

Dismissal for absconding in the public sector: Is it the end to procedural and substantive fairness?

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This research is dedicated to my late mother Irene Nosipho Nkosi who instilled in me a passion for education and gave me the best education. Ngiyabonga mawe!

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ABSTRACT

South African labour law is governed by the Labour Relations Act 66 of 1995 (LRA) as amended. Section 185 of the LRA provides a right to all employees not to be dismissed unfairly. The LRA in section 188 recognises three grounds for dismissal namely the employee's conduct, capacity and the employer's operational requirements.

For a dismissal to be fair, it has to be both procedurally and substantively fair. Procedural fairness entails that an employee is allowed to be heard in a disciplinary enquiry and substantive fairness means that an employee is dismissed for a fair reason.

The Employment of Educators Act 76 of 1998 as amended (EEA), the Public Service Act 103 of 1994 as amended (PSA) and The South African Police Service Act 68 of 1995 (SAPS Act) are legislations applicable to public service. These legislations introduced the so-called deemed dismissal or dismissal by operation of law where an employee is dismissed without being heard. In terms of these Acts, dismissal is by operation of law and not dismissal as expounded by section 186 of the LRA. The deeming provision has some semblance to procedural fairness in that an educator or an officer is given an opportunity after being deemed dismissed for being absent without authorisation to make a written submission to explain his or her absence by showing good cause. But a police officer is deemed dismissed if he or she is convicted of a crime and sentenced to direct imprisonment without the option of paying a fine. The concept of deemed dismissals does not apply to the private sector.

The study will investigate whether the provision of deemed dismissals conflicts with the procedural and substantive requirements as expounded in the LRA. In addition, whether the remedies available in the LRA for an employee unfairly dismissed are also available to an employee who has been dismissed by operation of law and if the employer's refusal to reinstate an employee deemed dismissed amounts to dismissal.

The study will conclude by making recommendations to amend the current legislation on dismissal by operation of law.

LIST OF ACRONYMS & LATIN TERMS USED

<i>Acta Juridica</i>	Law journal of the University of Cape Town
<i>Albeit</i>	Even though
<i>Audi alteram partem</i>	Hear the other side
<i>A quo</i>	From which
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
EA	Employment Act
EEA	Employment of Educators Act
<i>Et al</i>	And others
HOD	Head of Department
<i>i.e.</i>	That is
ILJ	International Law Journal
ILO	International Labour Organisation
<i>in casu</i>	In this case
LC	Labour Court
<i>lacuna</i>	A gap
LAC	Labour Appeal Court
LRA	Labour Relations Act
MEC	Member of Executive Council
NASC	Supreme Court of Namibia
N.O.	And others
NALCMD	Namibia Labour Court Main Division
NEHAWU	National Education, Health, and Allied Workers' Union
NLA	Namibian Labour Act
NPSA	Namibia Public Service Act
PAJA	Promotion of Administrative Justice Act
PAWUSA	Public and Allied Workers' Union
PSA	Public Service Act
s	Section
SAPS Act	South African Police Service Act
SCA	Supreme Court of Appeal
NLLP	Namibian Labour Law Publication
UGHCCD	Uganda High Court Civil Division
UPSSO	Uganda Public Standing Service Order
ZACC	Constitutional Court of South Africa
ZALAC	Labour Appeal Court of South Africa
ZALCCT	Cape Town Labour Court, South Africa
ZALCJHB	Johannesburg Labour Court, South Africa
ZALCPE	Port Elizabeth Labour Court, South Africa
BCLR	Bulletin of Comparative Labour Relations
ZASCA	Supreme Court of Appeal, South Africa

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CHAPTER 1

INTRODUCTION

1.1 Background

The Labour Relations Act (LRA)¹ was enacted in order to give effect to section 23(1)² of the Constitution.³ Every employee has the “right not to be unfairly dismissed and subjected to unfair labour practice”.⁴ “Dismissal means that an employer has terminated a contract of employment with or without notice”.⁵ Newaj has noted that “dismissals are commonplace in employment and arise for various reasons. One such reason is the unacceptable or undesirable conduct of an employee, which is recognised as a dismissal for misconduct”.⁶ The LRA requires that a dismissal must be for a fair reason.⁷

Du Toit *et al*, note that “the common denominator of the various forms of dismissal is that all of them are ultimately caused by the employer”.⁸ This research argues that this is incorrect, as it is unfathomable that the employer ought to be held accountable for the unbecoming conduct of an employee, considering that the said employee can justifiably be dismissed due to his or her misconduct or incapacity.⁹ Newaj also notes that one of the reasons for dismissal may be the unacceptable conduct of an employee.¹⁰ In addition, in the public sector, there is a provision where dismissal comes about due to the operation of law, which is also referred to as ‘deemed dismissal’. This provision comes into effect when an educator or officer is absent without authorisation for a period stipulated in the Employment of Educators Act (EEA)¹¹ or the Public Service Act (PSA).¹² The South African Police Service Act (SAPS

¹ 108 of 1996.

² “Everyone has the right to fair labour practices”.

³ Section 1(a) of the LRA.

⁴ Section 185 of the LRA.

⁵ Section 186 of the LRA.

⁶ Newaj K ‘Does the incorrect classification of misconduct charges constitute substantive fairness? EOH Abantu v CCMA 2019 40 ILJ 2477 (LAC)’ *Obiter* (2020) 41.

⁷ Section 188 (c) of the LRA.

⁸ Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2020) 426.

⁹ Section 188 (1) (b) of the LRA.

¹⁰ Newaj K ‘Does the incorrect classification of misconduct charges constitute substantive fairness? EOH Abantu v CCMA 2019 40 ILJ 2477 (LAC)’ *Obiter* (2020) 632.

¹¹ 76 of 1998 (as amended).

¹² 103 of 1994 (as amended).

Act)¹³ also provides for deemed dismissal but under different circumstances i.e., where a police officer is convicted of a crime and sentenced to direct imprisonment without an option of a fine. Deemed dismissal is not applicable in the private sector.

This study will consider the concept of deemed dismissals, presenting an analysis of whether deemed dismissals comply with the requirements of procedural and substantive fairness as envisaged by the LRA and also explore whether there are any remedies in the LRA that are available to an employee who was deemed dismissed.

1.2 Research questions

The study aims to address the following research questions:

- (1) Does the termination of absconding employees in the public sector circumvent the principles of procedural and substantive fairness of the LRA?
- (2) Is an employee who is deemed dismissed entitled to reinstatement?
- (3) Does an employer's refusal to reinstate a deemed dismissed employee amount to dismissal?

1.3 Scope of the study

The study concerns dismissal for abscondment in the public sector, with a focus placed on dismissal by operation of law in terms of the EEA and the PSA. Since police officers form part of the public service the SAPS Act makes provision for deemed dismissal, *albeit*, under different circumstances, a brief discussion of the provision is presented.

In the private sector abscondment or desertion is dealt with in terms of the LRA and in this research is not dealt with in detail.

1.4 Research methodology

This study presents an analysis of the doctrine of dismissals by operation of law. This is achieved by conducting legal research on international standards, the Constitution,

¹³ 68 of 1995.

labour statutes, textbooks, journal articles and judicial precedent. Thereafter, a conclusion is drawn.¹⁴

A comparative approach is adopted, where South African jurisprudence on deemed dismissals is compared to the position of Uganda and Namibia. Uganda is chosen because just like South Africa, Uganda has enacted labour legislation called the Uganda Public Standing Service Order (UPSSO)¹⁵ which provides for deemed dismissals in the public service. Similarly, the Namibian Public Service Act (NPSA)¹⁶ recognises the dismissal of employees in public service by operation of the law.

1.5 Overview of the chapters

Chapter One serves as the introduction to the study. It provides the basis for the study, sets out the research questions, defines the scope, and explains the research methodology utilised.

In Chapter Two focus is placed on the International Labour Organisation (ILO) legislative framework on dismissals, constitutional provisions on dismissals, the LRA's applicable provisions on dismissals and an analysis of the relevant case law on dismissals.

Chapter Three focuses on dismissals by operation of law. An in-depth analysis of the legislative framework of deemed dismissals or dismissals by operation of law is undertaken. The remaining parts of the chapter focus on jurisdictional requirements for deemed dismissals in terms of the Employment of Educators Act and the Public Service Act and the South African Police Act. The recourse available to a deemed dismissed employee will also be discussed.

The focus in Chapter Four shifts to a comparative analysis of deemed dismissal in two African countries, namely Uganda and Namibia. The Constitutional provisions on dismissal for misconduct in Uganda and Namibia are discussed. Furthermore, dismissal for misconduct and dismissal by operation of the law in terms of the Ugandan Public Service Standing Orders and the Namibian Labour Act are discussed. Remedies for unfair dismissal are also discussed.

¹⁴ Hutchinson T 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' *Erasmus L. Rev.* 8 (2015) 132.

¹⁵ Act of 2010.

¹⁶13 of 1995.

By way of conclusion, Chapter Five answers the research questions and makes recommendations on legislative reform that is required on dismissals by the operation of the law.

CHAPTER 2

LEGISLATIVE FRAMEWORK ON DISMISSAL

2.1 Introduction

The Termination of Employment Convention¹⁷ was adopted by the ILO for employees to be provided with job security.¹⁸ ILO conventions are binding only to member states who have ratified that particular convention. A country that has ratified a convention is subjected to the Constitution of the supervisory bodies.¹⁹ South Africa has not ratified Convention 158 of 1982 however when South African labour laws are interpreted they take cognisance of International Law.²⁰

The South African Constitution is one of the basic sources of labour relations law in South Africa.²¹ Several provisions in the Bill of Rights are relevant to South Africa's labour law,²² in interpreting the Bill of Rights a Court or forum must consider International Law.²³ In addition, every Court "when interpreting any legislation, must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".²⁴

The aim of the LRA is "to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation".²⁵ The LRA provisions apply to all employees and there is no distinction made between private sector and public sector employees.²⁶ In terms of the LRA public service is defined as "the national departments, provincial administrators, provincial departments and organisational components contemplated in section 7(2) of the PSA".²⁷

¹⁷ Termination of Employment Convention 158 of 1982.

¹⁸ Napier B 'Dismissal – The New I.L.O Standards' *Indus LJ* 12 (1983) 17.

¹⁹ Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law @work* (2019) 25.

²⁰ Smit P and van Eck BPS 'International perspectives on South Africa's unfair dismissal law' *Comparative and International Law Journal of Southern Africa* 43 (2010) 49.

²¹ Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2020) 73.

²² Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 8.

²³ Section 39 (b) of the Constitution.

²⁴ Section 233 of the Constitution.

²⁵ Section 1 (b) of the LRA.

²⁶ Section 213 (a)-(b) of the LRA.

²⁷ Section 213 of the LRA.

According to the LRA, dismissal must be effected for a reason that is fair. A person tasked with determining the fairness of the dismissal must have due regard for the Code of Good Practice: Dismissal.²⁸ The Code of Good Practice (Schedule 8 of the LRA) prescribes that the employer should hold an enquiry to determine whether there is a ground or grounds for dismissal.²⁹ A dismissal that is found to be unfair gives the court or arbitrator the power to order: a) reinstatement, b) reinstatement or c) compensation.³⁰

2.2 ILO Recommendation 119

In 1950, an ILO resolution noted that there were no international standards that dealt with the termination of employment, despite³¹ the promotion of rights at work being a primary objective of the ILO. International labour standards that govern the termination of employment were developed in order to achieve the ILO's objective.³² One such labour standard is Recommendation 119 on the Termination of Employment of 1963.³³ However, recommendations are regarded as guidelines and article 1 gives member states discretion to give effect to the recommendation in a manner that is consistent with the country's practice and appropriate for the national conditions.³⁴ Van Niekerk *et al*, argue that ILO Recommendation, as implied by the name cannot be ratified, and as such does not bind member states.³⁵

Notwithstanding the above, recommendation 119 provides key guidance on the termination of employment, stating that the reasons for termination of employment are the conduct or capacity of a worker or the operational requirements of the establishment.³⁶ It also provides for unfair reasons for termination of employment which are: a) belonging to a union, b) acting as a worker representative, c) filing a

²⁸ Section 188 of the LRA.

²⁹ Mathiba MK 'Deemed dismissal and suspensions in the public sector Grootboom v National Prosecuting Authority (2014) ILJ 121 (CC) cases 'Obiter (2015) 223.

³⁰ Section 193 (a) - (c) of the LRA.

³¹ Cassim N 'Unfair Dismissal' *Indus. LJ* 5 (1984) 277.

