7:670 and 7:670a.
[112] Article 7:679 determines that: "The fixed compensation for damages meant in Article 7:677, paragraph 4, equals the amount in money of the wages to which the employee would have been entitled for the time during which the employment agreement would have remained effective if there had been a regular termination, when the employee's wages are, either entirely or partially, not fixed for a specific period of time, the standard of Article 7:618 will apply in determining the amount of the wages.
[113] Article 7:681. Obviously unreasonable termination will be when the employment agreement was terminated without notification of reasons or under notification of a pretended or false reason.
[114] As provided for by Article 7:680a
[115] Article 7:677(4).
[116]Article 7:682(1) determines that: "The Court may also order the employer, who is liable for damages pursuant to Article 7:677 or who has terminated the employment agreement obviously unreasonable, to restore the employment agreement". However, a judgment ordering the restoration of the employment agreement may determine that the obligation to restore the employment agreement ceases to exist when the employer pays redemption money to the employee of which the amount is to be set in the judgment.
[117] Article 7:688.
[118] Gundt (2015) *Doc. Labor., núm.* at 118 remarks that: "The result, however, is that the possibilities to agree feely on the contents of the fixed-term contracts have been reduced".

months or more have lapsed between two fixed-term contracts, the chain of consecutive contracts starts again.

5.3. Work and Security Act - *WWZ*

The *WWZ* made significant amendments to the Dutch labour law. The government's aim was to make the laws governing termination of employment more fair, less technical and less costly.[119]

From 1 January 2015 specific provisions were applicable in respect of fixed-term contracts of employment. The most pertinent in respect of this study is the introduction of an interim termination clause[120] permitting the premature termination of the fixed-term contract by agreement. Despite this agreed upon termination clause in the fixed-term contract of employment the employer must still apply, depending on the reason for dismissal, to the Social Security Agency for permission to terminate the employment contract which must be done with observation of the required period of notice.[121] The employee may terminate the employment contract by simply invoking the interim termination clause and must also observe the notice period requirement.[122]

If termination takes place without an interim termination clause,[123] the terminating party is liable for damages equal to the amount of the salary for the remaining duration of the employment contract unless termination is for an urgent reason or without a simultaneous notification of this urgent reason to the opposite party.[124] The Sub-district Court can moderate the amount of compensation, but same shall not be less than the salary for three months.[125] Importantly, both parties may approach the Sub-district Court and apply for the dissolution of the employment agreement in terms of Article 7:685.

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[119] https://www.jonesday.com/en/insights/2014/06/the-netherlands-passes-work-and-security-act.
[120] The interim termination clause makes premature termination of a fixed-term employment contract possible. The clause must meet several formal requirements in that it must be agreed upon in writing, it must be agreed upon before or during the term of the employment contract (the clause can also be agreed upon after the start of employment), it must apply to both parties.
[121] Article 7:672-4.
[122] Article 7:679.
[123] In circumstances deemed to be urgent reasons for the employer to terminate as set out in Article 7:678 or by the employee in terms of Article 7:679.
[124] Article 7:677.
[125] Article 7:680-5.

For contracts entered into for 6 months or longer, the new article 7:668 *BW* requires employers to provide notice to **the** employee at least one month before his/her employment contract expires.[126] If the employer fails to comply (in time), it must pay the amount of (maximum) one month's salary to the employee. This amounts to a penalty for the failure by the employer to comply with the article. However, Gundt remarks that in practice employers included in the fixed-term contracts a specific clause indicating that the employer has no intention of extending the fixed-term contract.[127]

Under the previous legislation, the conclusion of successive temporary employment contracts was limited to 3 temporary contracts in a row within 36 months. When 3 months have elapsed between two contracts, the period is reset and a further 3 temporary contracts may be entered into subject to the chain rule. This rule was amended in the *WWZ.* The maximum number of consecutive fixed-term contracts that may be concluded between the employer and the employee remained three however, the employment period[128] was reduced to 24 months. In addition, the reset time[129] increased to more than 6 months. This rule also applies in the event of successor employer status.[130]

5.4. Work in Balance Act (*Wet op Arbeid in Balans* ("*WAB*"))

The Dutch Work and Security Act completely overhauled the dismissal law in the Netherlands to strike a balance and provide more security to employees. The focus of the 2020 changes through the *WAB* shifted towards bridging the gap between temporary and permanent employees and protecting employer rights.

Under the *WWZ* and the Dutch Civil Code there were 8 primary and acceptable reasons for termination of the contract of employment including reasons based on

[126] Article 7:672.
[127] Gundt (2015) *Doc. Labor., núm.* 105-118.
[128] The total time during which an employee may be employed by the three temporary contracts.
[129] The break in or time that must elapse between two contracts before you can start counting again and enter 3 temporary contracts again pursuant to the chain rule.
[130] This will apply where an employee continues doing the same work but for another employer , such as when an employee first works at the company through employment with a third party but is then hired by the company itself. In such cases no trial period is permitted.

operational requirements or economic reasons, frequent absence with unacceptable consequences and culpable acts or omission of the employee. The *WAB* introduces a possibility to combine several dismissal grounds which, if assessed individually, would not be sufficient for contract termination.[131] Authorisation for premature termination of the Fixed term contract of employment must be obtained from the Sub-district Court.[132] At the same time, the Court is entitled to award the employee half of the transition compensation if his or her appeal is successful.[133]

With the *WAB*, employers can enter three fixed-term contracts with an employee within a three-year period. The pause of six months which can 'break' the chain of successive employment contracts for a fixed term (which can, by operation of law, result in a permanent employment contract) will remain and a permanent contract after three years of employment is mandatory.

Under the new *WAB*, employees will be entitled to transition payment starting from the first day of employment and not only after 2 years of employment with the employer as stipulated in the *WWZ*. The transition payment of one sixth of the monthly salary per half year will be applied equally for all employees.

