TERMINATION OF THE CONTRACT OF EMPLOYMENT NOT CONSTITUTING DISMISSAL

by

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DECLARATION

I, SIBONGILE SIPUKA, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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Sibongile Sipuka

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SUMMARY

Section 23 of the Constitution provides that everyone has a right to fair labour practice. The constitutional right to fair labour practices includes the right not to be unfairly dismissed and is given effect to by section 185 of the LRA.

The constitutional right not to be unfairly dismissed is given effect to by Chapter VIII of the Labour Relations Act 66 of 1995 (the LRA), which provides a remedy for an unfair dismissal. Schedule 8 of the LRA contains a "Code of Good Practice: Dismissal", which the Commission for Conciliation, Mediation and Arbitration (the CCMA) and the Labour Courts must take into account when determining the fairness of a dismissal.

The LRA expressly recognises three grounds for termination of the employment contract namely; misconduct on the part of the employee, incapacity due to an employee's poor work performance, ill health or injury and termination due an employer's operational requirements. In terms of the LRA, a dismissal must be procedurally and substantively fair. The requirements for procedural and substantive fairness are contained in Schedule 8 of the Code of Good Practice: Dismissal.

The provisions of section 185 of the LRA apply to all employers and employees in both the public and the private sectors, with the exception of members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence.

Section 213 of the LRA defines an "employee" as 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 any person who in any manner assists in carrying out or conducting the business of an employer. Section 200A of the LRA sets out the presumption as to who is an employee. This is a guideline to assist in determining who is an employee.

The Basic Conditions of Employment Act 75 of 1997 (the BCEA) sets minimum terms and conditions of employment including the notice of termination of employment.

Under the common law an employment contract of employment can be terminated on either the expiration of the agreed period of employment or on completion of the specified task in cases of fixed-term contracts. Also, in terms of general contract principles an employment contract may be terminated by notice duly given by either party or by summary termination in the event of a material breach on the part of either party.

The death of either party may terminate the employment contract. However, the death of an employer will not necessarily lead to the contract's termination.

An employment contract may also terminate by operation of law or effluxion of time namely retirement and coming into being of fixed-term contracts, by mutual agreement, employee resigning, due to insolvency of the employer and due to supervening impossibility of performance.

In the circumstances indicated above, the termination of the contract of employment does not constitute dismissal. This means that the CCMA and the Labour Court do not have jurisdiction to determine should the employee allege that his or her dismissal was unfair. It has been argued that the instances where a termination of a contract of employment is terminated, but there is no dismissal should be scrutinised to avoid a situation where employees are deprived of protection afforded by the fundamental right not to be unfairly dismissed.

There have been some instances where employment contracts contain clauses that provide for automatic termination of employment contracts. It has been held by the courts in various decisions that such clauses are against public policy and thus invalid. The Labour Court stated that a contractual device that renders the termination of a contract something other than a dismissal is exactly the exploitation the LRA prohibits.

There are various court decisions providing guidelines of circumstances in which termination of employment may be regarded as not constituting dismissal. The main focus of the treatise is to discuss these instances and critically analyse the approach taken by forums like the CCMA, bargaining councils and the Labour Court in dealing with such instances.

CHAPTER 1
INTRODUCTION

Under the common law there was not much protection for an employee against unfair dismissal.[1] If the employer gave the employee the required notice of termination of employment, the employee generally had no recourse, however, unfair the reason for the dismissal might have been. This was aptly captured by the court in *Key Delta v Marriner*[2] where the court had this to say:

> "It may be so (though I make no finding on the question) that under the common law a contract of employment may give the employer the right to dismiss an employee for any reason, or indeed for no reason at all, provided that proper notice is given where notice is required.'

The employer was required to give notice of termination of employment in terms of the contract, in order for the termination to be valid or lawful. In essence, the key issue under the common law was whether the employee had been given a notice or not. The basis of this principle was anchored on the assumption of equal bargaining strength between the employer and the employee. That this assumption is erroneous was emphasized by Davis and Friedland[3] in *Kahn-Freund's Labour and the Law* this way:

> "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation, it is a condition of subordination."

The assumption that there is equal bargaining strength between an employer and an employee and consequently that the parties freely entered into the terms that regulate the employment relationship resulted in some deficiencies under the common-law when it came to stability and security of employment on the part of the employee.

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1 Van Niekerk *Law@work* 2nd ed (2012) 213.

2 [1998] 6 BLLR 647 (E)

3 *Kahn-Freund's Labour and the* Law (1983) 18.