³² Newaj K 'Critical Analysis of the Nebulous Concept of Incompatibility within South African Dismissal Law' (LLM Thesis) University of Pretoria, 2011) 5.

³³ ILO Recommendation 119 of 1963.

³⁴ Cassim N 'Unfair Dismissal' *Indus. LJ* 5 (1984) 278.

³⁵ Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* (2019) 25.

³⁶ Article 2 paragraph 1 of Recommendation 119.

complaint against the employer, d) reasons based on race, e) colour or marital status.³⁷

2.2.1 ILO Convention 158 of 1982

Approximately 20 years later, the ILO introduced Convention 158, which states that termination of employment occurs when the employment relationship is terminated at the employer's initiative.³⁸ Article 4 provides that no services of a worker can be terminated unless the reason is connected to capacity, conduct and operational requirements of the establishment.³⁹ Smith and Van Eck submit that the three grounds recognised by the ILO as the only permissible grounds for terminating the services of workers are those related to: "a) misconduct, b) incapacity, c) or the employer's operational requirements".⁴⁰ Those reasons not regarded as fair reasons for termination of the employment relationship are outlined in Article 5 and Article 6.⁴¹

A worker's services can be terminated based on the grounds that are related to the conduct of the worker or his or her performance. However, before termination can be effected the worker must be given the opportunity to defend himself or herself against the allegations levelled against him or her.⁴²

Article 8 accords a worker the right to appeal his or her termination to an impartial forum namely a court, labour forum or arbitration tribunal if he or she considers that his or her employment has been unjustly terminated.⁴³

2.3 The Provisions of the Constitution Act of 1996

Section 8 of the Constitution states that the Bill of Rights is not only binding on the legislature, but that it is also binding to the executive, the judiciary and all organs of the State including natural and juristic persons to which a particular right applies.⁴⁴

³⁷ Article 2 paragraph 3 of Recommendation 119.

³⁸ Article 3 of Termination of Employment 158 of 1982.

³⁹ Termination of Employment 158 of 1982.

⁴⁰ Smit P and van Eck BPS 'International perspectives on South Africa's unfair dismissal law' Comparative and International Law Journal of Southern Africa (2010) 49.

⁴¹ Termination of Employment 158 of 1982.

⁴² Article 7 of Termination of Employment 158 of 1982.

⁴³ Article 8 paragraph 1 of Termination of Employment 158 of 1982.

⁴⁴ Section 8 (1)-(2) of the Constitution.

The concept of labour practices that are unfair was first introduced into the law of South Africa by the Wiehahn Commission in 1979 and was later adopted in the Constitution.⁴⁵ Section 23 states that “everyone has the right to fair labour practices”.⁴⁶ “The reference to everyone extends to employers”.⁴⁷ In *NEHAWU v University of Cape Town & Others*,⁴⁸ the Constitutional Court (CC) held that “the right to fair labour practices is not defined by the Constitution”⁴⁹ and it is left to get its meaning primarily from the Courts decisions and legislation.⁵⁰

The Constitution further provides that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.⁵¹ The Promotion of Administrative Justice Act⁵² was enacted in order to give effect to section 33 of the Constitution.

The question of what constitutes administrative action was considered in *Phenithi v Minister of Education and Others*.⁵³ Here, the Supreme Court of Appeal (SCA) was tasked with answering the question as to whether the discharge of the appellant who was in the employ of public service constituted administrative action. In answering this question, the SCA held that unfair labour practice was not present as there was no ‘administrative act’ or ‘decision to be reviewed and to be set aside’.⁵⁴ The decision of *Phenithi* was confirmed in *Chirwa v Transnet Ltd and Others*,⁵⁵ where the CC had to deal with a public sector employee who was dismissed. Ms Chirwa referred the matter to the CCMA, however, when conciliation failed, she then referred the matter to the High Court where she sought to review the decision to dismiss her.⁵⁶ The Court held that the dismissal of the applicant was not administrative action under PAJA.⁵⁷

In the same vein, in *Gcaba v Minister of Safety and Security and Others*,⁵⁸ the CC was tasked with determining whether the decision of the public service employer not to

⁴⁵ Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* (2019) 43.

⁴⁶ Section 23 (1) of the Constitution.

⁴⁷ Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* (2019) 42.

⁴⁸ (2003) 3 SA 1 (CC).

⁴⁹ *NEHAWU v University of Cape Town & Others* (2003) 3 SA 1 (CC) at para 33.

⁵⁰ *NEHAWU v University of Cape Town & Others* (2003) 3 SA 1 (CC) at para 34.

⁵¹ Section 33(1) of the Constitution.

⁵² Act 3 of 2000.

⁵³ (2006) 1 All SA 601 (SCA).

⁵⁴ *Phenithi v Minister of Education and Others* (2006) 1 All SA 601 (SCA) at para 10.

⁵⁵ (2008) 29 ILJ 73 (CC).

⁵⁶ *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 2.

⁵⁷ *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC) at para 196.

⁵⁸ (2009) 12 BLLR 1145 (CC).

promote an employee i.e. unfair labour practice constituted administrative action. Van der Westhuizen J noted in this regard:

“Section 23 regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The ordinary thrust of section 33 is to deal with the relationship between the state as bureaucracy and citizens and guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 33 does not regulate the relationship between the state as an employer and its workers. When a grievance is raised by an employee relating to the conduct of the state as an employer and it has few or no direct implications or consequences for other citizens. It does not constitute administrative action”.⁵⁹

It is therefore submitted that the judgments in *Phenithi*, *Chirwa* and *Gcaba* have dispelled the supposition that public sector employees wanting to challenge dismissal and labour practices that are unfair can directly rely on s 158(1)(h) of the LRA. The section cannot be used to bypass dispute resolution mechanisms provided for in the LRA.

The discussion will now turn to the provisions of the LRA dealing with dismissals.

2.4 The Labour Relations Act 66 of 1995

The LRA was enacted to give effect to section 23(1) of the Constitution.⁶⁰ The LRA defines an employee as-

- (a) “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer”.⁶¹

Cohen notes that the LRA affords employees protection against unfair dismissals.⁶² This right is found in s 185 (a) of the LRA.⁶³ Furthermore, “employees have a right not to be subjected to unfair labour practices”.⁶⁴ The LRA recognises three reasons or circumstances where dismissal would be considered fair, which are akin to those

⁵⁹ *Gcaba v Minister of Safety and Security and Others* (2009) 12 BLLR 1145 (CC) at para 64.

⁶⁰ Section 1(a) of the LRA.

⁶¹ Section 213 of the LRA.

⁶² Cohen T ‘Termination of Employment Contracts by Operation of Law-Bypassing the Unfair Dismissal Provisions of the Labour Relations Act Stellenbosch Law Review (2006) 91.

⁶³ “Every employee has a right not to be unfairly dismissed”.

⁶⁴ Section 185 (b) of the LRA.

stipulated in ILO Recommendation 119 and ILO Convention 158. These are a) misconduct, b) operational requirements and c) capacity.⁶⁵ This illustrates that the LRA gives effect to international law. Van der Walt *et al*/submitted that absence without taking leave is misconduct and that a dismissal under these circumstances ought to be substantively and procedurally fair in accordance with section 188 of the LRA.⁶⁶

2.4.1 Schedule 8 of the LRA: procedural fairness

The provisions of Schedule 8 give effect to the right to procedural fairness espoused in section 188 (1) (b) of the LRA and to the provisions of ILO Convention 158. The employer is duty-bound to ensure that a fair procedure is followed before an employee is dismissed.⁶⁷ Mathiba notes that Schedule 8 prescribes that the employer should hold an enquiry to determine whether there is a ground or grounds for dismissal.⁶⁸

According to Schedule 8, procedural fairness entails that: a) before an employee is dismissed a disciplinary enquiry should be conducted, b) the employee must be notified about the allegation(s) that are levelled against him or her using a language that the employee understands, c) the employee must be given an opportunity to respond to the allegation(s), d) the employee should be given a reasonable time to prepare for the enquiry, e) the employee should be given written reasons about the outcome of the enquiry and f) the dismissed employee must be reminded of his or her right to refer the matter to a council that has jurisdiction or any dispute resolution procedure in terms of a collective agreement.⁶⁹

Grogan argues that before taking a decision to dismiss a worker there should be a disciplinary enquiry to afford an employee a chance to answer to the charge brought against him or her.⁷⁰ However, a flexible approach was endorsed in *Avril Elizabeth*

⁶⁵ Van Zyl L' An evaluation of fairness criteria for dismissal due to absenteeism and desertion in the workplace' (Doctoral thesis) North – West University (2011) 18.

⁶⁶ Van der Walt A, Abrahams D and Qotoyi T 'Regulating the Termination of Absconding Employees in the Public Sector and Public Education in South Africa: A Preliminary View' 141.

⁶⁷ Cohen T 'Termination of employment contracts by operation of law-bypassing the unfair dismissal provisions of the labour relations act' Stellenbosch Law Review (2006) 91.

⁶⁸ Mathiba MK 'Deemed dismissal and suspensions in the public sector Grootboom v National Prosecuting Authority (2014) 121 (CC) cases' Obiter (2015) 223.

⁶⁹ Item 4 of Schedule 8.

⁷⁰ Grogan *Dismissal* (2014) 285.

Home for the Mentally Handicapped v CCMA & Others.⁷¹ Here the Labour Court (LC) submitted that:

“...the Code requires no more than that before dismissing an employee the employer should conduct an investigation, give the employee or his representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision”.⁷²

In upholding the principle of procedural fairness, Levy submits that giving an employee a chance to answer to the allegation(s) brought against him or her is upholding the rules of natural justice namely the *audi alteram partem* rule.⁷³ The importance of the principle of *audi alteram partem* rule emerged in *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*.⁷⁴ Here, the CC found that the applicant was not afforded an opportunity to defend himself. Furthermore, he was also entitled to fair labour practices, and to be dismissed in a manner that is procedurally fair.⁷⁵

Despite the proviso that an employee should be afforded an opportunity to state his or her case in response to an allegation levelled against him or her,⁷⁶ the courts have held that employers may be justified in convening a disciplinary process in the absence of the employee. This view was echoed in *Old Mutual Life Assurance Co SA v Gumbi*,⁷⁷ where the respondent was dismissed for misconduct following a disciplinary enquiry. The respondent challenged the dismissal based on the fact that the hearing was held without him therefore he was dismissed before being given an opportunity to attend the disciplinary enquiry. The SCA held that:

“When all these facts are viewed objectively, it cannot be said that Old Mutual has acted procedurally unfairly in continuing with the hearing in the employee’s absence and dismissing him for the misconduct of which he was found guilty. The employee and his representative are the only persons to blame for his absence.”⁷⁸

⁷¹ (2006) 9 BLLR 833 (LC).

⁷² *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 9 BLLR 833 (LC) at para 834.

⁷³ Levy A ‘Can Anybody Hear Me? The Audi rule and Dismissal of Unprocedural Strikers’ *Indus LJ* 31 (2009) 825.

⁷⁴ (2021) ZACC 14.

⁷⁵ *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (2021) ZACC14 at para 4.

⁷⁶ Item 4(1) of Schedule 8.

⁷⁷ [2007] BLLR 699 (SCA).

⁷⁸ *Old Mutual Life Assurance v Gumbi* (2007) BLLR 699 SCA at para 21.

Furthermore, in *Foschini Group v Maidi and Others*⁷⁹ the respondents were charged with stock theft. A disciplinary enquiry was scheduled but the respondents did not attend the disciplinary enquiry and they were subsequently dismissed. The matter was taken on appeal. The Labour Appeal Court (LAC) held that “it is a trite principle in our law that a party who chooses not to attend a hearing, does so at his or her peril, and is precluded from later complaining about the outcome of the hearing”.⁸⁰

I am of the opinion that the judgments in *Old Mutual* and *Foschini Group* were decided correctly. It is trite that the Constitution accords every employee the right to fair labour practice which is expressed in the LRA as the right to a fair dismissal procedure. However, rights are not absolute and as such, they can be limited.⁸¹

In *S v Makwanyane & Another*⁸² the CC held for the purpose of limiting rights in terms of s 36 of the Constitution it involves weighing two or more conflicting interests.⁸³ The courts in *Old Mutual* and *Foschini Group* applied the principle laid down in *Makwanyane* by weighing the interest of the employer against that of the employee. The interest of the employer trumps the interest of the employee who was given an opportunity to be heard but squandered it, moreover, the employer has the right to discipline his or her employee.⁸⁴ It cannot be expected that the employer be held at ransom by an employee who is not willing to answer for his or her unbecoming conduct.