If an employer intends to end a fixed-term employment agreement that has lasted for two years or longer, a transition fee will be due to the employee, unless the termination is the result of serious wrongful acts or omissions by the employee.[134] A transition fee

[131] Article 7:670 which will remain applicable prohibiting termination of employment amongst other where the employment is terminated during a probationary period or where it is terminated on the ground of compelling reasons. The WAB makes provision for termination of employment due to frequent absenteeism with serious detriment to the company; dysfunction; culpable acts or omission such as theft or non-compliance with the duty of confidentiality; refusal to work due to serious conscientious objection whereby it is not possible to continue the work in an adapted form; disrupted employment relationship; circumstances other than those mentioned above that are so serious that the employment contract cannot continue, for example imprisonment or not having a work permit and Cumulative grounds: combined circumstances from several (above mentioned) grounds for dismissal.
[132]Article 7:670a requires authorisation of the Sub-District Court for termination of an employee's services.
[133] Article 7:670 set outs the grounds when an employer may not terminate the contract of employment and may include circumstances where the employee is unable to perform his work due to inability to perform due to sickness of less than 2 years; during an employee's pregnancy and birth leave (as contemplated in Article 3:1 paragraph 3 of the Work and Care Act); when the employee was prevented from performing due to military service or alternative service; when the employee is a member of a Works Council as contemplated in the European Works Council Act; transition of the enterprise or organisation.
[134] Deemed to be urgent reasons as set out in Article 7:678.

will also be payable when the fixed-term contract is terminated on the initiative of the employee himself, because of serious wrongful acts or omissions by the employer.

5.5. Comparing The Netherlands and South Africa

The Dutch labour law has a general protection for employees employed on a fixed-term contract of employment ensuring the elimination of abuse of this form of employment by employers.

The fixed-term contract of employment in Dutch labour law is subject to the general protection against unlawful dismissal as provided for by the ILO articles [135] and the Declaration on Core Labour Standards. Substantial protection is provided over and above the 3 permissible reasons for dismissal as set out in Article 4 of the ILO being for reasons related to the employee's conduct, incapacity and operational requirements of the employer. In the Dutch labour law there is 9 permissible reasons for termination of the fixed-term contract of employment, as with permanent employees, and the option of an agreed early termination clause in the fixed-term contract of employment.

The analysis of the regulation of fixed-term contracts of employment and the premature termination thereof due to the employer's operational requirements provides insight into the Netherlands' approach and how it may assist in developing a better functioning and adapted model for South Africa. It should be noted that the lessons gained point to measures which South Africa should adopt.

The termination of fixed-term contracts of employment is addressed in compliance with the ILO principles as set out in Article 4 as well as Article 5,[136] Article 11,[137] Article 12,[138] Article 13,[139] and Article 14.[140] Fixed-term employees may refer the termination of their contract, whether it was terminated prematurely or at the conclusion of the

[135] Article 4 and 5 of Convention No. 158. Invalid reasons for termination. See also Article 7:670 of the Dutch Civil Code.
[136] Invalid reasons for termination.
[137] Reasonable period of notice.
[138] Severance allowance or other separation benefits paid by the employer (Art. 12. para. 1(a)).
[139] Consultation of workers' representatives.
[140] Notification to the competent authority.

contractual period to a Sub-District Court. The employee may be entitled to a fixed amount of damages,[141] and in the event of an obvious unreasonable[142] premature termination[143] of the employment agreement, compensation as redemption money or restoration of the employment agreement.[144]

A key aspect of the Netherlands' norms is that the fixed-term contracts of employment is regulated alongside permanent contracts of employment with the aim to have greater protection and fairness to the employee employed on a fixed-term contract of employment. Should a fixed-term contract of employment be prematurely terminated it will result in contractual and statutory remedies for the employee. In South Africa the premature termination of the fixed-term contract is not specifically classified as a dismissal.

Furthermore the employee, employed on a fixed-term contract in the Netherlands has a potential claim, when the contract is not renewed or prematurely terminated, for both the premature termination of the contract as well as for transition payment.

One aspect that may be considered from the Dutch regulation of premature termination of fixed-term contracts of employment due to operational requirements that may be adopted in South Africa, to clarify the South African approach, is the fact that if termination takes place without an interim termination clause, the terminating party is liable for damages equal to the amount of the salary for the remaining duration of the employment contract and not less than the salary for three months.

It is submitted that it should be permissible in South Africa to prematurely terminate the fixed-term contract of employment on grounds of operational requirements of the

[141] Article 7:679.
[142] A termination of the employment agreement by the employer shall, among others, be considered obviously unreasonable when the employment agreement was terminated without notification of reasons or under notification of a pretended or false reason.
[143] Article 7:681. Obviously unreasonable termination.
[144] Article 7:682(1) determines that: "The Court may also order the employer, who is liable for damages pursuant to Article 7:677 or who has terminated the employment agreement obviously unreasonable, to restore the employment agreement". However, a judgment ordering the restoration of the employment agreement may determine that the obligation to restore the employment agreement ceases to exist when the employer pays redemption money to the employee of which the amount is to be set in the judgment.

employer as the South African legislative framework makes provision therefore and as addressed in detail above.[145]

6. Conclusion

This chapter explored 2 legal systems and their regulation of premature termination of fixed-term contracts of employment due to operational requirements together with international norms and standards as adopted by the ILO. The inner workings and relevant regulations of the ILO in as far as it pertains to the premature termination of fixed-term contracts of employment due to operational requirements of the employer was considered.

The relevance of the ILO standards to this study is borne from the Constitution[146] of South Africa providing that when any person or court is required to interpret the Bill of Rights, international law must be considered. This is re-iterated in section 1 of the LRA[147] and confirmed by the High Court in *Murray v Minister of Defence*.[148]

This chapter found that England has adopted specific regulations to administer and regulate fixed-term contracts of employment including the premature termination thereof due to the employer's operational requirements or redundancy measures. Fixed-term employment is largely regulated by the FTER,[149] with its termination regulated by the ERA, provided that the employee complies with the necessary qualifying period of employment of two years. The ERA[150] read with the FTER[151] confirms a redundancy will occur when the employee, employed on a fixed-term contract, is not being replaced due to the employer's operational requirements needing fewer employees to do work of a particular kind.