To address these common law deficiencies, statutory intervention in the form of legislation like the Basic Conditions of Employment Act[4] (hereinafter referred to as the BCEA"), the Labour Relations Act[5] (hereinafter referred to as "the LRA"), the Employment Equity Act[6] (hereinafter referred to as "the Employment Equity Act") have been pivotal in addressing the inherent inequality in the employment relationship.

Section 23(1) of the Constitution[7] provides that everyone has the right to fair labour practices. The LRA[8] gives effect to this constitutional right by providing that every employee has the right not to be unfairly dismissed. The LRA[9] further provides that a dismissal must be substantively and procedurally fair. In essence, legislation brings in an element of fairness to the employment relationship. This shows a radical departure from the common law position where the only requirement for the termination of a contract of employment was whether the termination was lawful or not. This requirement was met if the requisite notice of the termination of employment contract was provided.

The courts have also acknowledged the deficiencies of the common law with respect to the protection of employees in the context of the employment relationship, especially in the context of dismissal. The courts have also indicated that the common law principles must be developed to be in line with the Constitution. In *Fedlife Assurance Ltd v Wolfaardt*[10] the court had this to say:

> "It might be that an implied right not to be unfairly dismissed was imported into the common law employment relationship by the Constitution."'

In *Old Mutual Assurance Co SA v Gumbi*[11] the court held that a pre-dismissal hearing was also incorporated into the employee's employment contract. According to the

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4 Act 75 of 1997.
5 Act 66 0f 1995.
6 Act 55 of 1998.
7 Constitution of the Republic of South Africa 1996.
8 S 185(a).
9 S 188(1).
10 [2001] 12 BLLR 1301 (A).
11 [2007] 8 BLLR 699 (SCA).

court, the common law contract of employment had been developed in accordance with the Constitution to include a right to a pre-dismissal hearing.

This approach was further taken a step further in *Murray v Minister of Defence*[12] where the court had to determine whether a member of the South African National Defence Force who had resigned because of an intolerable employment relationship had been constructively dismissed. It must be noted that SANDF members are not covered by the LRA.[13] It is worth noting that under the common law the concept of a constructive dismissal does not exist. If an employee resigns there is no dismissal. On the other hand, in terms of section 186(1) (e) of the LRA an employee who resigns because the employer has made continued employment intolerable can make a claim of a dismissal. The court held that a contractual right not to be constructively dismissed existed. It further held that this was based on the development of common law contract principles in the light of section 23 of the Constitution. In this regard the court averred that the Constitution imposed on all employers a duty of "fair dealing" at all times with the employees even those employees not covered by the LRA.

In *SAMSA v McKenzie*[14] the court rejected the contention that the common law needs to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. According to the court the enactment of section 185 of the LRA gave effect to the constitutional right to fair labour practice in that in the employment relationship an employee has a right to be dismissed fairly. Giving effect to this right meant that there was no need to further develop the common law for employees already covered by the LRA as this would result in duplication of rights. For employees not covered by the LRA, such a need would be relevant.

It is worth noting that for an employee to rely on the protection offered by the LRA in the context of a dismissal claim, the existence of a dismissal must first be

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12 (2008) 29 *ILJ* 1369 (SCA).

13 S 2(a).

14 [2010] 3 ALL SA 1 (SCA).

established.[15] It is only then that the LRA provisions that a dismissal must be substantively and procedurally fair, will find application.

However, there are instances where the employment relationship may be terminated but such a termination may not constitute a dismissal. These include resignations, desertion, expiry of contracts of employment due to effluxion of time or completion of projects and so on. The main purpose of the treatise is to critically analyse the instances where termination of a contract of employment falls outside the meaning of dismissal as contemplated by the LRA. Since the termination of the employment contract under these circumstances would fall outside the meaning of dismissal as provided by the LRA,[16] the Commission for Conciliation Mediation and Arbitration (hereinafter referred to as "the CCMA") and the Labour Court do not have jurisdiction to arbitrate or adjudicate such terminations. The study will also look at how the courts have provided guidance on how such cases must be strictly interpreted in order to avoid a situation where parties to an employment relationship may contract out of the protection offered by the LRA and other legislation.

Chapter Two below analyses the nature of the employment relationship. Chapter Three below will focus on resignations. Chapter four below deals with the termination of the employment contract as a result of death of either the employer or the employee. Chapter Five below focusses on desertion in the private sector local government and public sector. Chapter Six below deals with the transfer of the employment contact as result of insolvency. Chapter Seven below analyses the termination of employment due to effluxion of time namely retirement and coming into being of fixed-term contracts. Chapter Eight will focus on the legality of automatic termination of employment contracts clauses. Lastly, Chapter nine deals with the conclusion.

