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Redakteur

Coenraad Visser B Com LLB LLM

Assistentredakteurs

Hermie Coetzee B Com LLB LLM LLD

Johann Knobel BLC LLD

Annelize Nienaber BHons LLM LLD

Insolvency, employment disqualification, and precarity*

Z Mabe

LLB LLM PhD

Senior lecturer, Department of Mercantile Law, University of Pretoria

TC Maloka

BA LLB LLM LLD

Professor, Department of Mercantile Law, University of Pretoria

OPSOMMING

Insolvensie, indiensnemingsdiskwalifikasie, en onsekerheid

Hierdie artikel ondersoek die diskwalifikasie van insolvente persone om sekere beroepe te mag beoefen en die uitwerking daarvan op hulle vermoë om 'n inkomste te verdien. Die gevolge van sodanige diskwalifikasie is beide voor die hand liggend en gevarieerd. Die eerste aspek om in ag te neem is dat sekwestrasie van 'n skuldenaar se boedel insolvente skuldenaars van sekere regte ontnem en hulle regsbevoegdhede om te kontrakteer en te litigeer, asook om sekere ampte te beklee of om sekere beroepe te volg, beperk. Die tweede aspek hou verband met die erodering van moontlikhede om 'n lewensbestaan te maak – asook van werksekerheid. Die vermoë om 'n inkomste te verdien is 'n sentrale anker van die sekuriteit van indiensneming en burgerskap. Sodanige diskwalifikasie vererger die onsekerheid van indiensneming en belemmer die uitbreiding van grondwetlike en statutêre indiensnemingsbeskerming. Alhoewel die sekwestrasie van die boedel van 'n persoon nie daardie persoon se dienskontrak noodwendig outomaties beëindig nie, word toegang tot statutêre onbillike ontslagremedies ingevolge artikel 186 van die Wet op Arbeidsverhoudinge 66 van 1995 verswak omrede diensbeëindiging as gevolg van insolvensie analoog is aan geagte ontslag. Die artikel voer aan dat sodanige diskwalifikasie en daaropvolgende uitdiensstelling onvermydelik aanleiding gee tot onsekerheid van 'n lewensbestaan vir die insolvent.

1 INTRODUCTION

The sequestration of the estate of an employee does not automatically terminate his or her employment contract.¹ However, the employee's employment contract may be terminated if the Insolvency Act² or any other legislation prohibits an insolvent or an unrehabilitated person from following a particular type of employment or occupation.³ An insolvent or unrehabilitated person employed in

* This article partly derives from Dr Mabe's doctoral thesis – *A comparative analysis of an insolvent's capacity to earn a living within the South African constitutional context* (PhD thesis, University of Pretoria 2022).

1 Du Plessis & Fouché *A practical guide to labour law* (2006) para 2.10.5.

2 Act 24 of 1936 (Insolvency Act).

3 See para 3 below; Du Plessis & Fouché para 2.10.5.

these positions must vacate the position, should his or her estate be sequestrated under the Insolvency Act.⁴

This unfortunate outcome of the sequestration of the estate of a person is derived from the fact that when the Insolvency Act was enacted insolvent people were regarded as dishonest people who traded fraudulently with the public and who often maliciously incurred credit without any reasonable intention of repaying it.⁵ As a result, insolvent people were treated as cheats akin to thieves.⁶ This created the negative perception that insolvent people were irresponsible people who could not be trusted and, as punishment, should be barred from certain trades and responsibilities of trust until they have learnt their lesson.⁷ Therefore, for an employee, the mention of the word “insolvency” leads to fears of unemployment and loss of income, reputational loss, and indignity. Thus, the implications of employment disqualification invariably lead to the insolvent’s descent into precarity.

This article discusses the disqualifications of insolvent persons from certain occupations and the effect of such disqualifications on their capacity to earn income. Further, it discusses the correlation between employment disqualification and dismissal by operation of law, or deemed dismissal. It addresses the question of whether the disqualification and subsequent vacation from employment because of insolvency amount to unfair dismissal in terms of section 186 of the Labour Relations Act,⁸ making the employee eligible for reinstatement if the dispute is referred to the Labour Court, or whether it amounts to a deemed dismissal, which is without the privilege of a referral to the Labour Court.

2 THE UBIQUITOUS ROLE OF WORK

Before the discussion turns to a consideration of the effect of disqualifications on an insolvent from certain occupations, a few words on the concepts of work and employment are appropriate. In the contemporary fragile labour market defined by structural unemployment⁹ and endemic poverty,¹⁰ employment remains scarce.¹¹

4 See s 58(a) of the Insolvency Act; s 69(4) of the Companies Act 71 of 2008 (Companies Act); ss 22(3)(a) and 46(5) of the National Credit Act 34 of 2005 (NCA); Bertelsmann *et al* *Mars The law of insolvency in South Africa* 10 ed (2019) para 8.4; Smith, Van der Linde & Calitz *Hockly’s Law of insolvency, winding-up and business rescue* 10 ed (2022) para 4.4; Millard *Loss of earning capacity* (2005) 52.

5 Smith *The law of insolvency* 3 ed (1988) 290 n 25. For an extensive treatment, see Mabe *A comparative analysis of an insolvent’s capacity to earn a living within the South African constitutional context* (PhD thesis, University of Pretoria 2022) para 1.1.2. See also Mabe “The Constitutional disqualification for unrehabilitated insolvents from being members of Parliament” 2023 *De Jure* 31.

6 Calitz “Historical overview of state regulation of South African insolvency law” 2010 *Fundamina* 1 11; Mabe (2022) para 1.1.2.

7 Mols “Bankruptcy stigma and vulnerability: Questioning autonomy and structuring resilience” 2012 *Emory Bankruptcy Developments J* 296; Mabe (2022) para 1.1.2; Mabe (2023) 31.

8 Labour Relations Act 66 of 1995 (LRA).

9 *Stats SA Report 2023: Quarterly Labour Force Survey – QLFS Q4-2022*.

10 *Assign Services (Pty) Ltd v NUMSA* 2018 ILJ 1911 (CC) para 2; *University of Stellenbosch Legal Aid Clinic v Minister of Justices & Correctional Services* 2016 ILJ 2730 (CC) paras 41–48.

11 *Edwards v Board of Trustees of Bay Islands College* [2015] NZEmpC 6 (3 February 2015) para 287, citing *Angus v Ports of Auckland Ltd (No 2)* [2011] 9 NZELR 40 paras 61–68.

Sight must accordingly never be lost of the fact that people construct much of their lives around their jobs.¹² Above all, labour law is profoundly concerned with the protection of employment.¹³ The vulnerability of employees is underscored by the level of importance that our society attaches to employment.¹⁴ The sting of dismissal is underlined by the fact that it is aptly called “the labour relations equivalent of capital punishment”.¹⁵

It cannot be denied that dismissal, whether fair or not, is usually a devastating blow for an employee.¹⁶ The harm caused to the dismissed employee may go far beyond monetary loss.¹⁷ Hurt to pride, dignity, and self-esteem, and economic dislocation are all readily foreseeable.¹⁸ The irretrievable collapse of the employment relationship and the primary remedy for unfair dismissal – reinstatement¹⁹ – confirm the importance of job security, though with a rather different emphasis.²⁰

The proposition that work is a defining aspect of personhood is so deeply entrenched that it no longer requires citation of authority.²¹ A person’s employment is an essential component of his or her identity, self-worth, and emotional well-being.²² Work is also sanctified as the touchstone of industrial citizenship²³ by advancing a sense of civic duty, reciprocity, social cohesion, and community involvement. The essential value of work is encapsulated in an array of international instruments concerning the right to work and the objective of full

12 Donovan *Report of the Royal Commission on Trade Unions and Employers’ Associations* (1965–1968) 142.

13 See *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 66; *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 para 6; also Freedland “The changing nature of the relationship at work – A symposium” 2016 *ILJ* (UK) 107 108.