[145] See para 4.5 and chapter 3 para 6.
[146] Constitution, 1996. See ss 39(1), 232 and 233. See also *S v Makwanyane* (1995) (3) SA 391 (CC) at para 35. Van Niekerk *et al* (2019) at 33; Aletter (LLD 2016) UP at 48.
[147] Act 66 of 1995. Section 3 of the LRA obliges any person applying this Act to interpret its provisions in compliance with the public international law obligations of the Republic.
[148] (2008] 6 BLLR 513 (SCA).
[149] SI 2002/2034, as amended; Koukiadaki (2010) *JILPT* 9 at 11–12.
[150] ERA (1996) s 95(1)(b) read with s 105.
[151] FTER (2002) Regulation 3.

A positive aspect of the regulation of fixed-term contracts of employment in England is that when redundancy is relied on, employers should look for suitable alternative employment for the employee and will have to make a statutory redundancy payment if the employee has service of two years or more. The employer will also have to ensure that it consults with the individual about their selection for redundancy and ways of trying to avoid it or mitigate its effects to ensure that the redundancy process is fair.[152]

Should a fixed-term contract of employment be prematurely terminated it will amount to a dismissal.[153] The employee will then be entitled to the remedies as set out in the ERA.[154] In South Africa there is no provision for the premature termination of the fixed term contract to be classified as a Dismissal.[155] Accordingly this classification of a premature termination of a fixed-term contract of employment due to operational requirements as a dismissal may be of value to South Africa as it will bring this under the determination of section 191 of the LRA.[156]

The ERA further makes provision for payment of compensation in terms of the unfair dismissal, payment of redundancy payment and additional amounts closely related to damages and expenses the employee has suffered.[157] This may also be of value to South Africa insofar as the LRA provides for compensation to be paid for unfair dismissal over and above any other amount that may be due to the employee in terms of any other act.[158]

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[152] UKEAT/0063/17/BA. In *Royal Surrey County NHS Foundation Trust v Drzymala* it is found that to act reasonably under section 98(4) an employer, depending on the facts, must engage in some degree of discussion or consultation with the emphasis more on the "equity" part of the fairness test and less on the "substantial merits" part of the test. "A dismissal by non-renewal of a standard fixed-term contract may, depending on the facts, have some features in common with a redundancy dismissal or, where there is no redundancy situation, with a non-redundancy "business reorganisation" case, or a case where the employer wishes to impose changed working practice or terms of employment on an unwilling or reluctant employee. Possible alternatives to dismissal may need to be discussed as a matter of fairness, where such alternatives are or may be available".
[153] ERA (1996) s 105.
[154] ERA (1996) Part X Chapter ii ss 111 to 132.
[155] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC). The law at present is that a fixed-term contract of employment cannot be prematurely terminated on grounds of operation requirements of the employer.
[156] Being an unfair dismissal the LRA fully deals with the matter as confirmed by Froneman AJA in the minority Judgment of *Fedlife* (2001) 22 *ILJ* 2407 (SCA).
[157] ERA (1996) s 123 determines Compensatory award based on just and equitability in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
[158] S 195 of the LRA.

The Netherlands regulate the premature termination of fixed-term contracts of employment both in terms of the contract but also by means of statute. The Dutch labour law recognises 9 permissible grounds for termination of the contract of employment, including for operational requirements. The Netherlands recognise that fixed-term contracts of employment may be entered into for three or more successive periods at intervals of not more than six months and during a total period of 36 months. Should the agreement then be extended explicitly or by conduct it will be deemed to be an employment agreement for an indefinite term.

One aspect that may be considered from the Dutch regulation of premature termination of fixed-term contracts of employment due to operational requirements is the fact that if an employer wishes to end an employment relationship that has lasted for two years or longer, a transition fee will be due to the employee. Similarly If termination takes place without an interim termination clause, the terminating party is liable for damages equal to the amount of the salary for the remaining duration of the employment contract and not less than the salary for three months. Thus the employee employed on a fixed-term contract of employment whose services is prematurely terminated due to the accepted reason of economic circumstances may claim transition payment (severance payment) and damages.

This chapter concluded that both the English and Dutch labour law provides for the premature termination of fixed-term contracts of employment due to operational requirements. The English model makes provision for unfair dismissal and damages whereas the Dutch model makes provision for compensation payable upon the occurrence of the premature termination of the fixed-term contract together with damages.

The approach of England and the Netherlands to the premature termination of fixed-term contracts of employment on grounds of operational requirements of the employer supports the view and conclusions that such dismissals in South Africa should not be

impermissible and outlawed as per the LAC discission in *Buthelezi v Municipal Demarcation Board.*[159]

It is submitted therefore, that the regulation of fixed-term contracts of employment in England is favoured to the South African approach to the premature termination of fixed-term contracts of employment due to the employer's operational requirements only in as far as it is better and clearly regulated than the South African legislative framework.

South Africa does have the required legislative framework matching that of England in relation to the remedies for premature termination of a fixed-term contract of employment due to the operational requirements of the employer. It should be permissible for the employer to prematurely end the fixed-term contract of employment on grounds of operational requirements. Should the requirements of the LRA not be complied with same will be regarded as an unfair dismissal.

The employee will have the associated remedies as set out in section 194 (amongst other the payment of compensation). Furthermore the employee has the right to severance pay as set out in section 41 of the BCEA which can be considered, in terms of section 195 of the LRA, as an amount to which the employee is entitled to in terms of other legislation.

It is submitted that this severance pay may be regarded as a form of payment in lieu of prejudice the employee has suffered because of the premature termination of the fixed-term contract on grounds of the employer's operational requirements. Further comparison with England indicates that an employee, in South Africa, accumulates "entitlement" to severance payment from the date of employment and not only after 2 years of being employed on a fixed-term as in England.