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15 S192.

16 S 186.

CHAPTER 2
THE NATURE OF THE EMPLOYMENT RELATIONSHIP

This chapter will deal with the parties to the employment relationship and also the nature of the employment relationship. The contract of employment is the foundation of the relationship between an employee and his or her employer. The existence of the employment relationship is the starting point for the application of all labour laws. If there is no employment relationship between the parties, labour laws do not apply to that relationship.

2.1 WHO IS AN EMPLOYEE?

A number of different definitions exist which differ from the common law position as to who should be regarded as an "employee". Focus will be placed on the definition of 'employee' as provided in the LRA[17] and the BCEA.[18] The relevance and the importance of the definition is because of the fact that only an employee as defined in the LRA[19] is entitled to protection against an unfair dismissal in terms of the LRA and if the person is not an employee, the CCMA and the Labour Court will not have jurisdiction to deal with the matter.

In terms of the LRA and the BCEA, an employee is defined 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."

The issue of who is an employee is pertinent, on a daily basis the commissioners of the CCMA are faced with a challenge of ascertaining whether the person seeking relief is an employee or not.[20]

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17 S 213 of LRA.

18 S 1 of BCEA.

19 S 213.

20 Basson; Christianson; Garbers; Le Roux; Mischke and Strydom *Essential Labour Law* (2005) 21.

In *Discovery Health Limited v CCMA & others*[21] the LC had to deal with the question of whether workers working without the required permit were regarded as employees in terms of the LRA since they were working in terms of unlawful employment contracts. In this case, the employee was a national of Argentina who worked in South Africa for Discovery Health. The employer terminated the employment contract after it learnt that the employee did not have a legal work permit. The employee approached the CCMA for relief, the employer argued that the CCMA did not have jurisdiction to deal with the matter since the employment contract was invalid and therefore the employee did not enjoy protection of the LRA.

The court ruled that the Immigration Act[22] does not say that employment contract concluded without the necessary permit is void. It highlighted the fact that the Act criminalizes the employment of a foreigner without the necessary permit and that the criminal aspect focuses on the employer not the employee. Further to that the court held that if the contract would be regarded as void, the employee would be left without remedy from instances where employers would deliberately employ foreign nationals and simply refuse to pay them, claiming that the contract is not valid.

2.2 STATUTORY PRESUMPTION

In order to assist with this pertinent question of who is an employee, the LRA[23] provides a rebuttable presumption of who is an employee.

> **"200A. Presumption as to who is employee**
>
> (1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
>
> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or direction of another person;

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21 [2008] 7 BLLR 633 LC.

22 13 of 2002.

23 S 200A.

(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person."

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees."

This means that a person is presumed to be an employee regardless of the form of contract if any one of the factors listed above is present in the relationship between that person and the person for whom they work for or to whom they render services to. The person must earn under the threshold which is currently R205 433 per annum.

In *Ganga / Grassroots Entrepreneurial Development (Pty) Ltd t/a Grassroots Scape Facilities*[24] the arbitrator stated:

> "In legal terms, a presumption is the acceptance of a fact or state of affairs as being true and correct. There are two types of presumption, a *rebuttable* presumption and an *irrebuttable* presumption. A rebuttable presumption means that the fact or state of affairs is presumed to be true and correct until it can be proved otherwise, whereas an irrebuttable presumption is a fact or state of affairs that cannot be disproved."

These factors are not however requirements for being an employee. They merely create a rebuttable presumption that a person is an employee. In other words once these factors are met, the onus shifts to the respondent to prove on a balance of

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[24] [2010] 6 BALR 644 (CCMA).

probability that the applicant is an independent contractor and not an employee in terms of the definition set out in section 213 of the LRA.

2.3 THE DOMINANT IMPRESSION TEST

The dominant impression test or multiple test is often used by courts to establish whether the person seeking relief is in actual fact an employee and also to determine whether the nature of the employment relationship is that of a contract of employment or not. The test requires the arbitrator or the court to arrive at a decision on the balance of probabilities on whether the facts indicate an independent contractor arrangement or the facts that indicate an employment contract relationship.

The factors that the court would consider when using the dominant impression would include but not limited to the following:[25]

- The control and supervision of the person's work outputs, that is whether the employer has the right to discipline the worker or not.[26]

- The extent to which the worker depends on the employer for the performance of his duties.