2.4.2 Schedule 8 of the LRA: substantive fairness

Dismissal must be substantively fair⁸⁵ in other words dismissal ought to be effected for a reason that is either fair or valid.⁸⁶ In determining substantive fairness, Newaj submits that:

“there are a number of factors that must be considered in determining substantive fairness (item 7 of the Code of Good Practice). Firstly, it must be considered whether the employee contravened a rule or standard regulating conduct in the workplace.

⁷⁹ (2010) 31 ILJ 1787 (LAC).

⁸⁰ *Foschini Group v Maidi and Others* (2010) 31 ILJ 1787 (LAC) at para 58.

⁸¹ Section 36(1) of the Constitution.

⁸² 1995 (6) BCLR 665 (CC).

⁸³ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para 104.

⁸⁴ *Tshenelo Waste (Pty) Ltd v Sekgoro and Others* (2021) 42 ILJ 2693 (LC) at para 42.

⁸⁵ Section 188 (1) (a) of the LRA.

⁸⁶ Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* (2009) 118.

Secondly, where a rule or standard was contravened, the commissioner has to consider whether the rule or standard was consistently applied; and whether the dismissal of the employee for contravening the rule or standard was an appropriate sanction”.⁸⁷

The Courts, when applying the law in determining substantive fairness, have handed down different judgments. As mentioned by Newaj, there are guidelines that must be considered by a person who is determining the fairness of a dismissal for misconduct. These are: a) whether a rule was contravened, b) if in the affirmative whether it is a valid rule, c) whether the employee was aware of the rule, d) whether the rule was consistently applied and e) whether a dismissal is an appropriate sanction.⁸⁸ Furthermore, the guidelines on substantive fairness were developed in *Sidumo v Rustenburg Platinum Mines Ltd*⁸⁹ where the CC found that:

“there is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All indicators are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator”.⁹⁰

In an instance where an employee has been dismissed as a result of misconduct, the onus shifts to the employer to demonstrate the existence of substantive fairness by proving that a workplace rule was contravened by said employee.⁹¹ A workplace rule that is valid cannot be against public policy or any law and the employer has the responsibility to bring the rule to the attention of the employee.⁹² Van Niekerk states that:

“the LRA does not provide any specific indicators that signal the need for statutory protection against unfair dismissal, nor does it expressly articulate any conception of justice that might inform a determination of the fairness of a particular dismissal. At best, the Code of Good Practice, published simultaneously with the LRA, suggests that

⁸⁷ Newaj K ‘Does the incorrect classification of misconduct charges constitute substantive fairness? EOH Abantu v CCMA (2019) 40 ILJ (LAC)’ *Obiter* (2020) 632.

⁸⁸ Item 7(a)-(b) (i) - (iv) of Schedule 8.

⁸⁹ (2007) 28 ILJ 2405 (CC).

⁹⁰ *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) at para 40.

⁹¹ *Grogan Dismissal* (2014) 179.

⁹² Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 444-445.

not every instance of serious misconduct warrants dismissal and that the tolerability of continued employment is the determining factor”.⁹³

There are remedies at the disposal of an employee who has been unfairly dismissed and these will be discussed in the next section.

2.5 Remedies for unfair dismissal

The three remedies provided in the LRA for an employee who alleges unfair dismissal are a) reinstatement, b) re-employment, or c) compensation.⁹⁴ An employee who has been dismissed can refer a dispute about unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA),⁹⁵ or a council that has jurisdiction.⁹⁶ Reinstatement and re-employment are primary remedies for unfair dismissal. “The judge or arbitrator does not have the discretion to award a combination of these remedies. Reinstatement and compensation are therefore mutually exclusive.”⁹⁷

Reinstatement means an employee will resume his or her duties on the exact terms and conditions of employment that existed before his or her dismissal, and this implies that the period of unemployment is deemed uninterrupted.⁹⁸ The word reinstatement was assigned a meaning in *Nel v Oudtshoorn Municipality*.⁹⁹ The SCA held that the word reinstatement must be assigned its ordinary meaning i.e. to put back a worker in the same position that was occupied by him or her before dismissal.¹⁰⁰ On the other hand, re-employment implies that the employee is re-employed but under new terms.¹⁰¹

The arbitrator or judge can make an order for compensation which is equivalent to 12 months’ salary calculated on the salary earned by the employee at the date of dismissal.¹⁰² This principle was enunciated in the case of *Okhahlamba Local*

⁹³ Van Niekerk A ‘Dismissal for Misconduct – Ghosts of Justice Past, Present and Future’ *Acta Juridica* (2012) 102.

⁹⁴ Section 193 (1) (a-c) of the LRA.

⁹⁵ Established in terms of Section 113 of the LRA.

⁹⁶ Section 191 (1) (a) of the LRA.

⁹⁷ Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 117.

⁹⁸ Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 117.

⁹⁹ [2013] 34 IJL 1737 (SCA).

¹⁰⁰ *Nel v Oudtshoorn Municipality* (2013) 34 IJL 1737 (SCA) at para 9.

¹⁰¹ Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 119.

¹⁰² Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi

*Municipality v Mabuya & others*¹⁰³ where an employee was dismissed for failing to return to work without an explanation. The LC held that the employee's dismissal was substantively unfair and the employee was awarded an equivalent of four months' salary calculated at the rate the employee was paid.¹⁰⁴

2.6 Case analysis

The thread running through the case law dealing with procedural and substantial fairness is that a decision to dismiss an employee should follow after the employee has been given a chance to state his or her case.

In *Avril Elizabeth Home*,¹⁰⁵ the principle of procedural fairness was expressed in the notion of the right to respond to the allegation. In subsequent court decisions of *Old Mutual*¹⁰⁶ and *Foschini Group*,¹⁰⁷ the Courts held that it was not procedurally unfair to hold a disciplinary enquiry in the absence of the employee. In *McGregor*,¹⁰⁸ the Constitutional Court held that the dismissal of the applicant was procedurally unfair, and that compensation was just and fair.¹⁰⁹

2.7 Conclusion

The ILO enabled South Africa to be part of the international labour community and South African constitutional provisions are aligned with international labour principles. The ILO Termination of Employment Convention¹¹⁰ has not been ratified by South Africa, but when the LRA was enacted, it incorporated the three grounds of dismissal namely: a) misconduct, b) capacity and c) operational requirements embodied in the Convention.

Dismissals must be procedurally fair which dictates that an employee must be given a hearing before he or she is dismissed. Substantive fairness entails that an employee must be dismissed for a fair or valid reason.

Labour Law in Context (2017) 147.

¹⁰³ (2022) 43 ILJ 198 (LC).

¹⁰⁴ *Okhahlamba Local Municipality v Mabuya & others* (2022) 43 ILJ 198 (LC) at para 42.

¹⁰⁵ *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* (2006) 9 BLLR 833 (LC).

¹⁰⁶ *Old Mutual Life Assurance Co SA LTD v Gumbi* (2007) BLLR 699 (SCA).

¹⁰⁷ *Foschini Group v Maldi and Others* (2010) 31 ILJ 1787 (LAC).

¹⁰⁸ *McGregor v Public Health and Social Development Sectoral Bargaining Council and others* (2021) ZACC 14.

¹⁰⁹ *McGregor v Public Health and Social Development Sectoral Bargaining Council and others* (2021) ZACC 14
At para 48.

¹¹⁰ 158 of 1982.

The Court has held that if an employee has been deprived of his or her right to be heard in a disciplinary hearing and is subsequently dismissed, the remedy at his or her disposal is compensation.¹¹¹

¹¹¹ *McGregor v Public Health and Social Development Sectoral Bargaining Council and others* (2021) ZACC 14 at para 48.

CHAPTER 3

DISMISSAL BY OPERATION OF THE LAW - DEEMED DISMISSALS

3.1 Introduction

Dekker presents that there are different terms used to refer to an employee who stays away from his or her place of employment without a valid reason. These terms are abscondment and desertion.¹¹² Cohen submits in this regard that “desertion occurs when an employee absconds from the workplace with no intention of returning”.¹¹³ In *Okhahlamba Local Municipality v Mabuya & others*,¹¹⁴ the LC stated that abscondment occurs “where an employee is absent from work for a time that warrants the inference that the employee does not intend to return to work”.¹¹⁵

Dekker further submits that desertion is a form of misconduct and that as such, before the employer terminates the employment relationship, a disciplinary hearing must be convened in terms of Schedule 8 of the LRA.¹¹⁶ This notion was expressed in *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹¹⁷ where the SCA held that:

“pursuant to the enactment of the constitution and the adoption into our law of the constitution and the adoption into our law of ILO conventions, the right to a pre-dismissal hearing is well recognised in our law (par 5-6) and that the entitlement to a pre-dismissal hearing is now incorporated into the common-law contract of employment”.¹¹⁸

In general, dismissals in the public sector and the private sector are governed by the same principles of procedural and substantive fairness which are found in the LRA. However, in the public sector, the legislature introduced two pieces of legislation that deal with deemed dismissals or dismissals by operation of law, namely s 14 of the

¹¹² Dekker AH ‘Gone with the wind and not giving a damn: problems and solutions in connection with dismissal based on desertion’ 22 SA *Mercantile Law Journal* (2010) 104.

¹¹³ Cohen ‘Termination of employment contracts by operation of law-bypassing the unfair dismissal provisions of the labour relations act’ Stellenbosch Law review (2006) 95.

¹¹⁴ (2022) 43 ILJ 198 LC.

¹¹⁵ *Okhahlamba Local Municipality v Mabuya & others* (2022) 43 ILJ 198 LC at p200 .

¹¹⁶ Dekker AH ‘Gone with the wind and not giving a damn: problems and solutions in connection with dismissal based on desertion’ 22 SA *Mercantile Law Journal* (2010) 105.

¹¹⁷ (2007) BLLR 699 (SCA).

¹¹⁸ Van Eck BPS ‘Chirwa v Transnet and beyond: Urgent need for the Constitutional Court to provide certainty’ *Journal of South African Law* (2010) 122.

EEA¹¹⁹ and s 17 of the PSA¹²⁰. The SAPS Act¹²¹ also makes provisions for deemed dismissal *albeit* for different circumstances. Erasmus argues that a deemed dismissed employee is not dismissed by the employer, but “instead the employee is dismissed through the mechanism of a legislative provision upon the occurrence of an event”.¹²² The employment contract of a public service employee who has absconded is terminated by the operation of law.¹²³ The position that ‘a deemed dismissal’ constitutes dismissal by operation of law is also applicable to the SAPS Act.¹²⁴

Deemed dismissal relates to abscondment and desertion in that in all three instances there is an element of unauthorised absence, where the employee does not tell the employer about his or her whereabouts and this gives the employer a right to infer that the employee has no intention of returning to work. In the public sector for the employer to invoke the deeming provision the offending employee has to either have absconded or deserted his or her workplace.

3.2 Does deemed dismissals exist in the private sector?

The rule of thumb is that an employee charged with misconduct ought to be given a chance to respond to the charge brought against him or her.¹²⁵ This was echoed in *South African Broadcasting Authority v CCMA & Others*.¹²⁶ Here the employee was charged with desertion. The employer was unsuccessful in getting the employee to report for duty. The employer resorted to issuing an ultimatum to the employee to return on a specified date. The employee did not comply and he was subsequently dismissed without being invited to a disciplinary enquiry.¹²⁷ The LC held that:

“Where an employer has an effective means of communicating with an employee who is absent from work, the employer has an obligation to give effect to the *audi alteram partem* rule before the employer can take the decision to dismiss such an employee for his absence from work or for his failure to report for duty.”¹²⁸

¹¹⁹ 76 of 1998 as amended.

¹²⁰ 103 of 1994 as amended.

¹²¹ 68 of 1995.

¹²² Erasmus J-L ‘Deemed dismissals in South African Labour Law’ accessed: <http://ceosa.org/deemed-dismissals-in-south-african-labour-law/text>.

¹²³ *MEC: Gauteng Department of Education v Msweli* (2013) 34 ILJ 650 (LC) at para 25.

¹²⁴ Section 1 of the SAPS act 68 of 1995.

¹²⁵ Item 4(1) of the LRA.

¹²⁶ (2002) 8 BLLR 693 (LAC).

¹²⁷ *South African Broadcasting Authority v CCMA* (2002) 8 BLLR 693 (LAC) at para 4-5.

¹²⁸ *South African Broadcasting Authority v CCMA* (2002) 8 BLLR 693 (LCA) at para 15.