In following the English approach to the provision for loss due to the premature termination of a fixed-term contract of employment,[160] severance payment may be

[159] (2004) 25 *ILJ* 2317 (LAC).
[160] As provided for in section 123(3) of the ERA.

expanded to include the number of years “left” on the contract (one week for each uncompleted year) for the ”unlawful” premature termination on grounds of operational requirements by the employer.

This approach will effectively assist in the complete removal of common-law remedies from the South African labour law and, with the recommended amendments to the LRA, assist in having only the Labour Courts determining disputes in relation to the premature termination of fixed-term contracts of employment on grounds of operational requirements of the employer. Such disputes may be heard by the Labour Courts the said and amounts may also be awarded as already provided for in section 195 of the LRA.

CONCLUSION AND RECOMMENDATIONS

1. Introduction

This study set out to analyse the premature termination of fixed-term contracts of employment due to the operational requirements of the employer. In conducting the research, the doctrinal research method, which is typical of legal research, was followed.[1] The principle purpose of employing doctrinal research is to provide explicit, normative comment of "how things should be", to formulate proposals for improvement.[2]

The application of the doctrinal research method requires a close examination of the legal framework consisting of the present legislation and case law and the combination

[1] Watkins and Burton (2013) 8. Doctrinal research is described as the process used to identify, analyse, and synthesise the content of law.
[2] Fourie (2015) 8 *Erasmus L. Rev* 95.

of all the relevant elements to establish a coherent view of the law relevant to the matter under investigation.[3]

The Explanatory Memorandum to the LRA Bill of 1995, noting the different laws applicable to different categories of employees, states the following:

> "[S]uch a multiplicity of laws creates inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion. A single statute that applies to the whole economy but nevertheless accommodates the special features of its different sectors is far preferable".[4]

Every employee has the right not to be unfairly dismissed and subjected to unfair labour practices.[5] This fundamental right is enshrined in section 23 of the Constitution. Dismissals, which are defined in section 186 of the LRA,[6] relate to circumstances in which the employer has engaged in an act that brings the contract of employment to an end, in a manner recognised as valid by the law.[7]

In *Langeveldt,*[8] Zondo JP expressed himself about competing jurisdictions, highlighting the fact that, by virtue of the provisions of section 157(1), only the Labour Court has jurisdiction to adjudicate disputes about breach of picketing rules. However, third parties, such as landlords or property owners (as involved in *Fourways Mall (Pty) Ltd v SACCAWU),*[9] cannot approach the Labour Court for relief, as there is no employer-employee relationship between them and the strikers. They would have to approach the superior courts for virtually the same acts, which are committed by the same people, in the same place and at the same time.

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[3] Watkins and Burton (2013) 10. The writers state that the three core features of doctrinal research include that arguments are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications. The second feature is that the law must represent a system and, thirdly, that even exceptions must take place in such a way that the systems remain coherent.
[4] (1995) 16 *ILJ* at 281-282.
[5] S 185 of the LRA.
[6] "Dismissal means that-
b) An employer has terminated employment with or without notice".
[7] Van Niekerk *et al* (2019) at 237. The author refers to the broader interpretation of termination adopted by the LAC in *National Union of Leatherworkers v Barnard NO & another* (2001) 22 *ILJ* 2290 (LAC) and cited with approval in *SA Post Office Ltd. v Mampuele* (2010) 10 BLLR 1052 (LAC) at para 16.
[8] (2001) 22 *ILJ* 1116 (LAC).
[9] (1999) 20 *ILJ* 1008 (W), in which a property owner sought relief against striking workers who were not its employees.

In general terms and aside from the protection afforded to an employee employed on a fixed-term contract of employment, the premature termination of a fixed-term contract of employment due to the employer's operational requirements is not clear, nor specifically provided for in the LRA. Judgments dealing with the overlap between common law and statute in the premature termination of a fixed-term contract of employment, have frequently shown a rather *ad hoc* approach. The result has been a growing number of ambiguities and a general confusing overlay between statutory and contractual rights and remedies.[10]

In *Buthelezi,*[11] the LAC held that no party is entitled later to seek escape from its fixed-term obligations on the basis that its assessment of the future has been erroneous or that certain things have been overlooked.[12] Both parties make a choice of concluding a contract for a fixed-term and there is no unfairness in the exercise of that choice.[13] The Court went further and found that:

> "without a clear indication from the LRA that the legislature intended to alter the common-law rule relating to a premature termination of a fixed-term contract during its currency, it cannot be contended that the Act has such effect".[14]

The Court found that the premature termination of a fixed-term contract was unfair, purely by virtue of its unlawfulness. The operational requirements, if any existed, did not give the employer the legal right to terminate the contract of employment between the parties.[15]

Considering the continuous debate surrounding the inter-relation between common law and the labour law in the premature termination of fixed-term contracts of employment, it is found that the Labour Court should have exclusive jurisdiction, as

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[10] Du Toit (2008) *SALJ* 95–133.
[11] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) as discussed in detail in Chapter 3 para 5.3.
[12] In common law a contract of employment is entered into for a fixed-term and the parties agree to honour and perform their respective obligations in terms of that contract for the duration of the contract.
[13] The Court found that the employer is free not to enter a fixed-term contract but to conclude a contract for an indefinite period if he thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter a fixed-term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materializes. The employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term at para 11.
[14] (2004) 25 *ILJ* 2317 (LAC) at para 14.
[15] Cohen (2007) *SA Merc LJ* 26 – 43.

suggested by Zondo DJP in the *Langeveld*[16] matter, to determine disputes relating to the premature termination of fixed-term contracts of employment due to the employer's operational requirements, and to remove common-law remedies for contracts of employment all together. The latter was also hinted towards in the minority judgment of Froneman AJA in the *Wolfaardt*[17] matter, as section 195 of the LRA incorporates the possibility of awarding a common-law remedy of damages.