- Whether the worker is allowed to work for another person. Usually employees are not allowed to work for more than one person whilst independent contractors on the other hand are free to render their services to other persons. In *Ganga*[27] there was no evidence led to suggest that the person actually rendered his services to another person while he was working for the respondent. This fact contributed in concluding that the person was an employee.

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25 Basson *et al Essential Labour Law* 30.

26 *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC).

27 *Supra.*

- Whether the worker is required to perform the work personally. Employees are usually required to perform the work personally whilst independent contractors do not have to personally do the work, the requirement is that the work must be done.

- Whether the worker is paid according to a fixed rate or by commission

- Whether the worker provides his or her own tools and equipment.

In *SABC v McKenzie*[28] the Labour Appeal Court made a distinction between the contract of employment and the contract of work. It ruled that in a contract of employment, an employee makes his services available to the employer irrespective of whether there is work to be done or not, therefore placing his productive capacity at the disposal of the employer. On the other hand, an independent contractor commits himself only to deliver a product or end result of that capacity. It also held that in a contract of employment the employee puts his or services at the "beck and call" of the employer. Services rendered are at the disposal of the employer, who may or may not decide to have them rendered. The employee is subordinate to the will of the employer. The employment contract terminates at death of employee or on expiration of period of service.

In a contract of work relationship, there is an independent contractor who is not obliged to perform work personally, unless specifically agreed upon. The independent contractor is bound to produce in terms of the contract of work, not by order of the employer and to perform in terms of the contract of work, not by the orders of the employer. The death of the contractor does not necessarily terminate the contract of work; it terminates upon completion of work.

2.4 WHO IS AN EMPLOYER?

Generally, the parties to an employment relationship include employers and employees. This may seem relatively straightforward but in certain cases it is not

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[28] [1999] *ILJ* 585 (LAC).

easy to identify the true nature of the parties involved as well as the nature of the relationship. For instance in the context of Temporary Employment Services (hereinafter referred to as "the TES") where there are three parties involved, the client, the labour broker and the employee it is not always easy to identify who the employer is. The challenge arises at the termination of the contract of employment where it has to be determined whether there has been a dismissal or not. An employee may allege that a client of the labour broker is the employer whilst the true employer could indeed be the labour broker.

In *Mandla v LAD Brokers (Pty) Ltd,*[29] the court held that the effect of section 198(2)[30] of the LRA is to create a unique tripartite relationship and by designating the TES, rather than the client, as the employer.

The LAC[31] held that for the purposes of the LRA and the BCEA, it matters not that the client would, under the ordinary tests, be the employer of the person who renders a service. By operation of law, for the purposes of those two statutes, the TES is deemed to be the employer in circumstances when it would otherwise not be. It further held that the supervision and control test was not in itself sufficient to create an employment relationship between the parties.

2.5 DISGUISED RELATIONSHIPS

In some instances, for variety of reasons parties may specifically elect to avoid employment contract agreements and enter into an independent contracting relationship. However, the fact that a person may be labelled or label himself as an independent contractor does not mean that the courts will not deem him or her to be an employee if the reality of the relationship dictates so. The fact that a person provides services through the vehicle of a legal entity such as a company or a closed

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29 (2002) 21 *ILJ* 1807 (LC).

30 For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

31 *LAD Brokers (Pty) Ltd v Mandla supra*.

corporation does not prevent the relationship being an employment relationship covered by labour legislation.

In *Denel (Pty) Ltd v Gerber*[32] the worker, Ms Gerber argued that she was dismissed by Denel, whilst Denel argued that she was not its employee but was an employee of her own company which had an agreement to provide certain services to Denel. The LAC was required to determine whether there was in fact a dismissal and also to rule on the true nature of the employment relationship. It held that such determination should not be solely made on the basis of what the parties have said in the agreement. It said[33] that the question must be decided on the basis of realities, on the basis of substance and not form or labels. Whatever is said in their agreement may have been convenient to both parties at the time and the agreement may not reflect the true nature of the employment relationship.

It further said that:

> "Any oral or other evidence which may assist the court to conclude what the reality of the relationship is or was between such two persons is admissible and is not precluded by the parol evidence rule. In this regard it is noteworthy that in almost all reported cases that I have come across which relate to this question, oral evidence was led which related to how parties interacted with each other and how they handled their relationship."

The court ruled that Ms Gerber was in reality the employee of Denel and further held that regard should be given to realities of the relationship and not labels in other words substance and not form.