The same stance was taken in *SACWU v Dyasi*.¹²⁹ The employee on being promoted was transferred to another branch, but instead, she requested to be transferred back to where she was working before her promotion. Approval of this transfer request never materialised. She subsequently took leave, and on her return, she was told that her failure to report to the new branch was tantamount to desertion and was subsequently dismissed.¹³⁰ The Labour Appeal Court held that the appellant was obliged to dismiss the respondent in a manner that is both procedurally and substantively fair, i.e. a disciplinary enquiry has to precede termination of employment.¹³¹

However, in *Lebowa Platinum Mines Ltd v CCMA & others*,¹³² an employee was dismissed without holding a disciplinary enquiry for his unauthorised absence for four (4) days. The company had a policy providing that unauthorised absence for six (6) days be treated as desertion. The employee returned to work on the fifth day and did not report to his supervisor however, on getting information from a colleague that he had been dismissed, left the premises of the employer and told a colleague that he found other employment closer to his family. He declared a dispute of unfair dismissal and the arbitrator held that the dismissal was substantively and procedurally unfair. The employer took the decision on review and the Labour Court held that the employee's dismissal was fair.¹³³ The court further held that the employer's duty to conduct a disciplinary hearing can only arise when:

“there is a proper report and tender of service by the employee, failing which it would be unfair to expect from the employer to conduct such an enquiry. Le Roux's failure to properly report and tender his service exempts the employer from conducting an enquiry. This in line with item 4 of Schedule 8 of the Code of Good Practice.”¹³⁴

There are two conflicting approaches followed by the Labour Courts regarding the requirement of holding a disciplinary enquiry before a dismissal. One approach suggests that when an employee has deserted there should be an attempt to convene a disciplinary enquiry before the employee can be dismissed. The conflicting approach

¹²⁹ (2001) 7 BLLR 731 (LAC).

¹³⁰ *SACWU v Dyasi* (2001) 7 BLLR 731 (LAC) at para 10-12.

¹³¹ *SACWU v Dyasi* (2001) 7 BLLR 731 (LAC) at para 75.

¹³² (2001) ZALC 56.

¹³³ *Lebowa Platinum Mines Ltd v CCMA & others* (2001) ZALC 56 at para 32.

¹³⁴ *Lebowa Platinum Mines Ltd v CCMA & others* (2001) ZALC 56 at para 33.

suggests that convening a disciplinary hearing is only necessary if the employee reports to work and tenders his or her services.¹³⁵

Unauthorised absence puts the employer in a predicament, where there are instances where the employer is unable to trace an employee who has absconded however, the employer is required to show that an effort was made to locate the employee who has absconded. This principle was laid in *Solidarity obo Kotze v Public Health & Sectoral Bargaining Council & Others*¹³⁶ where the LC ruled that:

“In the private sector cases of abscondment entail both absence from work without authority and evidence of the intention on the part of the employee not to return to work. To satisfy the requirements of fairness in abscondment cases the employer had to show that it took steps to locate the whereabouts of the employee.”¹³⁷

There are instances where it is impractical for an employee to report for duty because he or she is incarcerated as in the case of *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council (MEIBC) & Others*.¹³⁸ The appellant who conducts business in the mining sector was the employer of the fourth respondent. The fourth respondent was incarcerated for a period of 150 days and therefore could not render his services. He was subsequently dismissed for incapacity and the letter of his dismissal was submitted to the police station where he was held. The fourth respondent took the matter to arbitration, where it was found in his favour and the arbitrator ordered reinstatement as he was not given a chance to state his case thereby rendering the disciplinary enquiry procedurally unfair. On review, the judge agreed with the second respondent, and the matter was taken on appeal. The LAC held that dismissal was substantively fair, but procedurally unfair and the fourth respondent was awarded compensation equivalent to six months' salary as just and equitable.¹³⁹

The principle that an employee who is incarcerated cannot be dismissed without holding a disciplinary enquiry was reiterated in *Trident Steel (Pty) v Commission for Conciliation, Mediation & Arbitration & Others*.¹⁴⁰ The employer conducted a

¹³⁵ Le Roux 'AWOL' *Juta's Business Law Journal* (2003) 11 39.

¹³⁶ (2010) 31 *ILJ* 3022 (LC).

¹³⁷ *Solidarity obo Kotze v Public Health & Sectoral Bargaining Council & Others* (2010) 31 *ILJ* 3032 LC at para 9.

¹³⁸ (2010) 31 *ILJ* 1838 (LAC).

¹³⁹ *Samancor Tubatse Ferrochrome v Metal & Engineering* (2010) 31 *ILJ* 1838 LAC at para 16.

¹⁴⁰ (2005) 26 *ILJ* 1519 (LC).

disciplinary enquiry in the absence of an incarcerated employee and dismissed him even though they were aware that he was incarcerated. The employee declared a dispute of unfair labour practice and the arbitrator ordered reinstatement as the dismissal was found to be procedurally and substantively unfair. On review, the Labour Court ruled that it was not enough to make an employee aware that he had been dismissed for misconduct in a disciplinary enquiry that he did not attend.¹⁴¹

The answer to the question whether deemed dismissal existed in the private sector was clarified in *Jammin Retail (Pty) Ltd v Mokwane and Others*,¹⁴² where it was stated that:

“The authorities are in agreement that such a termination is not a dismissal as the contract is not terminated by virtue of the decision of the employer but by the operation of law. In other words, the employment contract is deemed to have been terminated due to absence from work by the employee and not the decision of the employer. This approach is generally applicable in the public sector and the same does not apply in the private sector.”¹⁴³

In light of the Court’s decision in *Jammin*, where it was succinctly stated that deemed dismissals are only applicable in the public sector, dismissals for desertion or abscondment in the private sector must be preceded by a disciplinary enquiry.

In *Kotze*, the Court laid down the principle that, in order to satisfy the fairness requirement in abscondment cases the employer must show that steps were taken to trace the employee before dismissing him or her. This implies that there is no dismissal by operation of law as the employee has to be given an opportunity to be heard in a disciplinary hearing.

The *Trident* ruling sends a message that employers in the private sector cannot just convene a disciplinary enquiry without the employee and then dismiss him or her for not coming to work even though the employee’s whereabouts are known. This will not pass muster as a dismissal has to be both substantively and procedurally fair.

¹⁴¹ *Trident Steel (Pty) v Commission for Conciliation, Mediation & Arbitration & Others* (2005) 26 ILJ 1519 (LC) at para 1520A.

¹⁴² (2010) 31 ILJ 1420 (LC).

¹⁴³ *Jammin Retail (Pty) Ltd v Mokwane and Others* (2010) 31 ILJ 1420 (LC) at para 13.

3.3 Deemed dismissal in terms of the Employment of Educators Act 76 of 1998 as amended

Dekker submits that if a clause for desertion is inserted into legislation the contract of employment is not terminated by the employer, but instead, termination is through the operation of law.¹⁴⁴

Section 14 of The Employment of Educators Act exclusively deals with deemed dismissal of educators who are permanently employed and it is not applicable to educators who are appointed in a temporary capacity. In terms of the EEA, an educator is deemed dismissed if: a) he or she is absent for more than fourteen (14) consecutive days without authorisation,¹⁴⁵ b) he or she without the permission of the employer assumes other employment¹⁴⁶ and c) he or she assumes other employment whilst on suspension.¹⁴⁷

In upholding the principle of natural justice that is 'hear the other side' the Gauteng Department of Education before invoking the deeming provision as per prescripts of the explanatory memorandum,¹⁴⁸ sends the offending educator what is referred to as Form A. The manager is required to send Form A if the educator has been absent for more than five (5) working days in order to notify him or her that he or she may be discharged.¹⁴⁹ Form A reads as follows:

"Dear Sir/Madam

NOTICE OF CAUTION: DISCHARGE IN TERMS OF S. 14(1)(a) OF THE
EMPLOYMENT OF EDUCATORS' ACT

Your unauthorised absence from your place of work, with effect from _____ (date)
refers.

¹⁴⁴ Dekker AH 'Gone with the wind and not giving a damn: problems and solutions in connection with dismissal based on desertion' 22 SA Mercantile Law Journal (2010) 109.

¹⁴⁵ Section 1(a) of the EEA 76 of 1998.

¹⁴⁶ Section 1(b) of the EEA 76 of 1998.

¹⁴⁷ Section 1(c) of the EEA 76 of 1998.

¹⁴⁸ Explanatory Memorandum Regarding The Termination of Services of Employees in terms of s 17 of the PSA and s 14 of the EEA of 27 June 2011.

¹⁴⁹ Explanatory Memorandum Regarding The Termination of Services of Employees in terms of s 17 of the PSA and s 14 of the EEA of 27 June 2011 para 2.1.

You are hereby informed to report for duty and/or requested to submit the prescribed application form for leave, with the supporting documents as required, without delay.

Kindly note that should you fail to do so and 14 (fourteen) days lapse, you may be deemed to have discharged yourself from the service of the Gauteng Department of Education on account of misconduct in terms of Section 14(1)(a) of Employment of Educators Act, 76 of 1998 (as amended).

Yours faithfully”

If the fourteen (14) consecutive days subsequently lapse, another letter is sent via registered mail. This letter prohibits the educators who have absconded to resume duties and gives direction as to where the educator can apply for reinstatement.¹⁵⁰ Form B gives effect to proviso (2) (a) of the EEA.¹⁵¹ The letter reads:

“Dear Sir/Madam

PROHIBITION ON RESUMPTION OF DUTIES: DEEMED DISMISSAL IN TERMS OF S.14(1)(a) OF THE EMPLOYMENT OF EDUCATORS’ ACT

My letter of caution in respect of abscondment dated _____ refers.

Kindly note that by virtue of your own conduct, you are deemed to have discharged yourself from the service of the Gauteng Department of Education on account of misconduct in terms of Section 14(1)(a) of the Employment of Educators Act, 76 of 1998 (as amended).

Your discharge will be confirmed by the Department in due course.

Your attention is drawn to the provisions of Section 14(2) of the Employment of Educators Act, 76 of 1998 (as amended), which states that should you wish to make an application for reinstatement, you must do so in writing to the Head of Department.

Yours faithfully.”

It is of no consequence if Form A does not reach the deemed dismissed educator. This view was expressed in *MEC for Education & Culture v Mabika and Others*,¹⁵² where the court held that if the ultimatum was not received, it does not render the

¹⁵⁰ Explanatory Memorandum Regarding The Termination of Services of Employees in terms of s 17 of the PSA and s 14 of the EEA of 27 June 2011 para 2.2.

¹⁵¹ “If an educator who is deemed dismissed to have been discharged under paragraph (a) or (b), the employer may, on good cause shown approve the reinstatement of the educator.”

¹⁵² [2005] ZALC 89.

discharge unfair, for either substantive or procedural reasons, as it does not have the effect of converting dismissal by operation of the law into a dismissal.¹⁵³

*Mkhwanazi v MEC for the Department of Education, KwaZulu-Natal*¹⁵⁴ established the jurisdictional requirements that have to be met in order for an educator to be regarded as deemed dismissed. The Court held that for an educator to be dismissed the jurisdictional requirements to be met are a) an educator must be permanently employed; b) an educator has to be absent for more than 14 days and c) the educator must have been absent without the employer's permission.¹⁵⁵

There have been instances where the jurisdictional requirements for an educator to be deemed dismissed were not met, and the Courts were not reluctant to make an order to reinstate the said deemed dismissed educator. Such an order was made in *Members of Executive Council, Department of Education, Western Cape Government v Jethro & another NNO*.¹⁵⁶ The LAC held that the respondent did not abscond, as it was known where he was and he told the principal of the school about his absence, moreover he was contactable.¹⁵⁷

When the employer continues to pay an educator who has been deemed dismissed does so at his own peril as was the case in *Mkhwanazi v MEC for the Department of Education, KwaZulu-Natal*.¹⁵⁸ The Court held that the applicant was not deemed dismissed, as she was paid after the deeming provision had taken place, and this implied that the applicant was reinstated.¹⁵⁹

The LAC judgment in *Jethro*¹⁶⁰ laid down the principle that, if the whereabouts of an educator who is absent are known by the employer, it cannot be said that the educator had absconded. I argue in this regard that the LAC missed an opportunity to pronounce that knowing the whereabouts of an educator is tantamount to authorised absence, where sending a sick note without applying for leave of absence nullifies Form A that

¹⁵³ *MEC for Education & Culture v Mabika and Others* (2005) ZALC 89 para 27.

¹⁵⁴ (2022) ZALAC 1.

¹⁵⁵ *Mkhwanazi v MEC for Department of Education, KwaZulu- Natal* (2022) ZALAC 1 at para 3.

¹⁵⁶ (2019) 40 ILJ 2318 (LAC).