The research questions which informed this study were the following:[18]

1.1. Is it permissible to terminate a fixed-term contract of employment prematurely on grounds of operational requirements?

1.2. What are the appropriate remedies available to parties involved in the premature termination of fixed-term contracts of employment due to the employer's operational requirements?

1.3. Is there a need to involve both the Labour Courts *and* Civil Courts in determining disputes about the premature termination of fixed-term contracts of employment resulting from the employer's operational requirements?

1.4. What are the lessons to be learned from the ILO and from England and the Netherlands to the premature termination of fixed-term contracts of employment due to the employer's operational requirements?

This study assesses relevant legislation, case law and principles in the South African context, with the view of providing recommendations to address any shortcomings. The study also comprises of comparative research comparing structures of the English law and the Dutch law performing similar or even identical functions than the South African law.[19]

This study focuses on the development of the interaction between common-law grounds and statutory grounds – as fully explained in Schedule 8 to the LRA[20] for the premature termination of fixed-term contracts of employment resulting from the

[16] *Langeveldt v Vryburg Transitional Local Council* (2001) 22 *ILJ* 1116 (LAC).
[17] (2001) 22 *ILJ* 2407 (SCA) at para 16.
[18] Chapter 1 para 5.
[19] Weiss (2003) *COMP. LAB.L & POL'y.J* 25:177. Chapter 5 paras 4 - 5.
[20] Schedule 8: Code of Good Practice: Dismissal deals with some of the key aspects of dismissals for reasons related to conduct and capacity. The key principle is that employers and employees should treat one another with mutual respect.

employer's operational requirements. The study investigates the application of the constitutional principles of establishing permissible grounds for premature termination of fixed-term contracts of employment, both contractually and in terms of the "fairness" principle as enshrined in the Constitution[21] and the remedies available to the parties[22] as well as the appropriate forum[23] to determine any disputes in this regard.

An investigation was conducted into the international prescripts for the premature termination of fixed-term contracts of employment[24] and the way in which the English[25] and Dutch law[26] deals with the premature termination of fixed-term contracts of employment, due to the employer's operational requirements.

2. Key Findings

2.1. The Role and Function of Labour Law

The inclusion of the different perspectives and approaches to labour law[27] in this study is specifically required to set the background to answer the research questions. Chapter 2 concluded that previously, protection for the premature termination of the fixed-term contract of employment was only found in common-law contractual remedies. The Wiehahn Commission reports and recommendations broadened the scope of statutory governance of the employment relationship through the dispute resolution forums recommended. This lead to the development of the fairness concept by the Industrial Court in the employment context which was sanctified in the Constitution.[28] The premature termination of the fixed-term contract of employment accordingly will be addressed through statute based on the fairness requirement and the contractual terms.

[21] Chapter 3 paras 2,3 and 5.
[22] Chapter 3.
[23] Chapter 4.
[24] Chapter 5 paras 2-3.
[25] Chapter 5 para 4.
[26] Chapter 5 para 5.
[27] Chapter 2 para 2.
[28] Chapter 2 paras 3.3.2 -3.3.3.

However, the fairness requirement supersedes the contractual terms and employers should possibly have the right to retrench the employee before the termination date of the fixed-term contract of employment.[29]

The human rights function of the labour law is a functional approach applied in South Africa considering the constitutionalising of the labour law, and the ever-changing nature of the contract of employment. This approach[30] accepts and gives effect to the rights of both parties to the fixed-term contract of employment and the premature termination thereof by virtue of the right to fair labour practices.[31]

2.2. Is it Permissible to Terminate a Fixed-term Contract of Employment Prematurely on Grounds of Operational Requirements?

The South African Courts accept, not without some controversy, that the unlawful premature termination of the fixed-term contract of employment on grounds of operational requirements may be substantively unfair in terms of the LRA due to the unlawfulness thereof.

In a unanimous decision of the LAC in *Buthelezi v Municipal Demarcation Board*[32] it was held that a premature termination of a fixed-term contract of employment on the grounds of operational requirements was substantively unfair,[33] and at common law a party to a fixed-term contract has no right to terminate such contract in the absence of repudiation or a material breach by the other party.[34] This finding was respectfully incorrect. It is submitted that this study has found that it should be permissible for the employer to prematurely end the fixed-term contract of employment on grounds of operational requirements for the reasons as set out hereunder.

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[29] Chapter 2 para 3.3.4. See also 2003 (3) SA 1 (CC) at para 40 where the Constitutional Court held that "In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed." See also para 33 and 38 in this context.
[30] Chapter 2 para 3.3.4.
[31] 2003 (3) SA 1 (CC) at para 40.
[32] (2004) 25 *ILJ* 2317 (LAC).
[33](2004) *ILJ* 2326 at para 16. See also Chapter 3 para 5.3 for a substantial discussion of this judgment.
[34] (2004) 25 *ILJ* 2317 (LAC) at para 16. See also Chapter 3.

The permissible grounds of termination of the employment relationship based on the employer's operational requirements is provided for in the LRA with specific requirements in relation to the process to be complied with by the employer which emphasises the concept of fairness.[35]

South Africa, as Member State to the ILO, has implemented the international norms and standards[36] and has committed to give effect to the said convention.[37] The relevance of the ILO standards to this study is borne from the Constitution[38] of South Africa providing that when any person or Court is required to interpret the Bill of Rights, international law must be considered. This is re-iterated in section 1 of the LRA.[39] The statutory requirement of procedural fairness as set out in section 188(1)(b) of the LRA further confirms South Africa's acceptance and following of international norms and standards.

Neither the ILO[40] nor the LRA excludes the premature termination of a fixed-term contract of employment on grounds of operational requirements.[41]

The LRA makes specific provision for fairness and should an employee, employed on a fixed-term contract of employment's contract be terminated for a permissible reason in terms of the LRA it must comply with the fairness requirement as prescribed in the human rights approach to the labour law.