14 *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 368.

15 See, for example, *BAWU v Edward Hotel* 1989 ILJ (IC) 373G–H; *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Lallie* 1994 ILJ 277 (LAC) 2811; *CWIU v Algorax (Pty) Ltd* 2003 ILJ 1917 (LAC) para 70. See, generally, Landman “Unfair dismissal: The new rules for capital punishment in the workplace (part one)” 1995 *CLL* 41, “Unfair dismissal: The new rules for capital punishment in the workplace (part two)” 1996 *CLL* 51.

16 *Netherburn Engineering Ceramic v Mudau* 2003 ILJ 1712 (LC) 1725E.

17 DiMatteo “Justice, employment, and the psychological contract 2011 *Oregon LR* 445 460–461.

18 Brodie “A fair deal at work” 1999 *OJLS* 83 85. See also *Wallace v United Grain Growers* 152 DLR (4 ed) 1 33; *Johnson (A) v Unisys Ltd* [2001] 2 WLR 1076 para 35.

19 See, generally, Okpaluba “Reinstatement in contemporary South African law of unfair dismissal: The statutory guidelines” 1999 *SALJ* 815; Okpaluba & Budeli “Twenty years of the remedy of reinstatement in the law of unfair dismissal in South Africa: Some preliminary, jurisprudential and sundry issues (1)” 2017 *SAPL* 1, “Twenty years of the remedy of reinstatement in the law of unfair dismissal in South Africa: Some preliminary, jurisprudential and sundry issues (2)” 2017 *SAPL* 1; Geldenhuys “The reinstatement and compensation conundrum in South African labour law” 2016 *PER/PELJ* 7.

20 *Equity Aviation (Pty) Ltd v CCMA* 2008 ILJ 2507 (CC) para 36; *South Africa Commercial, Catering and Allied Workers Union v Woolworths (Pty) Ltd* 2019 3 SA 362 (CC) paras 43–50.

21 Beatty “‘Labour is not a commodity’” in Reiter & Swan (eds) *Studies in contract law* (1980) 313.

22 See, eg, *Reference Re Public Service Employee Relations Act* 368, 324.

23 See Standing *The precariat: The new dangerous class* (2011) 11–16. See also Bruton & Fairris “Work and development” 1999 *ILR* 5; Klaaren “Human rights protection of foreign nationals” 2009 *ILJ* 82, and “Towards republican citizenship: a reflection on the jurisprudence of former Chief Justice Sandile Ngcobo” 2017 *SAPL* 1.

employment. The Constitution of the International Labour Organisation,²⁴ as amplified by the Declaration of Philadelphia²⁵ and the Employment Policy Convention,²⁶ proclaims the goal of securing “full, productive and freely chosen employment”.²⁷ In equal measure, from Bretton Woods to the Universal Declaration of Human Rights,²⁸ the International Covenant on Economic, Social and Cultural Rights,²⁹ the Convention on the Elimination of All Forms of Discrimination Against Women,³⁰ the European Social Charter,³¹ and the Copenhagen World Summit,³² the issue of work and the objective of full employment is accorded prominent attention.

Closer to home, constitutional and statutory protection of employment plays a role of undeniable importance. The elevation of the right to fair labour practices to the status of a fundamental right in the Constitution³³ places job security on a firm constitutional footing. This is reaffirmed by the employee’s right not to be unfairly dismissed³⁴ under the LRA. The commitment to employment protection is evident in the provisions of the Competition Act³⁵ dealing with mergers.³⁶ In

24 International Labour Organization (ILO), Constitution of the International Labour Organisation, 1 April 1919, <https://www.refworld.org/legal/agreements/ilo/1919/en/47521> (accessed 21-03-2024).

25 Declaration Concerning the Aims and Purposes of the International Labour Organisation, adopted by the General Conference of the International Labour Organization, 26th session, Philadelphia, 10 May 1944.

26 International Labour Organization, Convention Concerning Employment Policy, C122, 9 July 1964, <https://www.refworld.org/legal/agreements/ilo/1964/en/122507> (accessed 21-03-2024).

27 Art 1 of the Constitution of the ILO.

28 Art 23 of the Universal Declaration of Human Rights, 217 A (III), United Nations General Assembly, 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563> (accessed 21-03-2024).

29 Art 6 of the International Covenant on Economic, Social and Cultural Rights, United Nations, 993 UNTS 3, United Nations General Assembly, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/33423> (accessed 21-03-2024).

30 Art 11(1)(a) of the Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13, United Nations General Assembly, 18 December 1979, <https://www.refworld.org/legal/agreements/unga/1979/en/13757> (accessed 21-03-2024).

31 Council of Europe, European Social Charter (Revised), ETS 163, 3 May 1996, <https://www.refworld.org/legal/agreements/coe/1996/en/40138> (accessed 21-03-2024).

32 Report of the World Summit for Social Development, Copenhagen, 6–12 March 1995, A/CONF.166/9.

33 See s 23 of the Constitution of the Republic of South Africa, 1996 (Constitution). See, generally, *National Education Health & Education Workers Union v University of Cape Town* 2003 3 SA 1 (CC) paras 33–38; *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) para 13.

34 S 185 of the LRA. See *Kylie v CCMA* 2008 ILJ 1918 (LC) para 68. See also Van Niekerk “In search of justification: The origins of the statutory protection of security of employment in South Africa” 2004 *ILJ* 853; Du Toit *et al Labour relations law: A comprehensive guide* 7 ed (2023) ch VIII paras 1 and 12.

35 Act 89 of 1998.

36 In the context of s 12A(3) of the Competition Act, competition authorities have tended to place great emphasis on the impact of a proposed transaction on employment. See, eg, *Minister for Economic Development / Competition Tribunal* [2012] 1 CPLR 6 (CAC); *Minister of Economic Development v Competition Tribunal*; *In re: SACCAWU v Massmart Holdings Ltd* [2013] 1 CPLR 31 (CAC); *Tiger Brands / Ashton Canning Company (Pty) Ltd / Newco and Langeberg Foods International Ashton Canning Company (Pty) Ltd* (46/LM/May05) [2005] ZACT 82 (23 November 2005); *Daun et Cie AG / Kolosus Holdings Ltd* (10/LM/Mar03) [2003] ZACT 49 (17 September 2003). See, too, Bierman “The road to double regulation paved with good intentions: An analysis of the interplay

continued on next page

addition, issues affecting the interests of workers as stakeholders in terms of the Companies Act are now part of the corporate law discourse.³⁷

Work is a wellspring of human dignity.³⁸ It underscores the proposition that work is a cornerstone of an individual's sense of worth as well as an affirmation of the worth of human beings in society. Work encompasses the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. Similarly, human dignity as enshrined in the Constitution values both the personal sense of self-worth as well as the public estimation of the worth or value of an individual.³⁹ No sharp lines can be drawn between work, dignity, and equality. The right to work serves to foster human dignity, equality, and social justice.⁴⁰ To sum up, work and employment matter beyond measure.

