

Fixed-term contracts: A comparative analysis of the Mozambican and South African legislation

Stella Vettori

BA LLB LLM LLD

Associate Professor of Mercantile Law, University of Pretoria

OPSOMMING

Vastetermyndienskontrakte: 'n Vergelykende studie tussen die Suid-Afrikaanse en Mosambiekse wetgewing

In omstandighede waar 'n werknemer kan bewys dat hy of sy 'n "redelike verwagting" gekoester het dat die werkgewer sy of haar vastetermyndienskontrak sou hernu op dieselfde of sootgelyke voorwaardes en die werkgewer versuim om die kontrak sodanig te hernu, bepaal die Suid-Afrikaanse wetgewing dat die werkgewer se versuim 'n ontslag daarstel. Die bewyslas rus dan op die werkgewer om te bewys dat die ontslag billik was. Aangesien wat redelik is nie presies omskryf kan word nie, en altyd bepaal moet word met inagneming van die omringende omstandighede van elke saak, is die Suid-Afrikaanse reg met onsekerheid met betrekking tot vastetermyndienskontrakte omhul. Dit het uiteenlopende beslissings in die regspraak tot gevolg sowel as 'n gebrek aan regsekerheid. Hierdie onsekerheid gee verder aanleiding tot weerstand teen litigasie by vastetermynerwerknemers wat ontevrede is omdat die werkgewer nie hul vastetermyndienskontrakte hernu het nie.

Alhoewel die Mosambiekse wetgewing in sekere opsigte meer regsekerheid verskaf, is daar nogtans tekortkominge wat aangespreek moet word. Die doel van hierdie artikel is om die ooreenkomste en verskille in die Suid-Afrikaanse en Mosambiekse wetgewing wat vastetermyndienskontrakte reguleer uit te lig, sowel as moontlike tekortkominge en die praktiese gevolge daarvan te ondersoek.

1 Introduction

In terms of the South African (SA) legislation,¹ in situations where an employee can prove that he or she "reasonably expected" the employer to renew the fixed-term contract on the same or similar terms and the employer fails to do so, such failure constitutes a dismissal. The onus then shifts to the employer to prove that the dismissal was fair.² Since what is reasonable is incapable of precise definition and must invariably be dependent on the surrounding circumstances pertaining to each case, SA law regarding fixed-term contracts has not been endowed with the characteristic of certainty. The result is contradictory case law and consequent uncertainty of the law. This uncertainty adds to the reluctance to litigate

¹ The Labour Relations Act 66 of 1995 s 186(1)(b) (hereinafter "the LRA").

² S 192(2).

when fixed-term employees feel aggrieved because their employers failed to renew their fixed-term contracts of employment.

Although the Mozambican legislation³ provides more certainty in some respects, there are still a few shortcomings that should be addressed. The purpose of this article is to highlight the similarities and differences, possible flaws and their practical consequences in the legislation concerning fixed-term contracts in SA and Mozambique.

2 The Purpose of Fixed-term Contracts

A fixed-term contract is usually associated with the employment of an employee to complete a certain task or to act as a stand-in for another employee in his or her absence. Once that task has been completed or the other employee is back, the employer will have no use for the employee who was employed in order to complete that task or to act as a stand-in. It is unlikely that in these situations the fixed-term employee can claim a legal entitlement to have the contract renewed on a permanent basis. It is possible that the envisaged task may take longer to complete than has been originally foreseen or that the person who originally occupied the post is unable to work for a longer period than has been originally envisaged. In instances such as these it is therefore a logical consequence that the fixed-term contract could be renewed for an additional finite period of time until the task is complete or the original employee is able to return to work.