The definition of dismissal in the LRA is wide enough to include the premature termination of a fixed-term contract resulting from the employer's operational requirements. Similarly the LRA makes no distinction in section 189 between different

[35] Chapter 3 para 2.4.
[36] Termination of Employment Convention.
[37] Convention 158 of 1982.
[38] See ss 39(1), 232 and 233. See also *S v Makwanyane* (1995) (3) SA 391 (CC) at para 35. Van Niekerk *et al* (2019) at 33; Aletter (LLD 2016) UP at 48.
[39] Section 3 of the LRA obliges any person applying this Act to interpret its provisions in compliance with the public international law obligations of the Republic. This was also restated by the High Court in *Murray v Minister of Defense* (2006) 11 BLLR 1357 (C) at para 23.
[40] Operational requirements as a ground for dismissal is specifically addressed by the ILO in the 82nd Session 1995. Information and reports on the application of Conventions and Recommendations. General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982. Report of the Committee of Experts on the application of Conventions and Recommendations (articles 19,22 and 35 of the Constitution). See also https://eplex.ilo.org/fixed-term-contracts-ftcs/ accessed on 28 November 2021.
[41] Chapter 3 paras 1 and 2.

categories of employees in dealing with termination of service due to operational requirements. Section 189 accordingly applies to all employees, whether they are employed on a fixed-term contract of employment or on a permanent basis, in prescribing the requirements for a fair termination of employment on grounds of operational requirements of the employer. Furthermore the definition of 'employee' in the LRA[42] refers to all employees, including those employed on a fixed-term contract of employment.

The common-law grounds for termination of employment due to a material breach or repudiation of the contract is sufficiently incorporated in the LRA with reference to the permissible grounds for termination of employment requiring same to be fair as determined by the Constitution. To this effect it was found that the right to fair labour practices extend to both the employer and the employee.[43]

It was found in this study that where the common law, as supplemented by legislation, affords to employees the constitutional right to fair labour practices there is no constitutional imperative for the common law to be further developed.[44] The LRA already provides for the constitution's vision in terms of fairness and equity to be applied in the premature termination of fixed-term contracts of employment due to the employer's operational requirements and applies to the employee as well as the employer.

In compliance with the Human Rights approach to the labour law it was found that both the employee and the employer has a right to fair labour practices. For the employee employed on a fixed-term contract of employment it will, amongst other, imply protection against dismissal for impermissible reasons by the employer. For the employer it will imply the prerogative to invoke the permissible grounds for termination of employment as contemplated by the LRA and the common law.[45]

[42] S 213 of the LRA. See also para 2.1 above.
[43] Chapter 3 para 1. See also the discussion in support hereof in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* 2003 (3) SA 1 (CC) in Chapter 2 para 3.3.4 above.
[44] Chapter 3 para 5.3.
[45] Chapter 3 para 2.

An employee employed on a fixed-term contract of employment whose services are prematurely terminated has the same remedies in terms of the LRA than employees employed on a permanent basis and these remedies will apply to operational requirements as well.[46]

The conclusion of this study that, amongst other, it is permissible to prematurely terminate a fixed-term contract of employment due to the operational requirements of the employer is supported by the approach of England and the Netherlands. Both the English and Dutch labour law provides for the premature termination of fixed-term contracts of employment due to operational requirements. The English model makes provision for unfair dismissal and damages whereas the Dutch model makes provision for compensation payable upon the occurrence of the premature termination of the fixed-term contract together with damages.

South Africa does have the required legislative framework matching that of England in relation to the remedies for premature termination of a fixed-term contract of employment if same is regarded as an unfair dismissal due to the operational requirements of the employer.

Should the requirements of the LRA not be complied with, in the premature termination of the fixed-term contract, same will be regarded as an unfair dismissal to which the employee will have the associated remedies as set out in section 194 (amongst other the payment of compensation). Furthermore the employee has the right to severance pay as set out in section 41 of the BCEA which can be considered, in terms of section 195 of the LRA.

It is submitted that this severance pay may be regarded as a form of payment in lieu of prejudice the employee has suffered because of the premature termination of the fixed-term contract on grounds of the employer's operational requirements. Further comparison with England indicates that an employee, in South Africa, accumulates "entitlement" to severance payment from the date of employment and not only after 2 years employed on a fixed-term as in England. Apart from the afore going the

[46] Chapter 3 para 4.

employee may also institute a claim for an amount, to which the employee is entitled to in terms of other legislation or the contract of employment as well as damages, as contemplated in section 195 of the LRA.

2.3. What are the Appropriate Remedies Available to Parties Involved in the Premature Termination of Fixed-Term Contracts of Employment Due to the Employer's Operational Requirements?

An employee employed on a fixed-term contract of employment whose services are terminated has the same remedies in terms of the LRA than employees employed on a permanent basis. Similarly, an employer has the same rights to termination of service for permissible reasons of an employee employed on a fixed-term contract of employment than a permanent employee. This right applies to operational requirements as well.[47]

The remedies for an unfair premature termination of the fixed-term contract of employment due to the employer's operational requirements will be dependent upon whether the premature termination of the fixed-term contract is regarded as a dismissal or not.[48] If same is regarded as a dismissal, the remedies as contemplated in section 193 of the LRA for an unfair dismissal will be available to the employee whose fixed-term contract of employment was prematurely terminated due to the employer's operational requirements. The remedies as contemplated in section 193 of the LRA incorporates the common-law remedies as well.

This research concludes that despite recent case law, the common-law remedies for unlawful premature termination of the fixed-term contract due to the employer's operational requirements should not be available to an employee so employed. The employer will be required to satisfy the Court that the premature termination was fair in terms of the process adopted and economically required in terms of the substantive requirements of the LRA.

[47] Chapter 3 para 4.
[48] Chapter 3 para 5.4.