3 CAPACITY TO EARN A LIVING AND EMPLOYMENT DISQUALIFICATIONS OF INSOLVENT DEBTORS

The very nature of insolvency law limits the rights of most of its participants.⁴¹ This is because the sequestration of a debtor's estate deprives insolvent debtors of certain rights and limits their legal capacity to contract, litigate, and hold office or occupy certain types of employment.⁴² While these limitations were not

between the Labour Relations Act and the Competition Act regulation of retrenchments" 2015 *ILJ* 1693.

37 See generally, Joubert, Van Eck & Burdette "Impact of labour law on South African's new corporate mechanism" 2011 *IJCLIR* 65; Loubser & Joubert "The role of trade unions and employees in South Africa's business rescue proceedings" 2015 *ILJ* 21, and "The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)" 2010 *TSAR* 501 and (part 2) 2010 *TSAR* 698; Osode "Judicial implementation of South Africa's new business rescue model: Preliminary assessment" 2015 *JLIA* 459; Maloka & Muthugulu-Ugoda "The deadlock principle as a ground for the just and equitable winding up of a solvent company: *Thundercats Investments 92 (Pty) Ltd v Nkonjane Prospecting Investment (Pty) Ltd* 2014 5 SA 1 (SCA)" 2016 *PER/PELJ* 35; Muthugulu-Ugoda "Identifying the missing link in section 81(1)(d)(iii) of the Companies Act 71 of 2008: A case for innovative approach to dealing with solvent companies overwhelmed by deadlock" 2018 *JCLA* 110; Nwafor "Exploring the goal of business rescue through the lens of the South African Companies Act 71 of 2008" 2017 *Stell LR* 597; Van Eck & Boraine "Lock-out as a tool for the business rescue practitioner: The *Airline Pilots' Association of South Africa* judgment" 2021 *ILJ* 1390.

38 In *Affordable Medicines Trust v Minister of Health* 2009 3 SA 247 (CC) para 59, the Constitutional Court noted:

"Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is foundation of a person's existence'."

39 See, eg, *S v Makwanyane* 1995 3 SA 391 (CC) para 224; *The Citizen 1978 (Pty) Ltd v McBride* 2011 8 BCLR 816 (CC) paras 143–147; *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71.

40 *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 23.

41 Evans "Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa" 2018 *De Jure* 315.

42 *Spencer v Standard Building Society; Ex parte Taljaard; Standard Bank of SA Ltd v Essop; Evans* (2018) 315.

intended to limit an insolvent debtor's income, as shown below, because of the termination of their employment contract in certain circumstances, the limitations affect an insolvent debtor's capacity to earn an income. This is because they make it difficult for the insolvent debtor to recover from insolvency and to re-establish him- or herself in the economy by finding employment.⁴³ This has the potential consequences of rendering the insolvent a burden on society, or even leading to his or her insolvency after rehabilitation.⁴⁴

The Constitution provides that all people have the right to choose their trade, occupation, and profession freely, and only the law may regulate the practice of such trade, occupation, or profession.⁴⁵ While section 22 of the Constitution enshrines the right of every person to choose their trade, occupation, and profession freely, it has also given rise to numerous regulations affecting insolvent persons employed in certain industries in South Africa.

As indicated above, section 23(3) of the Insolvency Act allows an insolvent to follow any profession or occupation, or to enter into any employment in the business of a trader who is a general dealer or manufacturer during sequestration, provided that he or she obtains the written consent of his or her trustee.⁴⁶ The Insolvency Act defines a "trader" as any person who carries on any trade, business, industry, or undertaking in which property is sold, bought, exchanged, or manufactured for purposes of sale or exchange, or in which building operations of whatever nature are performed.⁴⁷ A trader also includes anyone involved in public entertainment, or who acts as a broker or agent for any person in the sale or purchase of any property, or the letting or hiring of immovable property.⁴⁸ However, an insolvent involved in farming operations is not a trader in terms of the Insolvency Act.⁴⁹

A "general dealer" is defined as a trader operating in a fixed place of business in a variety of goods and wares.⁵⁰ A "manufacturer", in turn, is defined as a trader who operates any kind of fabrication work.⁵¹ However, the consent of the trustee of the insolvent estate is not required in operations where the insolvent deals in fresh milk,⁵² operates a restaurant,⁵³ or the business of a chemist or a butchery,⁵⁴ or where the insolvent enters into any contracts that are reasonably incidental to the permitted trade.⁵⁵

The limitation on an insolvent's right to be employed in the business of a trader who is a general dealer or manufacturer is intended to protect the general

43 Roestoff "Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective" 2018 *THRHR* 399.

44 The World Bank Working Group *Report on the treatment of the insolvency of natural persons* (2013) para 103 (*World Bank Report*) notes that unemployment and a lack of available employment are among the primary causes of insolvency of natural persons.

45 S 22 of the Constitution.

46 S 23(3) of the Insolvency Act.

47 S 2 of the Insolvency Act.

48 *Ibid.*

49 *Ibid.*

50 *S v Van der Merwe* 1980 3 SA 406 (NC) 408–410; Meskin *et al Insolvency law and its operation in winding-up* (looseleaf, June 2023 update) para 5.14.1.

51 *AJ Ferreira Beleggings (Edms) Bpk v Swart* [1969] 2 All SA 254 (E) 259; Meskin *et al* para 5.14.1.

52 *Ex parte Du Plessis* 1957 2 SA 253 (W).

53 *R v Papangelis* 1960 2 SA 309 (O).

54 Smith 104.

55 *Priest v Charles* 1935 AD 147; *George v Lewe* 1935 AD 249.

public, especially creditors and people having dealings with such traders, against dishonest insolvent debtors.⁵⁶ This is a problem because a blanket disqualification is applied to all insolvent debtors, irrespective of whether or not a particular insolvent may still be honest and competent to perform the duties of his or her particular employment.⁵⁷ This is because South African insolvency law does not distinguish between different types of debtors depending on their circumstances.⁵⁸ Consequently, the Insolvency Act does not distinguish between dishonest insolvent debtors and honest but unfortunate insolvent debtors.⁵⁹

Honest but unfortunate debtors are those debtors who became insolvent because of factors beyond their control, such as terminal illness (which may require time off work), caregiving to a terminally ill family member, lack of adequate insurance, divorce, death,⁶⁰ or lack of available employment.⁶¹ These debtors may include those who may have been laid off from work during the level-five lockdown in South Africa as a result of the Covid-19 pandemic.⁶² Honest but unfortunate debtors may further include debtors who may only have a matriculation certificate and in today's world qualify only for employment as shop assistants or clerks in a large department store. However, these debtors are, without the consent of their trustee,⁶³ disqualified from employment in the businesses of a trader who is a general dealer or manufacturer, no matter how remote his or her chances of inflicting harm might possibly constitute a real danger to the general public.⁶⁴ Consequently, these debtors find it difficult to find alternative employment. An insolvent contravening section 23 will be guilty of an offence and liable to imprisonment,⁶⁵ and also risks the rejection of his or her application for rehabilitation by the court.⁶⁶

The limitation on an insolvent's right to be employed in the business of a trader who is a general dealer or manufacturer is also intended to ensure that the insolvent remains productive as an income generating person during the sequestration of his or her estate.⁶⁷ However, there seems to be a disconnect with this purpose, because an insolvent is prohibited from continuing with certain types of employment that would have helped him or her remain productive as an income generating person.⁶⁸

Although the Insolvency Act has not been amended as a whole, the South African Law Reform Commission⁶⁹ has investigated insolvency law in its

56 Smith 104.

57 Mabe (2022) para 1.1.1.

58 Evans "The abuse of the process of the court in friendly sequestrations proceedings in South Africa" 2002 *International Insolvency Review* 34; Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (2015) 12; Mabe (2022) para 6.1.