2.6 CODE OF GOOD PRACTICE: WHO IS AN EMPLOYEE?

The Code commences by setting out various guidelines, the main intention being to promote clarity and certainty as to who is an employee for the purposes of the LRA and other labour legislation.

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32 [2005] 9 BLLR 849 (LAC).

33 At par 22.

Another purpose of this code is to ensure that a proper distinction is maintained between the employment relationship which is regulated by labour legislation, and independent contracting. It spells out quite clearly that an employment relationship and an independent contractor relationship are totally different. A further purpose is to ensure that employees who are in an unequal bargaining position in relation to the employer are protected through labour law and are not deprived of those protections by contracting arrangements.

This indicates strongly that the legislature is aware that there are employers who may hide the true nature of the employment relationship in the disguise of a cleverly worded contract, thus depriving the employee of his legal right to fair treatment.

The code further acknowledges that there exists a variety of employment relationships in the labour market, including disguised employment, ambiguous employment relationships, non-standard employment, and triangular employment relationships. It requires that any person who is interpreting or applying any of the following Acts, must take this code into account for the purpose of determining whether a particular person is an employee, in terms of the LRA; the BCEA; the EEA or the SDA.

It seems the drafters of the code anticipated the issue of employers who might disguise the real nature of the employment relationship and show it as an independent contractor arrangement and states clearly in paragraph 16 that “a statement in a contract that the applicant is not an employee or is an independent contractor must not be taken as conclusive proof of the status of the applicant”. The code states further that “The fact that an applicant satisfies the requirements of the presumption by establishing that one of the listed factors is present in the relationship does not establish that the applicant is an employee”. However, the onus then falls on the “employer” to lead evidence to prove that the applicant is not an employee and that the relationship is in fact one of independent contracting.

CHAPTER 3
RESIGNATION

An employee may terminate an employment contract by resigning. Resignation can be defined as an employee's notice of termination of the employment contract. It is a unilateral decision by an employee to terminate the employment contract and does not require an employer's acceptance nor can an employer refuse to accept a resignation. If a resignation can only be effective or valid only once accepted by an employer, in effect that would mean an employer would force an employee to remain in its employ against his or her will. An employer cannot physically force an employee that has resigned to work, that employer has no choice but to accept the resignation. In modern employment is not clear as to what an employer would achieve by forcing an employee to remain in its employ. The employee would simply commit misconduct to avoid working for that employer.

In practice though, many employers "accept" resignation however, this practice has no legal effect since a resignation is a unilateral act. This principle was confirmed in *Mafika v SA Broadcasting Corporation.*[34]

In *SABC V CCMA*[35] the LC held that a resignation brings about an end of an employment relationship without the employer having to do any act and an employer's acceptance of the resignation is of no juridical significance.

An employee that has tendered a resignation cannot withdraw the resignation, unless there is mutual agreement between employer and employee to accept the withdrawal, the employer is not obliged to accept the withdrawal.[36] Due to the fact that resignation is a unilateral action by an employee, even if an employer has accepted a resignation, withdrawal of the acceptance of the resignation will have no legal effect.[37]

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34 [2010] 5 BLLR 542 (LC).

35 (2001) 22 *ILJ* 487 (LC) [11].

36 *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).

37 *De Villiers v Premier, Eastern Cape Provincial Government and Another* [2011] 12 BLLR 1187 (LC).

In the event that the resignation is tendered during the heat of an argument, the courts have held that refusal by the employer to accept the withdrawal may constitute a dismissal.[38] Subsequent decisions about whether an employee is entitled to withdraw a resignation do not support this view. In *Mafika v SA Broadcasting Corporation*[39] the court held that however noble the motives of the employee may be, in law it cannot serve as a basis for withdrawal of the termination since in the first place the resignation is a voluntary and deliberate action of the employee.

In *SACWU obo Sithole / Afrox Gas Equipment Factory (Pty) Ltd*[40] an employee had resigned and withdrew his resignation two weeks later. When the employer advised the employee that he had no right to do so, the employee contended that since the employer had not accepted the resignation and there were no discussions about the resignation he was entitled to withdraw the resignation. As stated previously it was confirmed that there is no requirement in law for an employer to accept the resignation or discuss it with the employee for it to be valid.