The premature termination of the fixed-term contract of employment may give rise to a challenge in terms of the contract for a material breach of the terms of the contract as well as the LRA due to the fairness thereof. The employee may challenge both, and claim compensation in terms of section 194 of the LRA for the unfairness and damages in terms of section 195 for the breach of contract, in accordance with the wording of section 193 and section 195 of the LRA, at the Labour Court.

2.4. Is There a Need to Involve Both the Labour Courts *and* Civil Courts in Determining Disputes About the Premature Termination of Fixed-Term Contracts of Employment Resulting from the Employer's Operational Requirements?

In Chapter 4 the interaction between the jurisdictional provisions of the LRA and the common law was investigated. The background to the exclusive jurisdiction of the Labour Court, as developed through case law was investigated and considered in respect of the provisions enacted in the LRA[49] and the BCEA.[50] Specific reference was made to the relevant sections of each act.

It was found that the SCA, was of the view that the legislature did not intend to create a multiplicity of laws and competing jurisdictions and therefor created specialised forums to deal with employment matters.[51] This view is supported by the LAC.[52] The LAC held that in the absence of a clear indication from the LRA that the legislature intended to alter the rule relating to premature termination of fixed-term contracts during their currency, it cannot be argued that the LRA had such an effect.[53] This is the law, as matters stand, pertaining to the premature termination of fixed-term contracts of employment on grounds of operational requirements. It is submitted that this approach should be revised and be amended.

The Constitutional Court noted that the purpose of the LRA is to provide a comprehensive system of dispute resolution mechanisms and forums "tailored to deal

[49] Chapter 4 para 2.2.1-2.2.2.
[50] Chapter 4 para 2.3
[51] Chapter 4 para 1. See also (2008) 29 ILJ 73 (CC) at para 120.
[52] (2001) 22 *ILJ* 1116 (LAC) at 1138-1139A.
[53] *Buthelezi v Municipal Demarcation Board* (2004) 25 *ILJ* 2317 (LAC) at para 14.

with all aspects of employment" and "even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes".[54] However the SCA deviated from this view by concluding that Section 157(1) does not confer exclusive jurisdiction generally on the Labour Court to deal with matters concerning the relationship between an employer and an employee.[55]

The Constitutional Court confirmed that section 157(1) confirms the Labour Court's exclusive jurisdiction over any matter that the LRA prescribes should be determined by it and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.[56] The purpose of Section 157(2) is to extend the jurisdiction of the Labour Court to embrace disputes arising from violations of fundamental rights in the employment context. However, the Court warned that Section 157(2), so interpreted, does not mean that the High Court is divested of jurisdiction where a cause of action and remedy lies within its jurisdiction.[57]

The reliance of the party on the fairness principle would invoke the meaning of section 157(1) and the matter would have to be heard by the Labour Court. Absent any reliance on any provision of the LRA the LRA does not extinguish contractual remedies available to employees following a breach of their contract of employment, or unlawful termination thereof,[58] such as the premature termination of the fixed-term contract of employment which may be referred to the High Court.

Chapter 4 concluded that the Constitutional Court cleared the jurisdictional debate on the law as it stands and confirmed that the High Court has jurisdiction over the alleged unlawful termination of a fixed-term contract of employment.[59] The Court held that absent any reliance on any provision of the LRA does not oust the High Court's

[54] (2008) 29 ILJ 73 (CC) at para 47.
[55] Chapter 4 para 2.4.3. See also *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA).
[56] *Gcaba v Minister for Safety and Security and Others* (2009) 12 BLLR 1145 (CC) at para 70.
[57] Chapter 4 para 2.4.3. See also *Gcaba v Minister for Safety and Security and Others* (2009) 12 BLLR 1145 (CC) at para 74 where the Constitutional Court held that the LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court or the Equality Court, Section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as such.
[58] (2020) ZACC 27 at para 48.
[59] (2020) ZACC 27.

jurisdiction to hear contractual disputes nor the remedies available to employees following a breach of their contract of employment, or unlawful termination thereof.[60]

There is accordingly, as matters stand, no need to involve both the Labour Court and Civil Courts in determining disputes about the premature termination of a fixed-term contract of employment resulting from the employer's operational requirements as both courts will have jurisdiction to determine such dispute subject to their inherent jurisdiction as explained by the Constitutional Court.

It is submitted that, considering the specialist nature of the Labour Courts, it is best placed to determine the lawfulness and unfairness of the premature termination of a fixed-term contract of employment due to the employer's operational requirements considering the South African legislative framework.

Section 191 of the LRA allows an employee whose services are terminated due to operational requirements to refer same to the Labour Court. Furthermore, section 193 and section 194 provide for remedies for unfair dismissal and section 195 of the LRA provides for amounts that may be due to the employee (damages) regardless of the unfair dismissal. However, to dispel any further uncertainty, it may be appropriate to amend section 157(2) of the LRA by reserving the exclusivity of the Labour Court's jurisdiction in matters of any alleged or threatened violation of any fundamental right and arising from employment and from labour relations.[61]

2.5. What are the Lessons to be Learned from the ILO and from England and the Netherlands to the Premature Termination of Fixed-Term Contracts of Employment Due to the Employer's Operational Requirements?

[60] Chapter 4 para 2.4.3. See also (2020) ZACC 27 at para 48.
[61] Van Eck (2014) *ILJ* at 878. Van Eck concluded that: "The legislature could have resolved the complexities by opting to follow one, or a combination, of a number of avenues". Firstly s 157(2) of the LRA could have been amended to read: "…[T]he Labour Court has exclusive jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution…"

In England fixed-term employment is largely regulated by the FTER, with its termination regulated by the ERA, provided that the employee complies with the necessary qualifying period of employment of two years. The ERA[62] read with the FTER[63] confirms a redundancy will occur when the employee, employed on a fixed-term contract, is not being replaced due to the employer's operational requirements needing fewer employees to do work of a particular kind.