¹⁵⁷ *Members of Executive Council, Department of Education, Western Cape Government v Jethro & another NNO* (2019) 40 ILJ 2318 para 47.

¹⁵⁸ (2022) ZALAC 1.

¹⁵⁹ *Mkhwanazi v MEC for Department of Education, KwaZulu- Natal* (2022) ZALAC 1 at para 32.

¹⁶⁰ See also *Mogola and Another v Head of the Department: The Department of Education* (2012) 6 BLLR 584 (LC).

has already been sent. As a result it can be said that the educator has not brought himself or herself within the net of s14 (1) of the EEA.

In *Jethro*¹⁶¹ and *Mkhwanazi*,¹⁶² the LAC favoured the notion that the employer in determining whether the misconduct warranted dismissal, the employer must follow a less restrictive procedure in its disciplinary code and procedure. Most importantly all the jurisdictional requirements have to be present in order for dismissal in terms of operation of law to take effect.

An educator can also be deemed dismissed if he or she resigns whilst disciplinary enquiry has not been disposed of.¹⁶³ A educator that is deemed dismissed can apply to be reinstated by showing good cause.¹⁶⁴

3.3.1 Deemed dismissal in terms of Public Service Act 103 of 1994 (as amended)

The second Act in the public service dealing with deemed dismissal is Section 17 (5)¹⁶⁵ of the PSA, which mirrors section 14 of the EEA, which states that:

“(a)(i) An officer, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from a date immediately succeeding his or her last day of attendance at his or her place of duty.”¹⁶⁶

Furthermore, the PSA, provides that an officer would be deemed dismissed if he or she assumes other employment.¹⁶⁷ However, if an officer who has been deemed dismissed reports for duty after one calendar month he or she must make an application for reinstatement by showing good cause.¹⁶⁸

The same process of sending Form A and then sending Form B which is applicable to an educator who is absent with authorisation is also applicable to an officer governed

¹⁶¹ *Members of Executive Council, Department of Education, Western Cape Government v Jethro & another NNO* (2019) 40 ILJ 2318 (LCA) at para 46.

¹⁶² *Mkhwanazi v MEC for Department of Education, KwaZulu Natal* (2022) ZALAC 1 at para 31.3

¹⁶³ Section 14(1)(d) of EEA.

¹⁶⁴ Section 14(2) EEA.

¹⁶⁵ Before the Act was amended this used to be section 17(3).

¹⁶⁶ Section 17(5)(i) of the PSA.

¹⁶⁷ Section 17(5)(ii) of the PSA.

¹⁶⁸ Section 17(5)(b) of the PSA.

by the PSA who is absent without authorisation. The point of departure is that the governing Act is the PSA and the period of absence is more than a calendar month.

Jurisdictional requirements to be met before an officer can be deemed dismissed were laid down in *PAWUSA and Another v Department of Education, Free State Province and Others*.¹⁶⁹ These are: a) “that the officer must have absented himself from his or her official duties, b) without permission of his or her head of department, office or institution, for a period exceeding one calendar month”.¹⁷⁰ For an officer to be deemed dismissed the aforementioned jurisdictional requirements have to be met just like the jurisdictional requirements of the EEA.

In *National Education Health & Allied Workers Union v MacGladdery NO Others*,¹⁷¹ the LC held that in the public sector, termination by operation of law is a two-stage process. The first stage involves a process according to which the employer effects a termination on account of an unauthorised absence for more than one calendar month,¹⁷² and the next stage is where an employee applies for reinstatement by showing good cause.¹⁷³

In *Ramonetha v Departments of Road and Transport Limpopo and Others*,¹⁷⁴ the employee was absent for four months without authorisation of the employer and on his return to work, he continued to work for seven months and was paid for his services. There was a disciplinary enquiry and the chairperson of the enquiry found that the applicant was absent for more than a month and has been dismissed in terms of section 17(5) (i) of the PSA. The matter was taken on review and the LC found that the employment relationship had been terminated by operation of the law. However, on appeal, the LAC held that when the appellant returned to work rendered his services and was renumerated, this implied that he was reinstated. The Court further held that after reinstatement the respondent could not rely on the deeming provision.¹⁷⁵

¹⁶⁹ (2008) 29 ILJ 3013 (LC).

¹⁷⁰ *PAWUSA and Another v Department of Education, Free State Province and Others* (2008) 29 ILJ 3013 LC at para 15-16.

¹⁷¹ (2011) ZALCJHB 152.

¹⁷² *National Education Health & Allied Workers Union v MacGladdery NO and Others* (2011) ZALCJHB at para 27.

¹⁷³ *National Education Health & Allied Workers Union v MacGladdery NO and Others* (2011) ZALCJHB at para 28.

¹⁷⁴ (2017) ZALAC 68.

¹⁷⁵ *Ramonetha v Department of Roads and Transport Limpopo and Others* (2017) ZALAC 68 at para 24.

It is submitted that LAC was correct in its decision. The employer committed an error in law, in the sense that employee was taken through a disciplinary hearing for absence without authorisation which is a dismissal that comes about by the operation of law i.e. the employee is not afforded an opportunity to attend a disciplinary enquiry. This grave error put the employer in a precarious position, in the sense that even if the employee was dismissed for absenteeism, the LAC would have arrived at the same decision i.e., that he had been reinstated, as he was allowed to come back to work and was paid for his services.

If jurisdictional requirements for deemed dismissal are not met, the Court held that there is no need to apply for reinstatement as there was no deemed dismissal. This view was expressed in *Gangram v MEC for The Department of Health, KwaZulu-Natal and Another*.¹⁷⁶ The LAC held that:

“... my conclusion on the set of facts presented is, therefore, that the jurisdictional requirements for the appellant to be deemed dismissed because of being absent for a period exceeding one calendar month without the permission and/or knowledge of the HOD, office or the institution have not been satisfied, and as such there was no need for her to make representation in terms of s 17(5)(b) for reinstatement ...”¹⁷⁷

The judgments of *Mkhwanazi* and *Ramonetha* established the principle that if a deemed dismissed employee is allowed back to work and is paid his or her monthly salary, the employer is barred from invoking the deeming provision.

3.3.2 Deeming provision: employees who resume other employment whilst on suspension

Mathiba submits that in South African labour law, there are two forms of suspension namely precautionary and punitive suspensions and the reason an employee is put on precautionary suspension is to enable the employer to continue with the investigation without interference from the employee.¹⁷⁸

¹⁷⁶ (2017) 38 ILJ 2261 (LAC).

¹⁷⁷ *Gangram v MEC for The Department of Health, KwaZulu-Natal and Another* (2017) 38 ILJ 2261 (LAC) at para 30.

¹⁷⁸ Mathiba MK ‘Deemed dismissal and suspensions in the public sector Grootboom v National Prosecuting Authority (2014) ILJ 121 (CC) cases’ *Obiter* (2015) 223.

In the matter of *Grootboom v National Prosecuting Authority*,¹⁷⁹ the employee was placed on precautionary suspension and whilst on suspension, he had the opportunity to study in the UK for a period of 12 months. He applied for leave for the duration of his study, and his employer the National Prosecution Authority (NPA) advised him he would not be paid for the duration of the study.¹⁸⁰ However, the NPA continued to pay his salary, two months later and without notice, the employer stopped paying his salary, and he was advised via e-mail that s 17(5)(a)(i) of the PSA was invoked, as permission to study in the UK was not granted.¹⁸¹ The Apex Court held that the applicant was not at work because he was suspended.¹⁸²

Section 14(1)(b) of the EEA and section 17(5)(a)(ii) of the PSA make provision for deemed dismissal of an employee who assumes alternative employment whilst on suspension.

In the matter of *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council and Others*,¹⁸³ the second appellant (employee) was placed on precautionary suspension on 4 July 2007. Whilst still on suspension, he secured alternative employment from Compu Africa, owned by his relative without seeking approval from his employer.¹⁸⁴ He received a letter from his employer on 19 October 2007 which notified him that the proviso of section 17(5)(a)(ii) has been invoked.¹⁸⁵

The SCA stated that there was no evidence that was tendered to the court which indicated that the employee's temporary employment interfered with his obligations towards his employer. The SCA went further and stated that the employee commenced other employment whilst on suspension during which period he had no obligation to render his services.¹⁸⁶

The SCA has taken the stance that taking up alternative employment whilst on suspension, does not mean that the employee is absent from his or her primary

¹⁷⁹ 2014 ILJ 121 (CC).

¹⁸⁰ *Grootboom v National Prosecuting Authority* (2014) ILJ 121 (CC) at para 6.

¹⁸¹ *Grootboom v National Prosecuting Authority* (2014) ILJ 121 CC at para 9.

¹⁸² *Grootboom v National Prosecuting Authority* (2014) ILJ 121 CC at para 45-49.

¹⁸³ (2014) ZASCA 70.

¹⁸⁴ *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council & Others* (2014) ZASCA at 70 para 1.

¹⁸⁵ *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council & Others* (2014) ZASCA at 70 para 2.

¹⁸⁶ *Solidarity and Another v Public Health & Welfare Sectoral Bargaining Council & Others* (2014) ZASCA at 70 para 11.

employer, as suspension bars the employee from rendering services to the primary employer.

3.3.3 Deemed dismissal in terms of South African Police Service Act 68 of 1995

Police are in the employ of public service however, their conditions of service are governed by the SAPS Act.¹⁸⁷ The SAPS Act, just like the EEA and the PSA makes provision for deemed dismissals, but not for absconding from duty. It only applies if a member of the South African Police Service is convicted of a crime and sentenced to direct imprisonment without the option of a fine. Section 36(1) of the South African Police Act of 1995 states –

“(1) a member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine, shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.”¹⁸⁸

In *Phopo v National Commissioner of the South African Police Services and Others*,¹⁸⁹ the applicant was convicted and sentenced to imprisonment for indecent assault. He was subsequently deemed dismissed in terms of s 36(1). He appealed against his conviction and sentence and in 2014 his appeal was upheld. He exercised his right to apply for reinstatement in terms of section 36(2)(c) which provides that a person whose direct imprisonment following an appeal is set aside is not deemed dismissed.¹⁹⁰ His application for reinstatement was not successful which led to the matter being taken on review in terms of section 158(1)(h) of the LRA. The court reviewed and set aside the decision not to reinstate the applicant and ordered that the application had to be reconsidered.¹⁹¹

It is therefore submitted that in terms of the SAPSA the jurisdictional requirement for dismissal by operation of law is a conviction followed by a sentence of direct imprisonment without a fine.¹⁹² The requirements that need to be met before a deemed dismissed police officer can be reinstated are: a) setting aside of the conviction on

¹⁸⁷ 68 of 1995.

¹⁸⁸ Section 36(1) of the SAPS Act.

¹⁸⁹ (2019) ZALCPE 15.

¹⁹⁰ *Phopo v National Commissioner of the South African Police and Others* (2019) ZALCPE 15 at para 3.

¹⁹¹ *Phopo v National Commissioner of the South African Police and Others* (2019) ZALCPE 15 at para 30.

¹⁹² Section 36(1) of SAPS Act.

appeal or review,¹⁹³ b) the member's direct sentence to imprisonment being converted to an option of paying a fine and c) the application for reinstatement being made within 30 days of the setting aside of the conviction.¹⁹⁴

3.4 Does the termination of absconding employees in the public sector circumvent the principles of procedural and substantive fairness of the LRA?

Newaj is of the view that section 188 of the LRA gives an employee the right not to be unfairly dismissed, where the employer fails to prove that the employee was dismissed for a fair reason and a fair procedure was followed the dismissal would be unfair.¹⁹⁵ When a public service employee without authorisation is absent from work for the period stipulated in either the EEA or PSA, such conduct constitutes abscondment. This manner of termination of employment is effected without the need to take the offending employee through a disciplinary enquiry. The educator or officer is dismissed by the operation of law.

The genesis of the concept of dismissal by operation of law can be found in the *Minister van Onderwys en Kultuur en Andere v Louw*¹⁹⁶ which was decided before the LRA was enacted. The Appellate Division (AD) was tasked with interpreting a provision of section 72(1) of the then Education Affairs Act, which is similar to section 17(5)(a) of the PSA. The AD subsequently decided that for the deeming provision to come into operation, it is not dependent upon any given decision. Furthermore, the *audi alteram partem* rule is not applicable, as the employer only notifies an employee about his or her discharge that occurred by operation of law.¹⁹⁷

Procedural fairness entails affording an educator or officer an opportunity to answer to the charge of misconduct. However, in *MEC: Department of Education Gauteng v Msweli and Others*¹⁹⁸ the LC decided the provision of Schedule 8 of the LRA is not applicable to section 17(5) of the PSA.¹⁹⁹

¹⁹³ Section 36(2)(b).