In *Meyer v Provincial Department of Health & Welfare & others*[41] an employee facing disciplinary charges resigned, the employer accepted the resignation "without prejudice" but later changed its mind and required the resigned employee to attend a disciplinary hearing. The LAC confirmed the principle that resignation is unequivocal and the employer's acceptance of the resignation without prejudice does not entitle the employer to withdraw the acceptance since the resignation does not need to be accepted. If the principle is that a resignation must be clear and unambiguous, an employer's acceptance of resignation must also be clear and without conditions.

An employee that has tendered a resignation cannot change his mind and withdraw the resignation unless the employer agrees to the withdrawal. The decision to accept the withdrawal is solely that of the employer. This means that an employer is free to

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38 *CEPPWAWU v Glass Aluminium* [2000] CC 8 *ILJ* 695 (LAC).

39 *Supra.*

40 [2006] 6 BALR 592 (MEIBC).

41 (2006) 27 *ILJ* 759 (LAC).

accept a withdrawal of a resignation from an employee that it wishes to keep in its employ and reject a withdrawal from an employee it does not wish to employ.

3.1 RESIGNATION GIVEN BUT NOT READ BY THE EMPLOYER

In *African National Congress v Municipal Manager, George Local Municipality and Others*[42] the SCA had to deal with the question of whether a resignation delivered by a municipal councillor, Mr Jones to the municipal manager, Mr Africa but subsequently withdrawn and returned unread constitutes a valid resignation under Section 27 of the Local Government: Municipal Structures Act 117 of 1998.

Mr Jones delivered a resignation letter to the municipal manager in a sealed envelope and left it on his desk. Mr Africa did not read the letter immediately due to the fact that he had to attend to other pressing municipal business matters. The following day Mr Africa was informed via telephone by another councillor that Mr Jones had changed his mind about resigning and shortly after the telephone call, Mr Jones indeed came to fetch his resignation letter. Mr Africa gave it back to Mr Jones still in a sealed envelope and unread.

The court was required to determine whether Mr Jones had in fact resigned and if so whether the municipal manager, the person authorised to receive the resignation letter, was advised of such resignation.

The appellant contended that in terms of section 27(a) of the Act, Mr Jones's seat became vacant as a matter of law once his resignation letter was delivered to the municipal manager who was in any event aware of the letter's content. It was argued that to deny a resignation by reason of municipal manager's failure to read the resignation letter whether deliberately or negligently would jeopardise certainty of practice in municipalities.

The SCA held that whilst a resignation is a unilateral act, it must be unequivocally communicated to the intended recipient in order to be effective, unless there is a

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42 [2010] 3 BLLR 221 (SCA).

contrary stipulation.[43] In this case since the resignation letter was not opened nor read by the intended recipient, in fact there was no communication between the parties.

The court held that mere delivery of the resignation letter was not sufficient. It is clear that Mr Jones had intentions to resign but on whether Mr Africa was advised, the court held that the party cancelling the resignation must convey his decision to the mind of the other party in order to bring the cancellation into effect.[44] This could only be done if Mr Africa had read the resignation letter, the fact that he may have been told about the resignation is irrelevant, the court held.[45]

The court held that it was imperative for the municipal manager to read the letter for resignation to come into effect.[46] It further held that there was no indication whatsoever that the municipal manager deliberately refused to read the letter or that he was negligent in failing to read the letter.

In conclusion, a resignation would only be effectively communicated to the employer once it is read by the employer.

3.2 NOTICE OF TERMINATION

The resignation can be with or without notice. The BCEA[47] stipulates the minimum notice period required in resignations as:

- one week if the employee has been employed for less than 6 months;
- two weeks if more than six months but less than 12 months; and
- four weeks if more than 12 months.

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43 [2010] 3 BLLR 221 (SCA) [11].
44 [2010] 3 BLLR 221 (SCA) [15].
45 [2010] 3 BLLR 221 (SCA) [16].
46 [2010] 3 BLLR 221 (SCA) [16].
47 Act 75 of 1997.

Despite the provisions of the BCEA an employer and employee may agree in writing to reduce or have longer notice period. Longer periods are mostly common in resignations of senior managers and employees with scarce skills. The requirement to give longer notice periods is applicable to both employers and employees. If an employee is required to give three months' notice the employer is also required to give the same notice period. In some cases this could have dire effects for one party, for example an employer may require a senior manager to work out the three months' notice whilst busy gathering the company trade secrets or the employer may be forced to pay an employee found guilty of dishonest misconduct.[48]

The BCEA does not apply to employees working less than 24 hours a month. The question therefore is whether or not an employer is obliged to give notice period to this group of employees. One of the requirements of Schedule 8 of the Code of Good Practice of the LRA[49] is that termination of employment must be procedurally fair. In the event that an employer would just inform an employee not bother to come to work the following day would be in line with this requirement.