Should a fixed-term contract of employment be prematurely terminated it will amount to a dismissal.[64] The employee will then be entitled to the remedies as set out in the ERA.[65] In South Africa there is no provision for the premature termination of the fixed-term contract to be classified as a Dismissal. Accordingly this classification of a premature termination of a fixed-term contract of employment due to operational requirements may be of value to South Africa as it will bring this under the determination of section 191 of the LRA.[66]

In following the English approach to the provision for loss due to the premature termination of a fixed-term contract of employment,[67] severance payment may be expanded to include the number of years "left" on the contract (one week for each uncompleted year) for the "unlawful" premature termination on grounds of operational requirements by the employer.

This approach will effectively assist in the complete removal of common-law remedies from the South African labour law and, with the recommended amendments to the LRA, assist in having only the Labour Courts determining disputes in relation to the premature termination of fixed-term contracts of employment on grounds of operational requirements of the employer. Such disputes and amounts may also be awarded as already provided for in section 195 of the LRA.

[62] Chapter 5 para 4.3. See also ERA (1996) s 95(1)(b) read with s 105.
[63] Chapter 5 para 4.4. See also FTER (2002) regulation 3.
[64] ERA (1996) s 105.
[65] ERA (1996) Part X Chapter ii ss 111 to 132.
[66] Chapter 5 para 4.5. Being an unfair dismissal the LRA fully deals with the matter as confirmed by Froneman AJA in the minority Judgment of *Fedlife* (2001) 22 *ILJ* 2407 (SCA).
[67] As provided for in section 123(3) of the ERA.

A positive aspect of the regulation of fixed-term contracts of employment in England is that when redundancy is relied on, employers should look for suitable alternative employment for the employee and will have to make a statutory redundancy payment if the employee has service of two years or more. The employer will also have to ensure that it consults with the individual about their selection for redundancy and ways of trying to avoid it or mitigate its effects to ensure that the redundancy process is fair.[68]

The ERA further makes provision for payment of compensation in terms of the unfair dismissal, payment of redundancy payment and additional amounts closely related to damages and expenses the employee has suffered.[69] This may also be of value to South Africa insofar as the LRA provides for compensation to be paid for unfair dismissal over and above any other amount that may be due to the employee in terms of any other act.[70]

The Netherlands[71] regulate the premature termination of fixed-term contracts of employment both in terms of the contract but also by means of statute. The Netherlands recognise that fixed-term contracts of employment may be entered into for three or more successive periods at intervals of not more than six months and during a total period of 36 months. Should the agreement then be extended explicitly or by conduct it will be deemed to be an employment agreement for an indefinite term.

One aspect that may be considered from the Dutch regulation of premature termination of fixed-term contracts of employment due to operational requirements is the fact that if an employer wishes to end an employment relationship that has lasted for two years or longer, a transition fee will be due to the employee.[72] Similarly If termination takes place without an interim termination clause, the terminating party is liable for damages equal to the amount of the salary for the remaining duration of the employment contract.

[68] Chapter 5 para 4.4.
[69] Chapter 5 para 4.5. See also ERA (1996) s 123 which determines that a compensatory award is payable based on just and equitability in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
[70] S 195 of the LRA.
[71] Chapter 5 para 5.
[72] Chapter 5 para 5.3 -5.4.

3. Recommendations

It is evident from the above mentioned that South Africa does have the required legislative framework in relation to the remedies for premature termination of a fixed-term contract of employment. Should the requirements of the LRA not be complied with same will be regarded as an unfair dismissal to which the employee will have the associated remedies as set out in section 193 (amongst other the payment of compensation).

To address the unlawfulness of the premature termination of the fixed-term contract of employment it is suggested that provision be made for the payment of a form of loss and expenses the employee has suffered. This is to a certain extent already provided for in section 195 of the LRA but not clearly stipulated.

It is therefore suggested that sections 186 (1) in its current form be clarified to include or specifically refer to the premature termination of the fixed-term contract of employment subject to the requirements of section 188 of the LRA. Furthermore that section 157(2) be amended to read as follow: "…[T]he Labour Court has exclusive jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution…"[73]

Such amendments will maintain the legal position of the permissible reasons for the termination of the fixed-term contract of employment in terms of the LRA as contemplated by section 188, in compliance with the international norms and standards. Should it be found that the said premature termination of the fixed-term contract of employment due to operational requirements amounts to a dismissal then the employer must also comply with the fairness requirements of the LRA.

Furthermore the employee has the right to severance pay as set out in section 41 of the BCEA which can be considered, in terms of section 195 of the LRA, as an amount to which the employee is entitled to in terms of other legislation. It is submitted that this severance pay may be regarded as a form of payment in lieu of prejudice the

[73] As suggested by Van Eck (2014) *ILJ* at 878.

employee has suffered because of the premature termination of the fixed-term contract on grounds of the employer's operational requirements.

In following this approach to the provision for loss due to the premature termination of a fixed-term contract of employment,[74] severance payment may be expanded to include the number of years "left" on the contract (one week for each uncompleted year) for the "unlawful" premature termination on grounds of operational requirements by the employer. This approach will effectively assist in the complete removal of common-law remedies from the South African labour law and, with the recommended amendments to the LRA, assist in having only the Labour Courts determining disputes in relation to the premature termination of fixed-term contracts of employment on grounds of operational requirements of the employer. Such disputes and amounts may also be determined and awarded as provided for in section 195 of the LRA.

It is submitted that, considering the specialist nature of the Labour Courts read with the interpretation of section 157(2) as explained by the Constitutional Court, the Labour Court is best placed to determine the lawfulness and unfairness of the premature termination of a fixed-term contract of employment due to the employer's operational requirements.

With the suggested amendment of section 157(2) of the LRA it will allow for the Labour Court to exercise exclusive jurisdiction over any breach or purported breach of the LRA as well as constitutional rights stemming from the contract of employment read with the requirements of the Constitution in respect of labour matters.

[74] As provided for in section 123(3) of the ERA.

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