¹⁹⁴ Section 36(2)(c).

¹⁹⁵ Newaj K 'Does the incorrect classification of misconduct charges constitute substantive fairness? EOH Abantu v CCMA (2019) 40 ILJ 2477 (LAC)' *Obiter* 632.

¹⁹⁶ (1995) 4 SA 838 (AD).

¹⁹⁷ *Minister Van Onderwys en Kultuur en Andere v Louw* (1995) 4 SA 838 (AD) at para 388 G-H. See also *Nkopo v Public Health & Welfare Bargaining Council & Others* (2002) 23 ILJ 520 (LC); *Mahlangu v Minister of Sport & Recreation* (2010) 31 ILJ 1907 (LC).

¹⁹⁸ (2013) 34 ILJ 650 (LC).

¹⁹⁹ *MEC: Department of Education Gauteng v Msweli and Others* (2013) 34 ILJ 650 (LC) at para 48.

The question of whether section 14 (1) of the EEA was constitutional came under scrutiny in *Phenithi v Minister of Education and Others*.²⁰⁰ The applicant challenged the constitutionality of s 14(1) on the premise that she was not given an opportunity to present her case. She further submitted that the section violates her right to fair labour practice as enshrined in s 23(1) of the Constitution. In this regard, the SCA made the following comment:

“But the fact that s 14 (1) (a) does not compel the employer to give an educator a hearing before its provision came into operation does not necessarily make it unconstitutional. The section does not totally exclude a hearing. While it is true that it does not place an obligation on the employer to invite an educator to a hearing, the educator is not precluded from placing before the employer material or facts that may move the latter to ‘direct otherwise’, i.e. to direct that the operation of the provisions of s 14(1) (a) be lifted or that the section shall not take effect. Section 14(2) also affords an educator an opportunity to be heard and to be reinstated, provided he/she is able to show good cause as to why the employer should reinstate.”²⁰¹

It is submitted that everyone is guaranteed a right to fair labour practices,²⁰² this right is also extended to the employer.²⁰³ The employee cannot without just cause withdraw his or her labour by absconding. In *Mabuza*, the Court held that an employee’s dismissal by operation of the law is not regarded as dismissal as defined by the LRA.²⁰⁴ It is trite that termination of employment through deeming provision does not constitute dismissal.²⁰⁵

3.5 What recourse is available to an employee who has been dismissed by operation of law?

It is not the end of the road for an educator or officer who has been dismissed by operation of law as he or she in terms of the EEA²⁰⁶ and the PSA²⁰⁷ can make an

²⁰⁰ (2006) 27 All SA 601 (SCA).

²⁰¹ *Phenithi v Minister of Education and Others* (2006) 27 All SA 601 (SCA) at para 21.

²⁰² Section 23 of the Constitution.

²⁰³ *NEHAWU v University of Cape Town* (2003) 3 SA 1 (CC).

²⁰⁴ *Minister of Social Development v Mabuza and Others* (2014) 11 BBLR 1142 (LC) at para 7.

²⁰⁵ Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 124.

²⁰⁶ Section 14(2).

²⁰⁷ Section 17(5).

application to be reinstated. However, the EEA and PSA are silent on time limits to apply for reinstatement and what constitutes a good cause.

When making an application for reinstatement the onus shifts to the employee to offer a plausible explanation for the unauthorised absence. In pleading his or her case the employee has to show what is referred to as ‘good cause’ as expounded in *Mkhwanazi v MEC for the Department of Education, KwaZulu-Natal*.²⁰⁸ The LC held that:

“the dismissed employee must show good cause for their application for reinstatement to be approved. The legal sense of the word, ‘show’, means that the employee must demonstrate or explain why good cause exists to reinstate him. The employee thus has a duty not to only place facts before the decision-maker but to show how these facts meet the legal standards of good cause”.²⁰⁹

In addition, in *Mabika* the LC held that the employer in considering whether to reinstate the employee must be guided by principles of justice, reasonableness and fairness.²¹⁰

When considering whether to reinstate an employee the employer has to take into consideration whether the abscondment has affected the employment relationship. This was expressed in *De Villiers v Head of Department: Education, Western Cape Province*,²¹¹ where the test for reinstatement was laid down. The Court stated that:

“ultimately, the employer should be satisfied that, on account of the employee’s absence from work, the employment relationship has irretrievably broken down. As set out in item 3(4) of the Code, it is generally not appropriate to dismiss an employee, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable”.²¹²

3.5.1 Does refusal to reinstate an employee dismissed by operation of the law amount to dismissal?

Cohen submits that it has been confirmed by the courts that the decision of the employer not to reinstate a deemed dismissed employee does not constitute a dismissal, because the contract remains terminated by operation of law.²¹³ The answer

²⁰⁸ 2022 ZALC 1.

²⁰⁹ *Mkhwanazi v MEC for Department of Education, KwaZulu Natal* (2022) ZALC 1 at para 10.

²¹⁰ *MEC for Education and Culture v Mabika & Others* (2005) ZALC 89 at para 23.

²¹¹ (2010) 31 ILJ 1377 (LC).

²¹² *De Villiers v Head of Department of Education, Western Cape*(2010) 31 ILJ 1377 LC at para 29.

²¹³ Cohen T ‘The legality of the automatic termination of contracts of employment’ *Obiter* (2011) 675.

as to whether the employer's refusal to reinstate a deemed dismissed employee amounts to dismissal is to be found in *MEC Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration & others*²¹⁴ where the LC held:

"In my view, a decision not to reinstate an employee whose employment has terminated by operation of law is not a 'dismissal' for the purpose of s186(a), which provides that 'where an employer has terminated a contract of employment with or without notice there is a 'dismissal', does not in my view apply. If the employer exercises his discretion in terms of s17(5)(b) not to reinstate, the contract of employment remains terminated by law and is not terminated by the employer."²¹⁵

In *Ramonetha*, the LAC pronounced that: "the Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in s 158(1)(h). It has power (and jurisdiction) to review them on any grounds permissible in law."²¹⁶

Erasmus & Kinghorn argue that if the employer fails to reinstate the employee, he or she may approach a bargaining council.²¹⁷ I argue that this is incorrect and that the bargaining council has no jurisdiction over deemed dismissals brought about by the operation of law. Furthermore, the failure of the State as an employer to reinstate an employee is only reviewable in terms of s158 of the LRA, which provides that the LC is empowered to "review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law."²¹⁸

A decision by the employer not to reinstate a deemed dismissed employee is referred to as administrative action, the definition of which was ventilated in *Member of the Executive Council for the Department of Education Western Cape Government v Jethro N.O and Another*²¹⁹ the Court stated that:

"Section 1 of PAJA defines administrative action as *inter alia*, a decision of an administrative nature taken by an organ of state when exercising a public function in

²¹⁴ (2003) 24 ILJ 2155 LC.

²¹⁵ P2158 H-J *MEC Public Works, Northern Province v Commission for Mediation and Arbitration & others* (2003) 24 ILJ 2155 (LC).

²¹⁶ *Ramonetha v Departments of Road and Transport Limpopo and Others* (2017) ZALAC 68 at para 17.

²¹⁷ Erasmus F & Kinghorn G 'Understanding deemed dismissal in state departments' *De Rebus* (2015) 26.

²¹⁸ Section 158(1)(h) of the LRA.

²¹⁹ (2019) 40 ILJ 2318 (LCA).

terms of any legislation, which adversely affects the rights of any person and which has a direct, external legal effect.”²²⁰

In promoting the principles of fairness and justice, the Courts have consistently held that the employer ought to have given reasons as to why the employment relationship has broken down. This was expressed in *MEC Department of Health, Western Cape v Weder*,²²¹ where the Court held that “it did not suffice for the employer to simply say without more, that the absence of the employee for the requisite period without a subsequent satisfactory explanation rendered the employment relationship intolerable.”²²²

Additionally in *Member of the Executive Council for the Department of Education Western Cape v Jethro N.O. and Another*,²²³ the notion of using the reason not to reinstate an employee as continued employment will not be tolerable did not pass muster, as the LAC held that:

“mitigating factors were ignored or not weighed properly.... The failure to assess properly the tolerability or practicability of a continued employment relationship caused the impugned decision to not be rationally connected to the relevant information and the purpose of section 14(2) of the EEA”.²²⁴

Therefore, the employer’s refusal to reinstate an employee dismissed by operation of law does not amount to dismissal.

4. Conclusion

Section 14(1) of the EEA and section 17(5) (a) of the PSA provides immunity to the state as an employer against unfair dismissal claims when it comes to deemed dismissals.²²⁵ The courts have held that deemed dismissals are not dismissals as per the definition of section 186 (1) of the LRA. Before the deeming provision can be invoked by the employer, there are jurisdictional requirements that are to be met as

²²⁰ *Member of the Executive Council for the Department of Education Western Cape Government v Jethro N.O. and Another* (2019) 40 ILJ 2318 (LCA) at para 38.

²²¹ (2014) 35 ILJ 2131 (LAC).

²²² *MEC Department of Health, Western Cape v Weder* (2014) 35 ILJ 2131 LAC at para 40.

²²³ (2019) 40 ILJ 2318 (LCA).

²²⁴ *Department of Education Western Cape v Jethro N.O. and Another* (2019) 40 ILJ 2318 (LCA) at para 48. See *PSA obo Matshoba v HOD: Department of Health, Northern Cape* (2017) ZALCCT 58.

²²⁵ Erasmus F and Kinghorn G ‘Understanding Deemed Dismissal in State Departments’ *De Rebus* (2015) 24.

set out in the respective acts. If the jurisdictional requirements are not met it cannot be said the educator or officer has absconded.

The debate as to whether the provisions of section 14 of the EEA and section 17 of the PSA circumvent the principle of procedural fairness was ventilated in the Court. It is therefore submitted that, since the PSA and the EEA are similarly worded, this means that both acts, in affording employees an opportunity to show good cause harbour a mechanism designed to promote the rules of natural justice i.e. hear the other side *albeit* after the fact of deemed dismissal. Ramasunga argues that despite the deeming provision being referred to as draconian the provision is flexible, as it allows an employee to show good cause.²²⁶

The employer is required to consider the reasons forwarded by an employee explaining his unauthorised absence, and to furnish reasons for that decision as expressed in *Weder*.

It is not all lost if the employer refuses to reinstate a deemed dismissed educator or officer, as the decision of the employer or failure to provide reasons for reinstatement can be taken on review in terms of s 158 (1) (h) of the LRA. The remedy of reinstatement as contained in the LRA is available at the disposal of a deemed dismissed educator, or officer who applies for reinstatement by showing good cause.

Therefore, it is submitted that section 14 of EEA and section 17(5) of the PSA exclude the operation of the normal procedural requirements, as envisaged by the LRA to effect the termination of an educator or officer who has absconded.

²²⁶ Ramasunga 'Deemed dismissal as a form of termination of employment in South Africa'(LLM Thesis) University of Johannesburg, (2014) 23.

CHAPTER 4

COMPARATIVE ANALYSIS OF DISMISSAL BY OPERATION OF LAW – (DEEMED DISMISSALS) IN AFRICAN COUNTRIES

4.1 Introduction

A comparative analysis of unfair and deemed dismissals between South Africa, Uganda and Namibia will be undertaken by first considering the Constitutions of these respective countries. The discussion will then shift to the legislation in Uganda and Namibia that provides for dismissals by operation of law. The law of these foreign jurisdictions will then be compared to the South African position.

4.2 Legal framework for labour rights

4.2.1 The Constitution of Uganda

The Constitution of Uganda²²⁷ since its inception, has been amended twice. In terms of the Constitution, parliament is required to enact laws that accord the workers a safe and healthy environment.²²⁸ The Constitution of Uganda similar to the South African Constitution, is considered the supreme law of the land,²²⁹ and where any law that is inconsistent with it is void.²³⁰ Unlike the South African Constitution which enshrines the right to fair labour practices, the Constitution of Uganda does not enshrine such a right however the Constitution affords citizens the right to be protected against forced labour.²³¹ The Constitution also accord citizens the right to join a union.²³² In terms of the Constitution, workers are provided with avenues for the enforcement of rights by competent courts.²³³ As defined by the Constitution a public officer “means any person holding or acting in an office in the public service.”²³⁴

²²⁷ Act of 1995.

²²⁸ Article 40(1) Constitution of Uganda.

²²⁹ Article 2(1) Constitution of Uganda.

²³⁰ Article 2(2) Constitution of Uganda.