59 Mabe (2022) para 6.1.

60 *Idem* para 3.6.

61 *Idem* para 3.9.

62 Department of Statistics South Africa: "Statistical Release P0277, Quarterly employment statistics (QES)" June 2020.

63 S 23 of the Insolvency Act; see also Mabe (2022) para 3.4.3.

64 Smith 104.

65 S 137(c) of the Insolvency Act.

66 *Ex parte Kahanovitz* 1941 GWL49; *Ex parte Scholtz* 1942 CPD 15.

67 See *Singer v Weiss* 1992 4 SA 362 (T) 367.

68 Mabe (2022) para 3.4.3.

69 In 1987, the then South African Law Commission started an investigation into the law of insolvency as a whole and a project committee was appointed to conduct and direct the

entirety and has made certain reform proposals. Amongst the reform proposals, the Commission indicated that section 23(3) of the Insolvency Act is outdated in its current form.⁷⁰ This is because it leads to problems as trustees and insolvents generally differ on whether or not the consent of the trustee is necessary.⁷¹ The Commission further noted that it makes no sense to require the consent of the trustee in the case of an insolvent who acts as a general dealer or manufacturer, but at the same time not to require consent where the insolvent is not a general dealer or manufacturer.⁷² It stated that such consent is not required in other jurisdictions such as England, Scotland, Australia, or the United States of America.⁷³ Therefore, the Commission proposed that the trustee's consent requirement be removed and that the different professions and industries be allowed to create their own rules disqualifying an insolvent from entering those professions or industries.⁷⁴ However, these have not led to amendments to the Insolvency Act or the promulgation of a new Insolvency Act.

Other limitations imposed on insolvent debtors by the Insolvency Act include the disqualification of an insolvent from acting as a trustee in an insolvent estate.⁷⁵ Statutory provisions in other statutes also regulate the trade, occupation, and profession of unrehabilitated insolvents in South Africa. Section 50 of the Property Practitioner Act,⁷⁶ prohibits a fidelity fund certificate from being issued to an unrehabilitated insolvent. A fidelity fund certificate already issued to an unrehabilitated insolvent will be of no force and effect,⁷⁷ and must be returned to the Authority.⁷⁸

Further, section 59(1) of the Property Practitioner Act immediately disqualifies a property practitioner who commits an act of insolvency or is insolvent from holding a fidelity fund certificate.⁷⁹ A disqualified insolvent person must inform the Authority, his or her auditor, the bank holding his or her trust account, his or her clients, employees, employers, or any other affected person of his or

review as project 63. A series of working papers for discussion dealing with selected topics, followed by reports, culminated in the Draft Insolvency Bill of 1996. This was replaced by the Report and Draft Bill published by the South African Law Reform Commission in 2000 (2000 Explanatory Memorandum and 2000 Draft Insolvency Bill, respectively). The 2000 Explanatory Memorandum contains the Discussion Paper. This document was revised in 2013 and 2014, and gave rise to the 2014 Explanatory Report on the review of the law of insolvency: Draft Memorandum Insolvency Bill and Explanatory Memorandum (project 63) 2014 (2014 Explanatory Memorandum). The 2014 Explanatory Memorandum contains the explanatory memorandum and the proposed 2015 Draft Insolvency Bill (2015 Draft Insolvency Bill). Both the 2000 and 2014 Explanatory Memoranda are working documents produced by the Department of Justice and contain proposals for a Draft Insolvency Bill. However, a formal Draft Bill has not yet been published. See also Mabe (2022) para 3.2.

70 Cl 15(4) of the Explanatory Memorandum; see also Mabe (2022) para 3.2.

71 Cl 15(1) of 2000 Explanatory Memorandum; see also Mabe (2022) para 3.8.2.

72 Cl 15(4) of the Explanatory Memorandum; see also Mabe (2022) para 3.8.2.

73 *Ibid.*

74 Cl 15(4) of the Explanatory Memorandum. Thus cl 15(2) of the 2000 Draft Insolvency Bill omitted this requirement, which is also the case with cl 16(2) of the 2015 Draft Insolvency Bill. See also Mabe (2022) para 3.8.2.

75 Ss 55(a) and 58(a) of the Insolvency Act.

76 S 50(a)(vi) of the Property Practitioner Act 22 of 2019 (Property Practitioner Act) which repealed the Estate Agency Affairs Act 112 of 1976.

77 S 52(4)(a) of the Property Practitioner Act.

78 S 52(5) of the Property Practitioner Act.

79 S 59(1)(a)–(b) of the of the Property Practitioner Act.

her disqualification.⁸⁰ The disqualified insolvent should then stop performing the functions of a property practitioner and hand over the administration of his or her trust account together with all relevant information and records to the Authority.⁸¹ An insolvent person contravening section 59 of the Property Practitioner Act commits an offence.⁸²

Section 138(1)(d) of the Companies Act disqualifies an insolvent person from acting as a business rescue practitioner. The Companies Act also disqualifies an insolvent person from being a director of a company if an exemption from the court has not been granted.⁸³ Section 11(2)(b) of the Liquor Act⁸⁴ disqualifies an unrehabilitated insolvent from registering as a manufacturer or distributor of liquor. Section 46(2) of the NCA disqualifies a person from registering as a credit provider, debt counsellor, or payment distribution agent if he or she is an unrehabilitated insolvent. Consequently, section 46(5) of the NCA allows the National Credit Regulator to deregister such a person if he or she becomes disqualified after being registered.

Other legislation that regulates the trade, occupation, and profession of unrehabilitated insolvents is the Second-Hand Goods Act,⁸⁵ which disqualifies a person from dealing in second-hand goods, scrap metal, or acting as a pawnbroker if he or she is an unrehabilitated insolvent. The object of this Act is to combat trade in stolen goods and promote ethical standards in the trade in second-hand goods.⁸⁶ It appears, then, that the disqualification of unrehabilitated insolvents is based on the legislature's assumption that all insolvent people are dishonest and untrustworthy.⁸⁷

Section 23 of the Consumer Protection Act⁸⁸ disqualifies an unrehabilitated insolvent from conducting an auction or in any other way acting as an auctioneer, or to represent him- or herself as an auctioneer. Section 8(1) of the Financial Advisory and Intermediary Service Act⁸⁹ disqualifies a person from being a financial services provider if he or she is an unrehabilitated insolvent. Section 37(5) of the Regulatory Board for Auditors will decline to register a person as an auditor or candidate auditor if he or she has been provisionally sequestered.⁹⁰ The Board may also cancel the registration of such a person if he or she is already registered.⁹¹

Based on the insolvent's possible dishonesty and incompetence, he or she is prohibited from being a member of statutory councils, boards, or bodies.⁹²