If the motivation for a fixed-term contract is not the completion of a certain task or for the fixed-term employee to replace another employee on a temporary basis, in certain circumstances that employee may be in a position to insist that the fixed-term contract be converted into a contract of employment, the duration of which is indefinite or permanent.⁴

The employee on a fixed-term contract normally has very little prospect of promotion and is normally not given the same benefits, including medical aid or pensions, that other employees in that workplace are entitled to. Most importantly, the fact that in the absence of a tacit term or legitimate expectation to the contrary, a fixed-term contract automatically expires when the period contracted for comes to an end, which means that such an employee enjoys very little job security. These disadvantages for the employee can translate into advantages for the employer: First, the employer can save costs on contributions to pension funds and other social security obligations. Second, by simply failing to renew a fixed-term contract when the expiration date is reached, the employer need not go through what can become onerous, time consuming and even costly procedures that are required by the law when dismissing employees. It is

³ Lei do Trabalho (versão final submetida a conselho de ministros a 30 de Junho de 2006).

⁴ Eg, in *Seforo and Brinant Services 2006 ILJ 855 (CCMA)*, the fact that the employee continued working after the expiration of the fixed term was taken to constitute a tacit renewal on a permanent basis.

a well documented fact that employers enter into fixed-term contracts of employment for these rather unsavoury reasons.⁵ The main objective of the legislation concerning fixed-term contracts in both Mozambique and SA is to prevent the use of fixed-term contracts for illegitimate reasons.

3 South African Legislation

3.1 Introduction

In terms of section 186(1)(b) of the LRA⁶ an employer's failure to renew a fixed-term contract on the same or similar terms in circumstances where the employee has a reasonable expectation that the contract should be so renewed, constitutes a dismissal. Over the years the Industrial Court in terms of the old LRA,⁷ and the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court in terms of the present LRA have applied the principles of fairness or reasonableness in ascertaining whether such a reasonable expectation exists. Factors that were considered in deciding whether or not a legitimate expectation is present include the fact that the work is necessary, that the money is available, that the fixed-term employees had performed their duties in terms of the fixed-term contract well, the renewal of the fixed-term contracts in the past⁸ and representations made by the employer or its agents.⁹ In *SA Rugby (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration*,¹⁰ Gering J stated that there are a number of factors that may be relevant with regard to the enquiry whether there was a reasonable expectation of renewal on the same or similar terms. These included the actual express terms of the contract, the past practice with regard to renewals, the nature of the employment, the reason for a fixed term, any assurances that the contract would be renewed and failure to give reasonable notice of non-renewal of the contract.

This list is not a *numerus clausus* and ultimately the existence or otherwise of a reasonable expectation requires a value judgment in the light of the surrounding circumstances. In short, having due regard to all the surrounding circumstances, the judge or arbitrator will have to decide whether a reasonable person in the situation of the employee would harbour a reasonable expectation of renewal. The enquiry as to whether the expectation in terms of section 186(1)(b) is reasonable, is an objective one.¹¹

5 See eg the judgment of Revelas J in *Biggs v Rand Water* 2003 ILJ 1957 (LC) 1961A.

6 66 of 1995.

7 28 of 1956.

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

9 2005 ILJ 176 (CCMA).

10 2006 ILJ 1041 (LC) 1045.

11 *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC); *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC); *SA Rugby (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration supra*.

A reasonable expectation in terms of this provision must be proved objectively in the sense that the employee must prove that a reasonable person in his or her circumstances would expect the contract to be renewed.¹² Ultimately, in my view, what should be the determining factor is the reason for entering into the fixed-term contract. The basis or the reason for the fixed term can often be ascertained from the surrounding circumstances. Since the policy consideration behind the enactment of section 186(1)(b) was to prevent employers from entering into fixed-term contracts in order to circumvent their obligations in terms of the law, it makes sense that the motivation for the fixed-term contract should determine its legitimacy.