²³¹ Article 25(2) Constitution of Uganda.

²³² Article 29(1)(e) Constitution of Uganda.

²³³ Article 50 Constitution of Uganda.

²³⁴ Article 175 Constitution of Uganda.

4.2.2 The Employment Act

The Employment Act (EA)²³⁵ was enacted to regulate the employer and employee relationship which is similar to the purpose of the LRA. The EA accords workers an array of rights namely; a) protection from forced labour²³⁶, a fair disciplinary enquiry before dismissal,²³⁷ and the right to be compensated or reinstated in a case of unfair dismissal.²³⁸ These rights are also provided for in the LRA. The similarity between the LRA and the EA is that neither of these Acts has made provision for dismissal by operation of the law.

The EA does not have a provision that deals with procedural and substantive fairness despite making a provision for a right to a disciplinary hearing that is fair before dismissal.

4.2.3 The Uganda Public Service Standing Orders

The Uganda Public Service Standing Orders (UPSSO)²³⁹ regulates employment relationships in the public service. The UPSSO seeks to give effect to constitutional provisions in the sense that the power to discipline and remove an employee in public service is provided for in the Constitution.²⁴⁰ The Commission in all matters of discipline must observe the principle of natural justice in disciplinary proceedings.²⁴¹

A disciplinary procedure that is proper must be followed in all cases involving the discipline and the removal of public officers.²⁴² The principle of natural justice must be applicable in all disciplinary cases.²⁴³ No public officer shall be subjected to any form of punishment without first being informed in writing about the allegation and the public officer must be allowed to defend himself or herself.²⁴⁴ Equally, in terms of the provision of section 188 of the LRA, an employee has the right to be heard.

²³⁵ Act of 2006.

²³⁶ Section 5 of the Employment Act.

²³⁷ Section 66 of the Employment Act.

²³⁸ Section 71(5) of the Employment Act.

²³⁹ UPSSO 2010.

²⁴⁰ Article 172 Constitution of Uganda.

²⁴¹ Section 18 of the Public Service Commission Act 2008.

²⁴² Section Fr para 3 of the Uganda Public Service Standing Orders.

²⁴³ Section F para 4 of the Uganda Public Service Standing Orders.

²⁴⁴ Section F para 5 of the Uganda Public Service Standing Orders.

A public service officer who is dismissed without following the provisions of section F, which provides for the principle of natural justice i.e. hearing the other side. The principle that guides the Court when reviewing the decisions of administrative bodies were laid out in *John Jet Tumwebaze v Makerere University Council & 2 Others*.²⁴⁵ The Court held that, in order to take a decision on review, the employee has to show that the decision complained of is tainted with illegality, irrationality, and procedural impropriety.²⁴⁶

An employee took a decision which was procedurally unfair on review in *Omalla Godfrey v Butaleja District Local Government Council and Others*.²⁴⁷ Here, the Court held that dismissal for abscondment of duty was “unlawful and contrary to the laws of natural justice as the applicant was never given a chance to defend himself.”²⁴⁸

The same principle was upheld in *Kiwanuka Kunsu Stephen v Attorney General*.²⁴⁹ The applicant was charged and convicted for causing financial loss, false accounting, and abuse of office and sentenced to direct imprisonment. Whilst in prison he, expressed his intention to retire and requested for his pension benefits to be paid. Instead of the employer responding to his request, a letter dismissing him from public service was issued to him. The Court held that the dismissal was ultra vires and contrary to the natural rule of ‘hear the other party’.²⁵⁰ In South Africa, the position regarding incarcerated employees is the same. The Court in *Trident Steel* has ruled that a disciplinary enquiry must precede a dismissal.

The above-mentioned case highlights the importance of the principle of natural justice and the principle highlighted is synonymous with the procedural fairness requirement of the LRA. Furthermore, the LRA makes provisions for taking the decision of arbitrators into review.²⁵¹

Notwithstanding, the above principles, deemed dismissals are provided for in the UPSSO. In terms of the UPSSO, it is the responsibility of a public officer when absent

²⁴⁵ Application No. 353 of 2005.

²⁴⁶ *John Jet Tumwebaze v Makerere University Council & 2 Others* Application No. 353 of 2005 at para E13 .

²⁴⁷ (2014) UGHCCD 148.

²⁴⁸ *Omalla Godfrey v Butaleja District Local Government Council and Others* (2014) UGHCCD 148 at para 13.

²⁴⁹ (2020) UGHCCD 7.

²⁵⁰ *Kiwanuka Kunsu Stephen v Attorney General* (2020) UGHCCD 7 at para G28.

²⁵¹ Section 145 of the LRA.

from duty to inform the ‘responsible officer’ in writing of such absence.²⁵² When a public officer has been absent from duty for a period of fourteen (14) days, the responsible officer will instruct the public officer to resume duty immediately and to provide written reasons for the unauthorised absence.²⁵³

If within thirty (30) days the public officer fails to communicate with the responsible officer or to resume duty, it is deemed that the officer has abandoned duty and the salary is stopped immediately.²⁵⁴ Equally so, in South Africa, when an educator or an officer does not resume duty after notice of abscondment, Form B was issued and the number of days prescribed in the respective legislation had lapsed, the educator or officer is deemed dismissed.

Taking study leave without permission of the employer was dealt with in *Akello v Attorney General*.²⁵⁵ The plaintiff, a public officer, was enrolled as a nursing officer and took study leave for a year but failed to return to work. Eighteen (18) months later she applied for reinstatement. She was reinstated and warned that failure to follow the public procedure in future would result in her being removed from public service. She was redeployed but did not report for duty and failed to give a written explanation. It transpired that she went on study leave and in obtaining the approval to take study leave bypassed the relevant structure. After an absence of three (3) years and having obtained a Master’s in Public Health, she returned to work and was told that she absconded from duty. She subsequently filed a suit for reinstatement. The Court held that the plaintiff absconded from duty “within the meaning of a Section A para 17-19” as she did not properly take study leave.²⁵⁶

Some similarities can be drawn between *Akello and Grootboom*.²⁵⁷ In both cases, the applicants were on study leave that was not properly taken and they were deemed dismissed for abscondment by the Court *a quo*. However, in *Grootboom* the applicant took the matter on appeal and the Apex Court held that the employer was wrong in invoking the deeming provision. The principle laid down by the Apex Court was that the employer knew where the employee was. The employer had suspended the

²⁵² Section A-n para 17 of the Uganda Public Service Standing Orders.

²⁵³ Section A para 18 of The Uganda Public Service Standing Orders.

²⁵⁴ Article 19 of The Uganda Public Service Standing Orders.

²⁵⁵ [2020] UGHC 133.

²⁵⁶ *Akello v Attorney General* [2020] UGHC 133 at para 22.

²⁵⁷ *Grootboom v National Prosecuting Authority* (2014) *ILJ* 121 CC.

employee and it could not be said that the employee absconded. The same could not be said for *Akello*. Here the employee took study leave but bypassed the committee that was tasked with approving study leave and sought permission from another committee instead. Since permission was not sought from the correct committee it could not be said that her whereabouts were known and she was subsequently deemed dismissed for absconding.

In terms of the UPSSO, there is no provision to give notice to the public officer about his or her dismissal²⁵⁸ and the order is silent about the process of applying for reinstatement. In stark contrast in South Africa, a deemed dismissed educator or officer is given notice of the intention to invoke a deemed dismissal using Form A. In addition, Form B is used in order to make an employee aware that he or she has been deemed dismissed, as well as the procedure to be followed to apply for reinstatement.

4.2.4 The Constitution of Namibia

The Constitution of Namibia²⁵⁹ is the supreme law of the land.²⁶⁰ The drafting of the Namibian Constitution was similar to that of the South African Constitution in that it was largely influenced by the recommendations of the Wiehahn Commission.²⁶¹ Cottrell argues that while the Namibian chapter on fundamental rights is wide. Several provisions have been left out.²⁶² One notable such provision is the right to fair labour practices. The Constitution does however accord citizens the right to form and join a trade union.²⁶³

4.2.5 The Namibian Labour Act

The Namibian Labour Act (NLA)²⁶⁴ is the first labour legislation to be introduced in the country. The NLA aims to promote labour relations that are sound and employment practices that are fair.²⁶⁵ The NLA does not apply to the Namibian Defence, Namibian Police Force, Namibian Central Intelligence Service, and Prison Service but applies to

²⁵⁸ Article 22

²⁵⁹ Act 7 of 2010.

²⁶⁰ Article 1(6) of the Constitution of Namibia.

²⁶¹ Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law @work* (2019) 43. Fenwick 'Labour Law in Namibia Towards an Indigenous Solution?' (2005) *The University of Melbourne* 11

²⁶² Cottrell 'The Constitution of Namibia: An Overview' *Cambridge University Press* (1991) 70.

²⁶³ Article 21(1)(e) of the Constitution of Namibia.

²⁶⁴ 11 of 2007.

²⁶⁵ Preamble of the Namibian Labour Act.

all employers and employees.²⁶⁶ This provision is similar to the LRA which does not apply to the National Defence Force and Security Agency.²⁶⁷

4.2.6. Procedural and substantive fairness in terms of the NLA

The NLA, unlike section 188 of the LRA does not define dismissal . However, it does makes provision for unfair dismissal. In terms of the NLA, a dismissal is unfair if there is no fair or valid reason ²⁶⁸ and if such dismissal is not effected for a fair procedure.²⁶⁹ In *Namibia Diamond Corporation (Pty) Ltd v Coetzee*²⁷⁰ the LC laid down the requirements for a fair procedure as follows:

- “a) the right to be informed of the nature of the misconduct contravened;
- b) the right to be given adequate notice prior to the disciplinary hearing;
- c) the right to some form of representation;
- d) the right to call witnesses and to cross-examine witnesses who have testified against the employee;
- e) the right to be informed of the penalty imposed;
- f) the right of appeal.”²⁷¹

The notion that dismissal should be fair was dealt with in *Coca-Cola Namibia Bottling Company (Pty) Ltd v Thomas & Another*.²⁷² The respondent was a shop steward and was charged with misconduct, requesting that the enquiry be postponed in order for him to be represented by a trade union. The appellant agreed on the condition that any penalty that will be imposed shall be backdated to the day of the initial date the hearing was scheduled, but that the respondent did not agree to the proposal. The appellant continued with the disciplinary enquiry in the absence of the respondent and subsequently dismissed the respondent. On arbitration, the dismissal of the respondent was found to be substantively and procedurally unfair and the employer

²⁶⁶ Section 2(a)-(d) of the NLA.

²⁶⁷ Section 2(a)-(b) of the LRA

²⁶⁸ Section 33(1)(a) of the NLA.

²⁶⁹ Section 33(1)(b)(ii) of the NLA.

²⁷⁰ [2017] NALCMD 5.

²⁷¹ *Namibia Diamond Corporation (Pty) Ltd v Coetzee* [2017] NALCMD 5 at para 17.

²⁷² [2017] NALCMD 37.

took the matter on appeal. The LCA agreed with the arbitrator and held that the dismissal was procedurally and substantively unfair.²⁷³

However, in *B2Gold Namibia (Pty) Ltd v PF Hoaseb*,²⁷⁴ the respondent was absent for eight (8) days ignored the instruction from his employer to return to work and was subsequently dismissed. In arbitration, the arbitrator ruled that the dismissal was both substantively and procedurally unfair and awarded compensation. On appeal, the court set aside the award and held that the dismissal was both substantively and procedurally fair and the order for compensation was set aside.²⁷⁵

4.2.7 Remedies for unfair dismissal in terms of the NLA

In terms of the NLA, there are remedies available to an employee who has been unfairly dismissed that can be made by an arbitrator namely an interdict,²⁷⁶ reinstatement,²⁷⁷ or monetary compensation.²⁷⁸ The LRA also makes provisions for remedies for unfair dismissal which are reinstatement or compensation.

The arbitrator is empowered to order reinstatement, compensation or both as expressed in *ABB Maintenance Services Namibia (Pty) v Moongela* Mr Moongela, a boilermaker was dismissed for misconduct and he referred an unfair dismissal dispute to arbitration. The arbitrator ordered that Mr Moongela be reinstated with full benefits calculated from the day he was terminated, until the day he was reinstated. The employer appealed the entire award and the Court held that the arbitrator could exercise his or her discretion to order the employer to grant back pay to the employee.²⁷⁹ The judge dismissed the appeal and held that Mr Moongela should be reinstated and paid compensation equal to the monthly salary he would have received had he not been unfairly dismissed.²⁸⁰

²⁷³ *Coca-Cola Namibia Bottling Company (Pty) Ltd v Thomas & Another* [2017] NALCMD 37 at para 45.