3.3 TERMINATION BY EMPLOYEE WITHOUT GIVING RELEVANT NOTICE

It sometimes happens that employees resign without giving the required notice or give shorter notice. One of the employer's recourse is to sue the employee for damages or hold the employee accountable to what is left of the contract. This may not be an easy task as the process would include a civil claim which might not necessarily be at the employer's best interest especially for low earning employees. For this reason it is questionable as to whether the notice period stipulated in the contract of employment is worth the paper it's written on.

In *NEWU v CCMA & others*[50] after an employee failed to give the required three months' notice period in terms of the employment contract, the employer, a trade union referred an unfair labour practice dispute to the CCMA. The CCMA held that it

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48 Jacobs "Goodbye: A prescription for terminating employment" *Pharmaceutical Practitioner.*

49 Act 66 of 1995.

50 Case number JR/685/02 (LC).

lacked jurisdiction to deal with the matter as it did not amount to unfair labour practice in terms of the LRA.[51]

NEWU took the decision of the CCMA to the LC seeking an order declaring that the LRA[52] and the EEA[53] infringe NEWU's and other employers' constitutional rights and are invalid or at least partially so. The LC confirmed NEWU's view that, the failure of the employee to give the required notice infringes employer's rights to equality, equal protection and benefit of these laws and their right to have a dispute about the fairness of the resignation of an employee from service resolved by the application of law in a fair public hearing before the CCMA, Labour Court or another independent and impartial tribunal.

The LC held that whist the definition of unfair labour practice in terms of the LRA specifically refers to the unfair conduct of the employer and not that of the employee, the conduct by the employee may qualify as an unfair labour practice, that is, a practice that is contrary to that contemplated by section 23 of the Constitution.[54] A lawful resignation that is also in the circumstances unfair may constitute an unfair labour practice. A breach of the contract of employment, which is unfair to an employer, may give rise to an unfair labour practice.

With regard to the recourse available to NEWU, the LC held that the employer did not need to rely on the broad, flexible, equity basis of an unfair labour practise as defined on the LRA. NEWU had a number of remedies available to it in order to address the consequences of the resignation of its employee including seeking an interdict in the form of a mandamus compelling then employee to adhere to the terms of the contract, suing the employee for three month's salary in lieu of notice and also approaching a court of competent jurisdiction relying on section 23 of the Constitution[55] to grant the relief which it seeks.

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51 Act 66 of 1995.
52 *Ibid*.
53 Act 55 of 1998.
54 Constitution of the Republic of South Africa 1996.
55 S 23 provides that "Everyone has a right to fair labour practices".

NEWU then approached the LAC[56] appealing the decision of the LC. The LAC held that the LRA[57] makes no provision for the right of an employer not to have the contract of employment terminated unfairly by an employee. It does not provide an employer with any recourse in a situation where an employee resigns or terminates the employment contract without giving the proper notice.

The court reasoned that perhaps the legislator had purposely omitted to make this provision simply because doing so would have been a step backward in the field of labour relations and employment law since employers already enjoy more economic power compared to employees.[58] If employers would be given such protection against employees, the power between employer and employee would become more imbalanced due to already existing unequal nature of the parties in an employment relationship. It held that where the employee had resigned without giving notice in circumstances where he was obliged to give notice, the employer has a right to sue the employees for damages equivalent of the notice pay at common law and in terms of the provisions of the BCEA.

Employers hardly use this right. Under the old Labour Relations Act[59] employers had a right to bring unfair labour practice claims against employees for virtually any conduct on the part of employees including termination of a contract of employment occasioned by the resignation of an employee however, even then one can hardly find a case brought to the Industrial Court by an employer against an employee complaining that the employee's resignation constituted an unfair labour practice. The fact that employers had a right to bring such claims but hardly ever brought them suggests that there was no need to include such a right in the current LRA.[60]

The LAC[61] further held that generally, employers do not need protection against unfair resignations from employees. They are sufficiently powerful when compared

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56 Case no JA51/03 (LAC).
57 S 186.
58 Case no JA51/03 (LAC)[22].
59 Act 28 of 1956.
60 Act 66 of 1995.
61 At par [20].

with individual workers acting individually and are able to deal with unfair resignations adequately without a statutory right not to be subjected to unfair resignations.

This assertion by the LAC is in line with ILO Convention 158 on Termination of Employment which provides no protection for employers against unfair or unjustified resignations but provides protection of employees against unjustified dismissals.