3 2 Express Terms in the Contract Negating Expectations of Renewal

An express term in a fixed-term contract to the effect that the employee entertains no expectation of renewal, is not a guarantee that no legitimate expectation in terms of section 186(1)(b) of the LRA can be found to exist.¹³ It is merely one of the factors taken into account amongst all other surrounding circumstances in the determination of whether or not the expectation of renewal on the part of the employee was reasonable.¹⁴ The answer to the question as to whether or not an expectation of renewal is reasonable is discovered by reference to the principles of reasonableness and fairness given the surrounding circumstances.¹⁵ To give exclusive precedence to a clause excluding all expectation of renewal irrespective of the surrounding circumstances would be tantamount to condoning the contracting out of section 186(1)(b) of the LRA.¹⁶

3 3 Renewal for Indefinite or Fixed Period?

Section 186(1)(b) provides that an employer's failure to renew a fixed-term contract *on the same or similar terms* in circumstances where the employee has a reasonable expectation that the contract should be so renewed constitutes a dismissal. The words "on the same or similar terms" were given a literal interpretation in *Dierks v University of South Africa*¹⁷ to the effect that a reasonable expectation in terms of this section can never include an expectation of permanent employment. The Labour Court in *McInnes v Technikon Natal*¹⁸ disagreed on the basis that, since it is the employer that creates the reasonable expectation, if the expectation created is for an indefinite period, then the section must be read to include

12 Grogan *Workplace Law* (8 ed) (1986) 110–111.

13 In *SA Rugby Players Association on behalf of Bands and SA Rugby supra*, and in *Yebe and University of Kwazulu-Natal (Durban)* 2007 ILJ 490 (CCMA) the commissioners found a legitimate expectation of renewal of a fixed-term contract to exist despite there being such a term in the contract.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 *Supra.*

18 [2000] 6 BLLR 701 (LC) 707.

that situation.¹⁹ A compelling reason for the interpretation that allows for an expectation of a permanent or indefinite renewal is that such an interpretation is consistent with the purpose or objectives of the section.²⁰ Revelas J in *Biggs v Rand Water*²¹ opined that the purpose of section 186(1)(b) is to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security so that when the employer wishes to dismiss the employee the obligations imposed on the employer in terms of the LRA need not be adhered to. Similarly, in *Mafike and Kwikot (Pty) Ltd*²² the arbitrator found that, in the circumstances, it was evident that the expiry dates of the fixed-term contracts were not intended to be genuine, but were inserted merely to enable the employer to evade its obligations in terms of applicable labour laws.²³ The arbitrator consequently concluded that the contract had to be construed as being for an indefinite or permanent duration.²⁴ Secondly, in my view, since the existence of the contract, or its renewal, is determined by reference to what is fair or reasonable in the circumstances, it follows that whether its renewal is for an indefinite period or for another fixed term should also be determined by the same factors, namely by what is fair or reasonable in the circumstances. It is the author's view that the phrase "on the same or similar terms" in section 186(1)(b) was intended to refer to the terms and conditions of the contract such as the employee's duties and the remuneration payable, the amount of leave the employee is entitled to and so on, but not to the duration of the contract.

3 4 Remedies

In terms of section 193(1) of the LRA, if a judge or an arbitrator finds a dismissal to be unfair (failure to renew a fixed-term contract on the same or similar terms where there is a reasonable expectation that this will be done constitutes a dismissal), the judge or arbitrator may order the employer to reinstate the employee, or order the employer to re-employ the employee, or order the employer to pay the employee compensation. Section 193(2) provides that the judge or arbitrator must require the employer to reinstate or re-employ the employee unless the employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal have rendered the employment relationship intolerable; it is not practical for the employer to re-employ or reinstate the employee and the dismissal was unfair only because the employer did not follow a fair procedure. Although section 193 of the LRA sets out the remedies for unfair dismissal, there is no certainty as to what award the arbitrator will make. It could be an award for compensation or reinstatement or re-employment. There are no prescribed guidelines as to the

19 See *Wood v Nestlé SA (Pty) Ltd* 1996 17 ILJ 184 (IC) 190J-191A; *Malandoh v SA Broadcasting Corporation* 1997 18 ILJ 544 (LC) 544, 547D-E.

20 *Biggs v Rand Water* 2003 24 ILJ 1957 (LC) 1961A.