80 S 59(1)(i)–(iii) of the Property Practitioner Act.

81 Mabe (2022) para 3.4.3.

82 S 59(2) of the Property Practitioner Act.

83 S 69(8)(b)(i) and 69(11) of the Companies Act.

84 Act 59 of 2003.

85 S 14(1)(c) read with s 2 of the of the Second-Hand Goods Act 6 of 2009 (Second-Hand Goods Act).

86 See the preamble.

87 Roestoff 398.

88 Act 68 of 2008 (CPA).

89 Act 37 of 2008 (FAISA).

90 S 37(5) of the Auditing Profession Act 26 of 2005 (Auditing Profession Act).

91 S 39(2)(a) of the Auditing Profession Act.

92 Member of the Health Professions Council (s 6(1)(a) of the Health Professions Act 56 of 1974); a local transportation board (s 5(1)(a) of the Road Transportation Act 74 of 1977); Council of the Academy of Science (s 7(1)(b) of the Academy of Science of South Africa Act 67 of 2001); Board of the South African National Accreditation System (s 10(1)(a) of

Insolvent debtors are either prohibited from registration as a member or from continuing to act as board or council members. For example, an unrehabilitated insolvent may not be appointed as a member of the Regulatory Board for Auditors,⁹³ a council member of the South African Council of Planners,⁹⁴ a council member of the South African Council for Natural Scientific Professions,⁹⁵ a council member of the South African Council for Property Valuers Profession,⁹⁶ a member of the Legal Practitioners' Fidelity Fund Board,⁹⁷ a member of the Land and Agricultural Development Bank,⁹⁸ or a member of the governing board of the National Credit Regulator.⁹⁹ As with section 23(3) of the Insolvency Act, a blanket disqualification is applied to all insolvent debtors, irrespective of whether or not a particular insolvent may still be honest and competent to be a member of such statutory councils or boards.¹⁰⁰

In some other professions in South Africa, an unrehabilitated insolvent will, generally, be disqualified only if his or her insolvency was caused by negligence or incompetence in performing the work of the relevant profession.¹⁰¹ Such professions include¹⁰² registering as a candidate, technical, or professional planner in terms of the Planning Profession Act,¹⁰³ a professional natural scientist in terms of the Natural Scientific Professions Act,¹⁰⁴ and a professional

the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006); or the Tourism Board (s 15(1)(b) of the Tourism Act of 2014). See Roestoff 402 n 85.

- 93 S 13(1)(c) read with s 13(4) of the Auditing Profession Act. Such a member shall cease to be a member from the date of disqualification.
- 94 S 5(1)(b) and 5(2)(a) of the Planning Profession Act 36 of 2002. Such council member is required to vacate his or her office if disqualified.
- 95 S 6(1)(b) of the Natural Scientific Professions Act 27 of 2003.
- 96 S 6(1)(b) and 6(2)(a) of the Property Valuers Profession Act 47 of 2000. Such council member is required to vacate his or her office if disqualified.
- 97 S 64(2)(a) of the Legal Practice Act 28 of 2014 (Legal Practice Act).
- 98 Ss 1 and 10(e) of the Land and Agricultural Development Bank Act.
- 99 Ss 20(2)(a), (c) and 46(2) of the NCA.
- 100 Roestoff states that in only five of the instances is the honesty and competency of the insolvent considered (Roestoff 402 n 86). See further the disqualifications in s 3(7)(b) of the Agricultural Produce Agents Act 12 of 1992 regarding membership of the Agricultural Produce Agents Council; s 12(b) of the Agrément South Africa Act 11 of 2015 regarding membership of the Board of Agrément South Africa; s 9(5)(b) of the Agricultural Research Act 86 of 1990 regarding membership of the Agricultural Research Council; s 6(8) of the Construction Industry Development Board Act 38 of 2000; s 4(13)(b) of the Marketing of Agricultural Products Act 47 of 1996 regarding membership of the National Agricultural Marketing Council. See also Mabe (2022) para 3.4.3.
- 101 See s 3(7)(b) of the Agricultural Produce Agents Act 12 of 1992 regarding membership of the Agricultural Produce Agents Council; s 12(b) of the Agrément South Africa Act 11 of 2015 regarding membership of the Board of Agrément South Africa; s 9(5)(b) of the Agricultural Research Act 86 of 1990 regarding membership of the Agricultural Research Council; s 6(8) of the Construction Industry Development Board Act 38 of 2000; s 4(13)(b) of the Marketing of Agricultural Products Act 47 of 1996 regarding membership of the National Agricultural Marketing Council (Roestoff 402 n 86).
- 102 Ss 19(3)(vi) and 20(1)(a)(i) of the Architectural Profession Act 44 of 2000; ss 19(3)(vi) and 20(1)(a)(i) of the Landscape Architectural Professions Act 45 of 2000; ss 19(3)(a)(vi) and 20(1)(a)(i) of the Quantity Surveying Profession Act 47 of 2000; ss 19(3)(a)(vi) and 20(1)(a)(i) of the Project and Construction Management Professions Act 48 of 2000; and ss 13(8)(a) and 14(1)(a) of the Geomatics Profession Act 19 of 2013.
- 103 See s 13(1) and 13(7). If already registered, it will be cancelled in terms of s 14(1)(a).
- 104 Section 20(4)(a)(v). If already registered, such registration may be cancelled by the Council for Natural Scientific Professions, in terms of s 21(1)(a)(i).

valuer, professional associated valuer, or a candidate valuer, in terms of the Property Valuers Profession Act.¹⁰⁵

The Insolvency Act exempts the income¹⁰⁶ of an insolvent from vesting in the insolvent estate, because sequestration is not intended to leave an insolvent and his or her dependants destitute.¹⁰⁷ However, the disqualifications specified above may cause the insolvent to forfeit the protected income which has been exempted by the Act, leaving him or her without a livelihood, and sometimes even destitute.¹⁰⁸

In the legal profession, the Legal Practice Act¹⁰⁹ provides for the appointment of a *curator bonis* to control and administer the trust account of a legal practitioner, with rights, powers, and functions as the court may deem fit, should the legal practitioner become insolvent. Accordingly, the status as insolvent does not disqualify a legal practitioner from practising law or remove him or her from the roll of legal practitioners. Instead, a legal practitioner is allowed to continue practising and earn a living despite not having control of his or her trust account.¹¹⁰ This provision in the Legal Practice Act is commendable as it not only protects public interests by placing the trust account under the control of a curator but also protects the livelihood of the insolvent legal practitioner so that he or she does not become a burden on the state. Therefore, this provision is aligned with an insolvent person's constitutional right freely to choose his or her trade, occupation, and profession, as entrenched in section 22 of the Constitution. It is also aligned with the insolvency law policy that sequestration should not leave an insolvent and his or her dependants destitute; instead, the insolvent should remain productive as an income-generating person during the sequestration of his or her estate.

Before the enactment of the Legal Practice Act, the Attorneys Act¹¹¹ allowed for the removal of an admitted attorney from the roll of practising attorneys if the court was satisfied that he or she was not a fit and proper person to continue practising as an attorney.¹¹² A fit and proper person was described as a person with integrity and who is reliable and honest.¹¹³ Further, if an admitted attorney was insolvent and unable to satisfy the court that despite his or her sequestration he or she was still a fit and proper person to continue practising as an attorney, such an admitted attorney was removed from the roll of admitted attorneys as he or she no longer qualified as a fit and proper person to practise law.¹¹⁴ This provision in

105 Ss 19(1)(a) and 20(4)(a)(vi) of the Property Valuers Profession Act.

106 S 23(9) of the Insolvency Act; see also *Mars* para 10.2.2.

107 *Hockly* para 4.2. See also *Ex parte Kroese* 2015 1 SA 405 (NWM); *Ex parte Van Dyk* (1869/2015) [2015] ZAGPPHC 154 (26 March 2015).