²⁷⁴ [2017] NALCMD 10.

²⁷⁵ *B2Gold Namibia (Pty) Ltd v PF Hoaseb* [2017] NALCMD 10 at para 30-32.

²⁷⁶ Section 86 (15)(a) of the NLA

²⁷⁷ Section 86 (15)(d) of the NLA.

²⁷⁸ Section 86 (15)(e) of the NLA.

²⁷⁹ *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* [2017] NAHCMD 18 at para 66.

²⁸⁰ *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* [2017] NAHCMD 18 at para 70.

4.3 Dismissal by operation of the law in terms of the Public Service Act of Namibia

The Public Service Act Namibia (NPSA)²⁸¹ was enacted to regulate among other things the discharge of employees in the employ of public service.²⁸² It regulates all employees in the public service.

In terms of section 24(1) (o) of the NPSA, a staff member commits misconduct if he or she is absent from his or her official duties without a valid reason or leave. Section 24(5) (a) outlines the jurisdictional requirements for deemed dismissal of a staff member. These are: a) absence without permission,²⁸³ b) absence from duty that is more than thirty (30) days,²⁸⁴ and c) staff member assumes other employment whilst absent without authorisation.

In outlining the importance of the deeming provision the learned judge Strydom JP in *Njathi v The Permanent Secretary, Minister of Home Affairs*²⁸⁵ stated that

“the deeming clause terminating the employment comes to the rescue of the employer who placed in the invidious position of not knowing why and for how long such absence would continue, to again fill the position so that the work can be done”.²⁸⁶

An employee dismissed in terms of section 24 (5) (i)-(ii) is dismissed by operation of law. This view was expressed in *Gouws v The Office of the Prime Minister*,²⁸⁷ where the Court held that “it is common cause that the dismissal was done in terms of the provisions of s 24(5)(a)(i) of the Public Service Act 13 of 1995”.²⁸⁸

All is not lost for a staff member who has been dismissed by operation of law as he or she has an opportunity to be reinstated on the recommendation of the Commission.²⁸⁹ In terms of the Act, the employee initiates the reinstatement in terms of the EEA and the PSA just like an educator or officer by showing good cause. A staff member who

²⁸¹ 13 of 1995.

²⁸² The preamble of the NPSA.

²⁸³ Section 24 (5) (a) of the NPSA.

²⁸⁴ Section 24 (5) (a) (i) of the NPSA.

²⁸⁵ NLLP [2002] (2) 34.

²⁸⁶ *Njathi v The Permanent Secretary, Minister of Home Affairs* NLLP [2002] (2) 34 at para 38.

²⁸⁷ [2013] NALCMD 23.

²⁸⁸ *Gouws v The Office of the Prime Minister* [2013] NALCMD 2 at para 2.

²⁸⁹ Section 25(5)(b) of the NPSA.

was dismissed by operation of law and is subsequently reinstated for the period he or she was absent without authorisation will be regarded as unpaid vacation leave.²⁹⁰

4.4 Conclusion

The EA just like the LRA protects workers against unfair dismissal and if an employee is unfairly dismissed, there are remedies such as compensation or reinstatement that are at the disposal of the employee to redress a wrong. I argue in this regard that UPSSO labour legislation does not adequately afford an employee who has been dismissed by operation of law protection as there is no provision for the employee to apply for reinstatement. The similarity of this Act to the EEA and PSA is that dismissal under the UPSSO is not dismissal in the true sense of the word but rather dismissal by operation of law.

Many similarities can be drawn between the Constitution, the NLA and the NPSA of Namibia, and the Constitution, the LRA, EEA and the PSA of South Africa. In terms of the NLA and the LRA, procedural and substantive fairness are of paramount importance. If dismissal is found to be unfair the unfairly dismissed employee is afforded a remedy in the form of either compensation or reinstatement.

The NPSA section 24(5), the EEA section 14(a)-(b) and the PSA section 17(5)(a) have a similar provision, dealing with dismissal by operation of the law. The common thread is that the provisions set out the jurisdictional requirements for deemed dismissals namely; employment in the public service, unauthorised absence for a specified period and assumption of other employment whilst on unauthorised absence. These legislations make provisions for a deemed dismissed employee to apply for reinstatement.

²⁹⁰ Section 25(5)(c) of the NPSA.

CHAPTER 5

CONCLUSION

5.1 Introduction

In terms of the Labour Relations Act (LRA) 'dismissal' means that "an employer has terminated employment with or without notice".²⁹¹ It is trite that dismissal should be effected for a fair reason after following a fair procedure.²⁹² However, the Employment of Educators Act (EEA)²⁹³ and the Public Service Act (PSA)²⁹⁴ have a deeming provision called dismissal by operation of law also known as deemed dismissal. An educator or officer who is dismissed by operation of the law is not afforded an opportunity to be heard in a disciplinary enquiry. The South African Police Service (SAPS Act)²⁹⁵ also has a provision of deemed dismissal not for absconding but for a police officer who is convicted and sentenced to direct imprisonment.

Against the aforementioned backdrop, this study aims to first, analyse whether the dismissal by operation of law or deemed dismissal circumvents the right to procedural and substantive fairness enshrined by the LRA. The second phase explores whether there are any available remedies available for an educator or officer dismissed by the operation of the law to apply for reinstatement. Lastly, if the educator's or officer's bid to be reinstated is not successful, it remains a question as to whether that means that the educator or officer has been dismissed.

5.2 Research questions answered

5.2.1 Does the termination of absconding employees in the public sector circumvent the principle of procedural and substantive fairness of the LRA?

When an employee has been dismissed the reason for the dismissal has to be for a fair reason and a fair procedure has to be followed. Where wither is not done, the dismissal would be deemed unfair.²⁹⁶ Fair reasons for dismissal are: a) conduct or

²⁹¹ Section 186 of the LRA.

²⁹² Section 188 of the LRA.

²⁹³ Section 14 of the EEA.

²⁹⁴ Section 17(5) of the PSA.

²⁹⁵ 68 of 1995.

²⁹⁶ Newaj K 'Does the incorrect classification of misconduct charges constitute substantive fairness? EOH Abantu v CCMA (2019) 40 ILJ 2477 (LAC)' *Obiter* (2020) 632.

capacity of the employee, b) operational requirements and c) a dismissal effected in accordance with a fair procedure.²⁹⁷

In *Minister van Onderwys en Kultuur en Andere v Louw*,²⁹⁸ which can be regarded as the genesis of the deeming provision, the Court held that when interpreting the then provision, which is similarly worded to section 17(5)(a) of the PSA the deeming provision is not dependent upon a decision made by the employer. Additionally, the *audi alteram partem* rule is not applicable as the employer only notifies the employee about his or her discharge, which has occurred by operation of the law.²⁹⁹

It is therefore submitted that the Employment of Educators Act (EEA)³⁰⁰ and the Public Service Act (PSA)³⁰¹ are similarly worded and this implies that any Court ruling made according to either Act would apply to the other. Scholars have noted that it is trite that termination of employment by operation of law does not constitute dismissal.³⁰² The courts have also echoed the same sentiments. Furthermore, in *Minister of Social Development v Mabuza and others*³⁰³ the LC held that when an employee's dismissal is by operation of the law in terms of the PSA it is not regarded as a dismissal as defined by the LRA.³⁰⁴ This judgment is similar to the *Louw* judgment.

The constitutionality of the deeming provision came under scrutiny in *Phenithi v Minister of Education and Others*.³⁰⁵ The SCA held that the employer does not decide to terminate an educator's services under section 14(1)(a) of the Act the discharge is by operation of law and in such cases, there can be no unfairness.³⁰⁶

²⁹⁷ Section 188 (1)(a)-(b).

²⁹⁸ 1995(4) SA 838 (A).

²⁹⁹ *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 838 (AD) at para 388 G-H.

³⁰⁰ 76 of 1998 (as amended).

³⁰¹ 103 of 1994 (as amended).

³⁰² Govindjee, Van der Walt, Abrahams, Calitz, Chicktay, Cohen, Dupper, Fergus, Mahomed, Pillay and Qotoyi *Labour Law in Context* (2017) 124.

³⁰³ (2014) 11 BLLR 1142 (LC).

³⁰⁴ *Minister of Social Development v Mabuza and Others* (2014) 11 BLLR 1142 (LC) at para 7.

³⁰⁵ (2006) 1 All SA 601 (SCA).

³⁰⁶ *Phenithi v Minister of Education and Others* (2006) 1 All SA 601 (SCA) at para 19.

In *MEC: Department of Education Gauteng v Msweli and Others*³⁰⁷ the court held that the provisions of Schedule 8 of the LRA do not apply to section 17(5) of the PSA³⁰⁸ and that the dismissal of the first respondent was procedurally fair.³⁰⁹

The provisions of section 14 of the Employment of Educators Act (EEA) and section 17(5) of the Public Service Act (PSA) mirror one other. Both items of legislation have laid out jurisdictional requirements that have to be present before an educator or officer can be deemed dismissed and they also make provisions to apply for reinstatement by showing good cause.

5.2.2 Is an employee who is deemed dismissed entitled to reinstatement?

Once an educator or officer has been dismissed by operation of the law he or she whether in terms of section 14 of the Employment of Educators Act (EEA) or section 17(5) of the Public Service Act (PSA) can apply for reinstatement by showing good cause.

In *Mkhwanazi v MEC for Department of Education, KwaZulu- Natal*,³¹⁰ the LC held that showing good cause means that the employee must explain why he or she ought to be reinstated.³¹¹ The employer, in considering reinstating the employee must act in a manner that is just, fair and reasonable.³¹²

Showing good cause is a recourse that is available to an employee who is dismissed by the operation of the law.

5.2.3 Does an employer's refusal to reinstate a deemed dismissed employee amount to dismissal?

Dismissal means that "an employer has terminated a contract of employment with or without notice".³¹³ The Courts have held that the deeming provision brings the employment contract to an end by operation of law and as such, does not constitute dismissal.

³⁰⁷ (2013) 34 ILJ 650 (LC).

³⁰⁸ *MEC: Department of Education Gauteng v Msweli and Others* (2013) 34 ILJ 650 (LC) at para 2.

³⁰⁹ *MEC: Department of Education Gauteng v Msweli and Others* (2013) 34 ILJ 650 (LC) at para 43 .

³¹⁰ 2022 ZALC 1.

³¹¹ *Mkhwanazi v MEC for Department of Education, KwaZulu Natal* (2022) ZALC 1 at para 10.

³¹² *MEC for Education and Culture v Mabika & Others* (2005) ZALC 89 at para 23.

³¹³ Section 186 of the LRA.

Therefore, an employer's refusal to reinstate an officer or educator similarly does not amount to dismissal.

In considering whether a deemed dismissed employee can be reinstated the employer has to consider whether the employment relationship had broken down. This principle was laid down in *De Villiers v Head of Department: Education, Western Cape Province*,³¹⁴ where the Court held that it is not appropriate to dismiss an employee, except where the misconduct is sufficiently serious that the gravity makes continued employment relationship intolerable.³¹⁵

In later court judgments *Jethro* and *Weder*, the principle that the employer had to merely state that the employment relationship had broken down was rejected.

5.3 Recommendations

It has been established that there is nothing unfair about dismissal by operation of law. The EEA regulates the discharge of educators however, s14 of the EEA makes a distinction in the sense that it is only applicable to educators who are permanently employed.

It is trite that services of temporarily employed educators are used in the education sector. The provision of s14 creates a *lacuna*, whereas as it stands there is no legislation that is applicable to temporarily employed educators.

The concept of good cause is broad and therefore, there is a need to have a criterion of what could be considered a good cause but it should not be exhaustive. Streamlining what would be considered a good cause will eliminate the administrative bottleneck of dealing with applications that do not show a good cause.

It is thus my recommendation that the Employment of Educators Act should be amended as follows:

- a) The EEA should also apply to temporary educators.
- b) It should be clearly stated what factors will be considered as 'good cause'.

³¹⁴ (2010) 31 ILJ 1377 (LC).

³¹⁵ *De Villiers v Head of Department: Education, Western Cape Province* (2010) 31 ILJ 1377 (LC) at para 29.

With the proposed additions the EEA should read:

- (1) An educator appointed in a permanent or *temporary* capacity -
- (2) (i) *Factors that may be considered as good cause are that the absence was reported to the manager with proof furnished and a valid sick note accounting for all the days, not at work.*

It is also recommended that the Public Service Act be amended to reify those factors that may be considered as good cause.

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