21 2003 24 ILJ 1957 (LC) 1961A.

22 2005 26 ILJ 2267 (BCA).

23 2271I.

24 2271-2272J.

factors that would render continued employment intolerable and hence attract an award for compensation. The judge or arbitrator must determine this with regard to what is reasonable in the circumstances. Likewise, what is practical or otherwise for an employer would also depend on what is reasonable, in the arbitrator or judge's view, in the circumstances at hand.

In terms of section 194 of the LRA, the award for compensation cannot exceed twelve months' salary unless the dismissal is automatically unfair²⁵ in which case the award cannot exceed an amount of twenty-four months' salary. For example, if an employee's fixed-term contract is not renewed because of her pregnancy or membership of a trade union, and she had a reasonable expectation that her contract would be renewed, this would constitute an automatically unfair dismissal. She would be able to claim an amount in compensation of up to twenty-four months' salary.

The judge or arbitrator, in determining what remedy to award, is guided by the principles of fairness and reasonableness.²⁶ If the arbitrator decides to award compensation as opposed to reinstatement or re-employment, the amount of compensation awarded is also determined with due regard to these principles, bearing in mind the cap imposed by the LRA.

3.5 Critical Analysis

The most obvious criticism of section 186(1)(b) of the LRA is that it creates uncertainty. First, there is uncertainty facing a fixed-term employee wishing to take an employer to task for failing to renew the contract as to whether or not the failure will be taken to constitute a dismissal. Since the answer to this is determined with reference to the vague concepts of reasonableness and fairness, the determination of this question cannot be cut and dried. Although case law can provide some guidance with regard to the kind of factors that are considered relevant in this determination, this is not a *numerus clausus*. Ultimately, one cannot escape the simple truth that the judge or arbitrator's subjective sense of what is reasonable or fair in the particular circumstances at hand is bound to prevail.²⁷ Second, if the expectation is indeed found to be reasonable, there is uncertainty as to whether the expectation can only be for another fixed term or whether the expectation can include an expectation of renewal for an indefinite period of time. Even if it is accepted that the expectation is not

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

26 Vettori *The Employment Contract and the Changed World of Work* Ashgate (2007) 84–87.

27 *Idem*.

limited to an expectation of renewal for another fixed-term period, there is still uncertainty as to the circumstances which will justify an expectation for renewal on a permanent basis.²⁸ Finally, there is uncertainty as to what award the arbitrator will make should the employee be successful. The judge or arbitrator must determine this with regard to what is reasonable in the circumstances. The only certainty in this regard is that the amount cannot be more than the maximum set in terms of the LRA.²⁹

A further criticism regarding the legislation is that in a situation where the motivation for entering into a contract on a fixed-term basis is not honest or is illegitimate, the aggrieved employee can only take the employer to task once the contract has expired and the employer has failed to renew it in circumstances where there was a reasonable expectation of renewal. In other words, the legislation does not prevent employers from entering into fixed-term contracts for illegitimate reasons until and unless non-renewal thereof is found to constitute an unfair dismissal. The effect of this is that the underlying motivation for entering into a fixed-term contract can only be questioned on expiry of the fixed-term contract if certain circumstances prevail.

4 Mozambican Legislation

In 2005 the Mozambican government set up a tripartite commission to prepare new draft labour legislation.³⁰ The legislation came into effect on 31 October 2007. The main changes to the old legislation are in the following areas:

- (i) Increased flexibility for firms in hiring, firing and employing workers which includes relaxing restrictions on the use of fixed-term contracts, especially for small- and medium-sized firms;
- (ii) changes in the cost of severance pay and leave benefits; and
- (iii) institutional changes in dispute resolution procedures.³¹

As opposed to only one subsection dealing with fixed-term contracts, as is the case with SA legislation, in the Mozambican legislation³² articles 40 to

28 This is uncertain because the outcome is dependent on what is reasonable in the circumstances. What is reasonable, of course, is incapable of precise definition. This was explained in *University of Cape Town v Auf der Heyde* 2001 22 ILJ 2647 (LAC); [2001] 12 BLLR 1316 (LAC) 1322 par 21 where the Labour Appeal Court stated: "In order to determine whether the respondent had a reasonable expectation, it is first necessary to determine whether he in fact expected his contract to be renewed or converted into a permanent appointment. If he did have such an expectation, the next question is whether, taking into account all the facts, the expectation was reasonable."