108 Mabe (2023) 29.

109 S 90(1)(b) of the Legal Practice Act.

110 S 89 of the Legal Practice Act.

111 S 22(1)(d) of the Attorneys Act 53 of 1979 (Attorneys Act). The Attorneys Act was repealed by s 119 of the Legal Practice Act.

112 Slabbert "The requirement of being a fit and proper person for the legal profession" 2011 *PER/PELJ* 210; "A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014" <https://bit.ly/3Jxr0AB> (accessed 13-04-2022); Maloka "Protecting the foundation and magnificent edifice of the legal profession: Reflections on *Thukwane v Law Society of the Northern Provinces* 2014 (5) SA 513 (GP) and *Mtshabe v Law Society of the Cape of Good Hope* 2014 (5) SA 376 (ECM)" 2015 *PER/PELJ* 2643.

113 "A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014" <https://bit.ly/3Jxr0AB> (accessed 13-04-2022).

114 S 22(1)(e) of the Attorneys Act.

the Attorneys Act had the effect of distinguishing between dishonest insolvent legal practitioners and honest but unfortunate insolvent legal practitioners.

The Legal Practice Act also refers to a fit and proper person. Section 24(2)(c) provides that a person may be admitted and enrolled as a legal practitioner only if the High Court is satisfied that such a person is fit and proper to be admitted.¹¹⁵ Further, section 31(1) directs the Council to suspend or cancel the enrolment of a legal practitioner where a High Court has ordered that he or she be struck off the roll of legal practitioners. In 2017, Legodi J, in *General Council of the Bar of South Africa v Jiba*,¹¹⁶ stated that a lawyer should at least have integrity, which he described as “impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain”. As a result, Legodi J ordered that the second and third respondents be struck off the roll of advocates because their misconduct rendered them unfit to continue to practise as advocates.¹¹⁷ This was especially because they were shown to be dishonest and lacked integrity.¹¹⁸ Thus, it appears that also in terms of the Legal Practice Act, a legal practitioner will not be struck off the roll of legal practitioners based on the sequestration of his or her estate but rather based on his or her integrity and honesty.

4 The correlation between employment disqualification and deemed dismissals

The point has already been made that the sequestration of the estate of a person does not automatically terminate that person’s employment contract. However, loss of employment is an inseparable henchman of disqualification triggered by insolvency. The question that arises is whether the disqualification of a person and subsequent vacation from employment because of insolvency amounts to unfair dismissal. Section 186(1) of the LRA states that the term “dismissal” means that –

- “(a) an employer has terminated a contract of employment with or without notice;
- (b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
- (c) an employer refused to allow an employee to resume work after she –
 - (i) took maternity leave in terms of any law, collective agreement or contract of employment; or
 - (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employer;
- (f) an employee terminated a contract with or without notice because the employer, after a transfer in terms of section 197 or 197A, provided the employee with conditions of service that are substantially less favourable to the employer than those provided by the employer.”

115 S 24(2)(c) of the Legal Practice Act; “A thought piece on ethical conduct for attorneys, advocates and corporate counsel having regard to the Legal Practice Act, 2014” <https://bit.ly/3Jxr0AB> (accessed 13-04-2022).

116 2017 2 SA 122 (GP) para 3 (*Jiba*).

117 *Jiba* paras 138 and 168; *General Council of the Bar of South Africa v Jiba* 2019 8 BCLR 919 (CC) para 24 (*Jiba (2)*).

118 *Jiba* para 168; *Jiba (2)* para 24.

It can be said with some confidence that disqualification and vacation from employment connected with sequestration do not fit neatly within the purview of the statutory notion of dismissal. A cursory reading of section 186(1) demonstrates that the term dismissal envisages an act initiated by the employer, not by the employee,¹¹⁹ and the employer bears the burden of proving that the dismissal is fair.¹²⁰

In *Spijkerman v ABSA Bank Ltd*,¹²¹ the court distinguished between the circumstances where an employee is dismissed from employment by an employer because of his or her insolvency, on the one hand, and circumstances where the insolvency of a person is stipulated by the law to be incapacity, on the other hand. In this case, the applicant worked as a credit manager at ABSA. The applicant was dismissed from his employment after being insolvent and his estate was sequestered.¹²² The applicant's competence and integrity as an employee were unquestioned and the Industrial Court accepted that his business ventures collapsed through no fault of his own.¹²³ The question before the court was whether the applicant's insolvency constituted sufficient ground for his dismissal. The court held that it was highly reluctant to adopt an attitude that envisages the dismissal of a person just because he or she is insolvent.¹²⁴ However, the court also said it was highly reluctant to adopt the attitude that an employee being dismissed purely for being insolvent was *ipso facto* an unfair labour practice.¹²⁵ The court held that each case had to be decided individually.¹²⁶ Importantly, the policy that an employee whose estate has been sequestered warrants dismissal is unjust, bad law, and bad policy.¹²⁷ Further, the insolvency of an employee and the sequestration of his or her estate becomes an incapacity only if stipulated by law.¹²⁸ If it is not stipulated by law, the same dismissal laws applicable to other employees apply to an insolvent employee.¹²⁹ Therefore, insolvent employees should be able to defend themselves against dismissal just like other employees.¹³⁰

Consequently, if the termination of an insolvent person's employment contract is derived from provisions in statutes, which disqualify unrehabilitated insolvents from holding certain positions,¹³¹ the termination of the employment contract does not amount to unfair dismissal. In the first instance, it is not initiated by the employer. Secondly, the disqualification is stipulated in statute and it is a termination of employment by operation of law, because it kicks in upon the occurrence of an event, which, in this instance, is the insolvency of the employee. Consequently, the remedy of reinstatement that is awarded under unfair dismissal disputes is not available to employees who have been dismissed by operation of law.

119 Du Toit *et al* ch VIII para 2.

120 S 188(1) of sched 8 to the LRA; Du Toit *et al* ch VIII para 5.2.

121 *Spijkerman v ABSA Bank Ltd* 1997 3 BLLR 287 (IC) 295.

122 288.

123 *Ibid.*

124 295.

125 *Ibid.*

126 289 295.

127 295.

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 See para 3 above.

In this regard, an insolvent person is in a position similar to that of a person whose employment was terminated by operation of law, such as a person whose appointment has been declared irregular. For our purposes, we focus on instances of termination of employment arising from a judicial declaration of invalidity of appointments¹³² and recommendations of the commissions of inquiry. Loss of employment consequent upon setting aside of the appointment of a former National Director of Public Prosecutions (NDPP) as being inconsistent with the Constitution and invalid, can be seen from the seminal judgment handed down in *DA v President of the RSA*.¹³³ Another notable illustration is the decision in *Corruption Watch NPC v President of the RSA*,¹³⁴ upholding the High Court judgment in *Corruption Watch (RF) NPC v President of the RSA*,¹³⁵ setting aside the appointment of the Acting NDPP. The Constitutional Court effectively terminated the employment of the acting NDPP by operation of law.