29 S 194.

30 Paper drawn up by team from Direcção Nacional de Estudos e Análise de Políticas: Ministry of Planning and Development Mozambique and Poverty and Economic Management Department, Africa Region, The World Bank (2006) 1 available at www.arbitrtionmz.com (World Bank 2006).

31 *Idem* 3.

32 *Lei de Trabalho*.

43 deal directly with fixed-term contracts, and articles 38 and 39 deal peripherally with them. The result is that there is more clarity and certainty in the Mozambican legislation than in the SA legislation.

4 1 Purpose of Fixed-Term Contracts

Article 40 (Fixed-term contracts) provides:³³

- “1 Fixed term employment contracts may only be entered into for the performance of temporary duties, for as long as it is strictly necessary for this purpose.
- 2 The following, among others, are temporary needs:
 - (a) The replacement of employees who, for whatever reason, are temporarily unable to perform their duties;
 - (b) The performance of duties aimed at responding to an exceptional or unusual increase in production, and the performance of seasonal work;
 - (c) The performance of duties that are not aimed at meeting permanent needs of the employer;
 - (d) The performance of a single piece of work, a project or other specific, temporary activity, including the performance, direction and supervision of civil construction works, public works and industrial repairs on a works-contract basis;
 - (e) The provision of services in activities that are incidental to those referred to in the preceding paragraph, namely, subcontracting and tertiarization of services;
 - (f) The performance of non-permanent activities.
- 3 The permanent needs of an employer comprise job vacancies that are contemplated in the staff structure of the enterprise, or those which may not be so contemplated but which correspond to the normal cycle of production or operation of the enterprise.”

Article 38(1)(g) requires a fixed-term contract to provide grounds to justify the fact that the contract is on a fixed-term basis. Subsection (2) provides further that the statement of the grounds justifying the fixed-term contract must make express reference to the facts on which the justification is based, and must establish a link between the justification and time period set for the duration of the contract.

As seen from these provisions, an employer may only enter into a fixed-term contract for necessary and legitimate reasons. What legitimate and necessary reasons entail is defined with clarity.³⁴ SA legislation does not define or describe what a legitimate reason for a fixed-term contract is, leaving it up to the discretion of a judge or an arbitrator to decide on the legitimacy of the employer’s motivations for entering into a fixed-term contract of employment.

Mozambican legislation requires the employer to justify both the fixed-term contract and its duration on entering into the contract. This is preferable to the SA situation where the underlying motivation for a fixed-term contract is only put into question if, on the employer’s failure to

³³ The English translation was furnished by *Centro de Arbitragem Laboral*, Maputo, Mozambique.

³⁴ Art 40(2).

renew the contract on expiration of the fixed-term contract, the employee can prove that he or she had a reasonable expectation of renewal.

4 2 Presumption that Contract of Employment is for an Indefinite Period

Article 41 provides:

- “1 Employment contracts may be permanent or they may be entered into for a fixed term or an unspecified term.
- 2 Employment contracts whose duration is not indicated are presumed to be permanent, although the employer may rebut this presumption by giving evidence of the temporary or the transient nature of the duties or activities to which the contract pertains.”

The same applies in SA since it is considered the norm for contracts to be of indefinite duration. This preference accorded to contracts for an indefinite period is to be welcomed.³⁵

4 3 Time Restrictions

Article 42 provides:

- “1 Fixed term contracts may be entered into for a period of up to two years, and this period may be renewed twice by agreement between the parties, without prejudice to the rules applicable to small and medium-sized enterprises.
- 2 A fixed term employment contract shall be considered a permanent contract if it exceeds the maximum periods of duration or the number of renewals permitted under the preceding paragraph . . .
- 3 Small and medium-sized enterprises shall be free to enter into fixed term contracts during their first ten years of activity.”

As seen from the discussion of SA legislation above, these provisions provide more clarity than the SA legislation with regard to the number of times a fixed-term contract can be renewed as well as the total time period for which an employee may be employed on a fixed-term basis.

4 4 Remedies

Article 42(4) provides:

“Where a fixed term contract is entered into outside the cases specifically contemplated in article 40 herein, or in breach of the limits set down in the provisions of this article, the employee shall be entitled to compensation in the terms set down in article 128 herein.”

Article 128(3) provides:

“Rescission of a fixed term employment contract by the employee, with just cause, shall entitle the employee to compensation equal to the remuneration that the employee would have earned between the date of termination and the contractual expiry date of the contract. This subsection ensures that an employee who had good reason to resign prior to the expiration of the contract will be entitled to claim all the money he would have received had he worked for the full duration of the fixed term.”³⁶

³⁵ See *Mafike and Kwikot (Pty) Ltd* 2005 ILJ 2267 (BCA) 2271.

³⁶ In terms of s 186(1)(e) of the SA LRA if an employee who resigns because the employer has rendered continued employment intolerable for the employee, the resignation will constitute a constructive dismissal.

Article 135(2) provides that where a court finds that a contract was rescinded on “unfounded” grounds by the employer, the employee “shall be reinstated and shall be entitled to receive an amount equal to the remuneration payable between the date of the termination and the date of effective reinstatement, subject to a maximum of six months . . .” Article 135(3) provides that “where circumstances objectively make the employee’s reinstatement impossible or if the employee expressly chooses compensation, the employer shall be bound to pay compensation calculated in terms of article 128”.

4 5 Critical Analysis

The fact that employers have to justify the motivation for the fixed-term contract and the duration thereof on entering into the contract in terms of the Mozambican legislation is to be welcomed. This is different to the situation in SA where the underlying motivation for a fixed-term contract is only put into question if, on the employer’s failure to renew the contract on expiration, the employee can prove that he or she had a reasonable expectation of renewal. Justification of the fixed term itself and its duration at the outset seems to be a more efficient and practical way of eliminating the practice of entering into fixed-term contracts merely to escape labour and social security law obligations towards employees. There is certainty with regard to what is a legitimate reason or justification for a fixed-term contract. The Mozambican legislation also provides more certainty with regard to how long an employee can be employed on a fixed-term basis as well as how many times a fixed-term contract can be renewed. In SA there is no clarity and it is dependent on what, in the arbitrator’s or judge’s opinion, is reasonable in the circumstances. There is also more clarity in terms of the Mozambican legislation with regard to remedies and the amount of compensation an aggrieved fixed-term employee can claim from an employer. Unlike SA, nothing is left to the judge’s discretion with regard to the amount of compensation payable to a successful fixed-term employee.

Since one of the main objectives of the new legislation in Mozambique was to create more flexibility for employers in hiring and firing, the drafters decided to relax restrictions on the use of fixed-term contracts, especially for small- and medium-sized firms.³⁷ Consequently small- and medium-sized firms are “free to enter into fixed-term contracts” for the first ten years of their existence.³⁸ This time period seems too long and can result in abuse of legitimate employee interests by employers.