Insofar as the recommendations of a commission are concerned, the Nugent Commission is notable for recommending the immediate termination of the service of the suspended commissioner of the South African Revenue Service while his disciplinary proceeding was in process.¹³⁶ Also, the recommendations of the Mokgoro Inquiry into the fitness to hold office led to the termination of two high-profile public prosecutors.¹³⁷ To this can be added the recently concluded impeachment of the former public protector.¹³⁸

However, as indicated in *Spijkerman*, if it is a policy or rule of practice of an employer that upon the insolvency of an employee, the employee should be dismissed without considering, amongst others, the circumstances that led to the insolvency¹³⁹ and the employee's competence to perform their duties,¹⁴⁰ then that policy or rule is unjust, bad law, and bad policy. Consequently, an insolvent employee under these circumstances can approach the Labour Court and allege unfair dismissal and request reinstatement, as with other employees.

Whilst, indeed, the insolvent's disqualification fits uneasily within the ambit of the statutory concept of dismissal, loss of employment caused by sequestration is akin to deemed dismissal or discharge, also referred to as termination of employment by operation of law (*ex lege*). The effect of disqualification or deemed discharge is analogous to the common law concept of self-repudiation.¹⁴¹

132 See, eg, *HSF v Minister of Police* [2017] 3 All SA 253 (GP).

133 *Democratic Alliance v President of the Republic of South Africa* 2012 1 SA 417 (SCA).

134 *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC).

135 *Corruption Watch (RF) NPC v President of the Republic of South Africa; Council for the Advancement of the South African Constitution v President of the Republic of South Africa* [2018] 1 All SA 471 (GP).

136 Commission of Inquiry into Tax Administration and Governance by SARS (11 December 2018). See also *Moyane v Ramaphosa* [2019] 1 All SA 718 (GP).

137 The outcome of the recommendation by the Mokgoro Inquiry was the termination of the services of two senior public prosecutors. See also *Jiba v General Council of the Bar of SA* 2019 1 SA 130 (SCA).

138 Merten "Historic impeachment of Mkhwebane highlights impact of politicking in crucial public accountability appointments" 11 Sep 2023 *Daily Maverick* <https://www.daily-maverick.co.za/article/2023-09-11-historic-impeachment-of-mkhwebane-highlights-impact-of-politicking-in-crucial-public-accountability-appointments/>.

139 *Spijkerman* 296.

140 291–292.

141 *Van Rooyen v Minister van Openbare Werke* 1978 2 SA 835 (A) 845F–846A.

The legislative landscape for deemed discharge¹⁴² is replete with cases of dismissed absentee employees. The facts in *Maswanganyi v Minister of Defence and Military Veterans*¹⁴³ adequately provide a clear picture of the asperities of the deemed discharge provision. The applicant was, at the time of arrest, conviction, and sentence an employee of the South African National Defence Force (SANDF). After conviction, the SANDF, relying on section 59(1)(d) of the Defence Act, terminated his employment. Section 59(1)(d) provides that the service of a member of the Regular Force is terminated by operation of law if he or she is sentenced to a term of imprisonment by a competent civilian court without the option of a fine. After the applicant's conviction and sentence were set aside, the SANDF refused to reinstate him. In the High Court proceedings, the applicant contended that the refusal to reinstate him under the circumstances infringed his constitutional right to fair labour practices. He submitted that the SANDF should have suspended him in terms of section 42(1) of the Military Discipline Supplementary Measures Act¹⁴⁴ pending the conclusion of his appeal. According to the applicant, the investigating officer in his case had informed the Defence Force about his pending case.

The High Court upheld the arguments advanced by the applicant. However, it noted that section 59(1) is silent on the powers and discretion of the respondent regarding possible reinstatement after termination of services. It further noted that section 59(3) grants this power and discretion to the Chief of the Defence Force, on good cause shown, to reinstate the member. The High Court found that the election to invoke section 59(1)(d), and not one of the other two sections, was an arbitrary administrative decision in the circumstances.

On appeal, the Supreme Court of Appeal reaffirmed that in the instances listed in paragraphs (a) to (e) of section 59(1), the termination follows *ex lege*. Hence, in the present matter, after the respondent had been sentenced to life imprisonment, his service in the SANDF was terminated by operation of law in terms of section 59(1)(d). No decision was required by the employer to effect that termination. As with the other four instances listed in section 59(1) – resignation, retirement (or pension), termination of a fixed-term contract, and medical or psychological unfitness for duty – termination would follow automatically. The Supreme Court of Appeal found that the absence of a provision for any reinstatement in section 59(1)(d) of the Defence Act meant that the absentee soldier remained dismissed by operation of law.

At the apex court, the matter turned to whether the jurisdictional requirements of section 59(1)(d) had been satisfied.¹⁴⁵ The court held that as soon as the appeal set aside the sanction, there was no longer any sentence or conviction to note effectively. As a result, the section 59(1)(d) requirement had not been satisfied.¹⁴⁶ The net effect was that the absentee soldier was reinstated.

142 See s 17(5)(a)(i) of the Public Service Act 104 of 1994; s 14(1)(a) of the Employment of Educators Act 76 of 1998; s 59(3) of the Defence Act 42 of 2002 (Defence Act); s 36(1) of South Africa Police Act 68 of 1995.

143 2020 ILJ 1287 (CC).

144 Act 16 of 1999 (MDSM Act).

145 *Maswanganyi* para 42.

146 Para 46.

Another instructive decision is *Masinga v Chief of the South African National Defence Force*.¹⁴⁷ In that case, the Supreme Court of Appeal had to grapple with the construction of section 59(3) of the Defence Act in a dispute concerning the deemed discharge of cadets undergoing training in military medicine in Cuba for defying instructions to attend classes from 11 February to 20 March 2019. They created chaos at the Inter Arms School in Cuba by absenting themselves from classes with no indication of their whereabouts. They pressured the second-year cadets (the 2016 group) and four students of the 2017 group not to attend classes. They contaminated bathrooms and left taps running, with the result that the dormitory ran out of water and other cadets could not shower.¹⁴⁸ After futile efforts to get them to return to class, they were handed a letter by the Surgeon General (dated 17 February 2019) in which they were informed that the Surgeon General intended to apply to the Chief of the SANDF for their administrative dismissal or discharge, and that they had committed an offence of mutiny. They were given an opportunity to make written submissions to the Chief of the SANDF to show cause why they should not be dismissed. However, they refused to exercise that right.¹⁴⁹

Upon their return, the absentee cadets launched an urgent application in the High Court for an order declaring that the “decision to terminate” their service in the SANDF was unlawful and invalid. The High Court held that the jurisdictional requirements of section 59(3) had not been satisfied. A board of inquiry should have been convened in terms of section 103(1) of the Defence Act, prior to the dismissal.¹⁵⁰ Accordingly, Basson J set aside the decision to terminate the disgruntled cadets’ service and ordered retrospective reinstatement. Following skirmishes around section 18(3) of the Superior Courts Act¹⁵¹ for the enforcement of the High Court’s order, pending the determination of the appeal by the full court, the parties were granted permission to approach the Supreme Court of Appeal.

The questions to be decided by the Supreme Court of Appeal could conveniently be distilled into two primary issues. The first was whether the Chief of the SANDF had taken a decision to dismiss the appellants prior to, and regardless of, any submissions they might make. The gist of the appellants’ contention was that SANDF opted to commence an *ad hoc* disciplinary process for an alleged offence of mutiny under the Military Discipline Code (the Code) and gave them a “semblance of a hearing” in the Surgeon General’s letter of 17 February 2019 when they were asked to show cause why they should not be discharged. The second issue concerned the interpretive question. Put differently, it turned on the proper interpretation of section 59(3), precisely whether its jurisdictional requirements were met.