In terms of SA law, one advantage for the employee on a fixed-term contract is that an employer cannot terminate the contract prior to the termination of the fixed term unless specifically agreed to in the contract.³⁹ In this way the temporary employee is guaranteed permanence at least for the duration of the fixed term. *Buthlezi v Municipal Demarcation*

37 World Bank 2006 12.

38 Art 42(3).

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

*Board*⁴⁰ is a case in point. The appellant was appointed as deputy manager for the respondent's financial operations in terms of a fixed-term contract of five years, running from 24 January 2000 to 23 January 2005. The appellant was dismissed with effect from February 2001 on the basis of the employer's operational requirements. The Labour Appeal Court held that, although legislation had amended the common law in certain respects, it had not amended the common-law principle that a unilateral cancellation of a fixed-term contract constitutes a material breach of contract.⁴¹ Jafta, with whom Zondo and Davies concurred, stated:

"Generally, our courts have declined to interpret a statute as taking away existing rights unless that was the purpose intended by the legislature and that is expressed in clear unambiguous terms in the statute itself."⁴²

Jafta quoted the explanation of Nugent, with whom Howie, Marais and Mpati concurred, in *Fedlife Assurance Ltd v Wolfaardt*.⁴³

"The common law right to enforce such a term remained intact and it was not necessary to declare a premature termination to be an unfair dismissal. 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."⁴⁴

On the face of it, this does not seem to be the case in terms of the Mozambican legislation. In terms of article 130 employers may rescind contracts for "structural, technological or market related reasons, and that it is essential to the competitiveness, economic structuring or the administrative or productive reorganization of the enterprise". Since no mention is made of fixed-term contracts for purposes of differentiation, it may be correct to presume that a fixed-term contract may be legally terminated prior to its expiration for structural, technological, administrative or economic reasons. If this is the case, fixed-term employees are exposed to the possibility of retrenchment prior to the expiry of their fixed-term contracts. This may render it difficult for Mozambican employers to attract skilled fixed-term employees from abroad.

A final possible point of criticism regarding the Mozambican legislation is that despite the certainty concerning the amount of compensation an aggrieved fixed-term employee is entitled to, this amount may be insufficient to deter employers from making abusive use of fixed-term contracts. Furthermore, there is no possibility of reinstatement for an indefinite

40 2004 25 ILJ 2317 (LAC).

41 See also in this regard *Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC) and *Hartstief v Lamontville Golden Arrows Football Club* 2007 28 ILJ 638 (LC).

42 *Buthlezi v Municipal Demarcation Board supra* 2322. In support of this conclusion Jafta quoted the following *dictum* of Smalberger in *SA Breweries Ltd v Food & Allied Workers' Union* 1990 1 SA 92 (A); 1989 10 ILJ 844 (A) 99F: "There is an assumption against the deprivation of, or interference with, common law rights, and in the case of ambiguity an interpretation which preserves those rights will be favoured."

43 2002 1 SA 49 (SCA); 2001 22 ILJ 2407 (SCA) par 18.

44 See also *Denel (Pty) Ltd v Vorster* 2004 25 ILJ 659 (SCA) where the court held that, despite the fact that the employer had abided by statutory procedural requirements, its failure to abide by the procedural requirements provided for in terms of the contract constituted a breach of contract.

period. However, one must bear in mind that legitimacy of the fixed term is scrutinised on entering into the contract. Since all fixed-term contracts must be shown to be for a legitimate motive at the outset, it is unlikely that it would be fair or reasonable to have an expectation that the contract should be renewed indefinitely, as is the case in SA.

5 Conclusion

The SA legislation has two major flaws: First, there is a lack of certainty with regard to the determination of the existence of a reasonable expectation of renewal, whether the expectation can include an expectation for renewal on a permanent basis and the amount of compensation that will be awarded should the employee be successful. Second, the fact that the underlying motivation for fixed-term contracts is only scrutinised if an employee claims a reasonable expectation of renewal when the employer has failed to renew the contract leaves the door wide open for abuse.

The Mozambican legislation also has a few shortcomings: First, the fact that small companies have a free hand with regard to the employment of fixed-term employees for the first ten years of their existence means that these employers can take advantage of fixed-term employees with no legal repercussions for the first ten years of operation. Second, the small amount of compensation payable by employers to aggrieved fixed-term employees may be insufficient to deter the illegitimate use of fixed-term contracts by employers. Finally, the fact that the fixed-term employee runs the risk of being retrenched prior to the expiry of the fixed term means that the fixed-term employee has no job security even for the duration of the fixed term.