On the question of being accorded an illusory hearing arising from the Surgeon General’s letter of 17 February 2019, the court brushed aside and rejected the absentee cadets’ argument, holding that it was “fanciful and absurd”.¹⁵² It was common ground from the letter of 25 February 2019, handed

147 2022 ILJ 805 (SCA).

148 Para 13.

149 Para 14.

150 Para 21.

151 Superior Courts Act 10 of 2013.

152 *Masinga* para 28.

to the appellants only on 26 March 2019 after they had returned home, that they were being discharged from the SANDF with immediate effect, because they had refused to attend classes since 11 February 2019. The High Court's conclusion to the contrary was incorrect, since the cadets had been absent from their place of duty for longer than 30 days.¹⁵³

The second issue concerned the proper interpretation of section 59(3), especially whether its jurisdictional requirements were met. On the argument based on non-fulfilment of the conditions precedent to the application of section 59(3), the Supreme Court of Appeal was of the view that the appellant's submission contained two patent flaws. In the first instance, the jurisdictional prerequisite of section 59(3) was trite and clear. To recap: the members must have (i) absented themselves from official duty; (ii) without permission of their commanding officer; and (iii) for a period of not less than 30 days. Once these requirements were satisfied, the absentee cadets were considered as having been discharged on the ground of misconduct with effect from the day immediately following their last day of attendance at their place of duty.¹⁵⁴ As the Supreme Court of Appeal observed, these jurisdictional requirements are settled:

"In *Louw* this Court held that a deemed discharge provision comes into effect by the operation of law, and not as a result of an administrative decision, if the person concerned is absent from duty for 30 days. Consequently, the *audi alteram partem* principle which requires affected persons to be heard before decisions are taken affecting their rights, privileges or liberty, has no application. Whether the jurisdictional requirements for a deeming provision have been satisfied is objectively determinable."¹⁵⁵

It was further submitted that the appellants did not absent themselves from official duty. Despite their refusal to attend classes, they had regularly reported for roll call and were physically present at the Inter Arms School.¹⁵⁶ Besides, the cadets never deserted their assigned place of duty and their whereabouts were always known to their commanding officer. The Supreme Court of Appeal felt this submission was flawed, and, if accepted, it would produce a manifest absurdity. It could mean that

"a member of the SANDF could just as unlawfully absent himself/herself from official duty without permission by, for example, hiding on a military installation, as another who absents himself/herself by walking away from it. Neither of these individuals is performing his/her duty, and neither has authority for his/her action."¹⁵⁷

Section 59(3) does not lend support to such a construction advanced by the appellants. The evidence established that the cadets absented themselves from their official place of duty without permission for a consecutive period in excess of 30 days and the requirement in (iii) was also fulfilled. Sight must not be lost of the fact that the cadets were considered as having been discharged from the force by the operation of law, but might be reinstated by the Chief of the SANDF on good cause shown.¹⁵⁸

153 Para 30.

154 Para 33.

155 Para 34.

156 Para 38.

157 Para 39.

158 Para 42.

Finally, the appellants contended that even if section 59(3) applied to them, no valid dismissal could take place unless and until a board of enquiry was convened under section 103(1) of the Defence Act, in order to determine that the appellants had been absent without leave for more than 30 days. The submission was infirm. Schippers JA elaborated:

“It ignores the plain wording, context and jurisdictional requirements of s 59(3). The latter is a self-standing provision. It is not rendered subject to s 103(1) or any other provision of the Act. The purpose of s 59(3), as in the case of s 59(1)(d) of the Act (which is to safeguard the SANDF against members convicted of serious crimes) is to ensure that the SANDF ‘is structured and managed as a disciplined military force’,¹⁵⁹ as required by s 200(1) of the Constitution.¹⁶⁰ Military discipline constitutes the difference between an army and a mob. Obedience and order are the backbone of any military force. The SANDF simply cannot function properly when its members absent themselves from duty without permission, contrary to the job they agreed to do, and the rules with which they undertook to comply. The appellants’ conduct was a flagrant breach of duty. It is precisely for this kind of conduct that s 59(3) was enacted.”¹⁶¹

It is worth noting that once the jurisdictional requirements of section 59(3) are satisfied, the member must be regarded as having been dismissed on account of misconduct, by operation of law and without a hearing.¹⁶² More particularly, the consequences of deemed discharge would be rendered meaningless by any inquiry into the absence of the member under section 103(1), a point since confirmed in *Grootboom v National Prosecuting Authority*.¹⁶³ By parity of reasoning, the power granted to the Chief of the SANDF to authorise the reinstatement of members deemed to have been discharged in terms of section 59(3), would similarly be rendered nugatory, *a fortiori*, when a board of inquiry convened under section 103(1) “has no power to determine the reasons for the absence without leave”.¹⁶⁴

It will be remembered that the court above gave greater prominence to the fact that a board of inquiry had not been convened, in terms of section 103(1), before the dismissals. Doing so led Basson J to overlook the fact that “s 59(3), critical to the functioning of the SANDF as a disciplined military force, will be stripped of its efficacy if it is construed as a first step in a section 103(1) board of inquiry procedure”.¹⁶⁵ The reality is that the text, structure, and purpose of section 59(3) do not allow for such a construction.

4 CONCLUSION

From the preceding discussion, it seems clear that the disqualifications of insolvent persons from certain occupations may be a catalyst for the erosion of livelihoods and a predictable slide into precarity. Whilst the insolvent employee is not automatically dismissed upon his or her insolvency, under certain circumstances the insolvent employee may be dismissed from employment following their insolvency.

¹⁵⁹ *Maswanganyi* para 38.

¹⁶⁰ S 200 (1) of the Constitution states: “The defence force must be structured and managed as a disciplined military force.”

¹⁶¹ *Masinga* para 47.

¹⁶² Para 48.

¹⁶³ 2014 1 BCLR 65 (CC) para 37; see also Mathiba “Deemed dismissals and suspensions in the public sector” 2015 *Obiter* 223.

¹⁶⁴ *Mamasedi* para 11.

¹⁶⁵ *Masinga* para 49.

If the dismissal is attributed to a disqualification indicated in a statute, it is by operation of law and there could be no talk of an unfair dismissal. In such a case the insolvent employee is in the same situation as a deemed discharged absentee public sector employee, or person who has vacated office because of a judicial declaration of invalidity of his or her appointment. In these circumstances, the prospects of reinstatement are very slim indeed.¹⁶⁶

However, if the dismissal is based on a rule or policy of an employer, the employee is entitled to defend themselves and allege unfair dismissal and claim reinstatement. In this instance, it was held in *Spijkerman* that a policy or rule of practice of an employer that automatically dismisses an employee without considering the circumstances that lead to the insolvency and the employee's competence to perform their duties is unjust, bad law, and bad policy. With that said, because of the dire implications of the dismissal, each case of an insolvent employee has to be decided upon its own facts.

¹⁶⁶ *Western Cape Education Department v The General Public Service Sectorial Bargaining Council* 2014 ILJ 3360 (LAC). See also Okpaluba & Budeli-Nemakonde "Reinstatement in the context of 'deemed dismissal': A critical analysis of recent case law" 2022 *SA Merc LJ* 1.