In *SA Music Rights Organisation v Mphatsoe*[62] the LC held that circumstances in which an employer would seek to recover damages from an employee for a breach by the employee of the employment contract must be extremely limited, although in principle an employer is entitled to recover any loss that it suffers consequent on such breach.[63] The court held that it is not sufficient for an employer to base its calculation of damages merely on remuneration and benefits that the employee would have earned; it held that when claiming damages an employer must be able to establish any loss consequent on the respondent's breach of contract.[64]

3.4 MUST THE NOTICE OF TERMINATION BE IN WRITING?

The BCEA[65] requires that the notice of termination of an employment contract must be in writing except when given by an illiterate employee. The next question is whether it is obligatory for a resignation to be in writing. Common law does not require the notice of termination to be in writing. In *Quinn/Singlehurst Hydraulics (SA) Ltd*[66] it was stated that the test as to whether an employee resigned or not is that an employee has to show by "word or conduct" a clear and unambiguous intention not to continue with the contract of employment and lead a reasonable person to believe so. The word "conduct" implies that it does not have to be in writing. Since the employment contract does not have to be reduced to writing, it can safely be said that a resignation does not have to be in writing.

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62 [2009] 7 BLLR 696 (LC).
63 At par [15].
64 At par [19].
65 S 37(4)(a).
66 [2005] 6 BALR 673 (CCMA).

However, a distinction between a resignation and an intention to resign must be made as discussed in *African National Congress v Municipal Manager, George Local Municipality and Others*[67] above. Employers are cautioned not to be hasty and interpret an intention to resign as "resignation"; because an "intention" to resign does not constitute a resignation. This supports the principle that resignation must be clear, unambiguous and there must be no conditions attached to it.

In *Mafika v SA Broadcasting Corporation Ltd*[68] an employee had terminated an employment contract with immediate effect via SMS (short message system) and later changed his mind and claimed that an SMS does not constitute notice in writing. The court was required to decide whether notice via SMS constitutes notice in writing. The court held that termination via an SMS constitutes notice in writing.[69] The court based its decision on Electronic Communications and Transactions Act[70] which provides that a requirement in law that a document must be in writing is met if the document is in the form of a data message, it held that an SMS is a data message and qualifies as a notice in writing.

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67 [2010] 3 BLLR 221 (SCA).

68 [2010] 5 BLLR 542 (LC).

69 *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC) 548G-I.

70 S 12, Act 25 of 2002.

CHAPTER 4
DEATH

The death of either party in an employment contract may terminate the contract. In the event of the death of an employee, the employment contract terminates.

4.1 DEATH OF AN EMPLOYEE

When an employee dies, performance of the employee's obligation in terms of the contract is prevented by a superior force of nature that could not reasonably have been guarded against.[71] It is not possible to continue with the terms of the contract, meaning that supervening impossibility of performance has occurred.

"Death in service" is the term used where an employee dies while working or still in service with the employer. The employee's death could be as a result of an injury or an occupational disease that arises out of and in the course of employment or it may have nothing to do with the employment relationship.

At common law, in the event that an employee dies in service or contracts an occupational injury or disease through the employer's negligence, the employee or his dependant has to institute a delictual action against the employer for compensation. A delict is an act that is wrongful and unlawful that causes damage, where there is also a link between the damage and the act.

Dependants of deceased employees are however at liberty to make a claim against third parties other than their employer for example, colleagues. They can still hold the employer accountable from the perspective of criminal liability.

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71 Brassey "The Effect of Supervening Impossibility of Performance on Contract of Employment" 1990 *Acta Juridica* 22 23.

4.2 DEATH OF AN EMPLOYER

The death of an employer does not necessarily end the employment contract. Where the employer is a juristic person, the death of its members even a sole member does not affect the existence of the contract between the company and its employees.[72] Employees may claim for notice pay against the deceased estates of their employers.

In the event of the death of the employer, a juristic person, the death of its members, even of a sole member does not affect the existence of the contract between the company or closed corporation and its employees. Companies must be formally wound up in order to terminate contractual ties with their employees. Contractual rights and duties are generally transmissible on death of an employer and the resolution of the contract is left to the executor of the deceased's estate.

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[72] Grogan *Workplace Law* 84.

CHAPTER 5
DESERTION

In terms of the employment contract, the primary and fundamental duty of an employee is to render services and skills to his employer at the agreed time and place. The employer has a commensurate right to expect him to do so within the administrative arrangements of the contract such as determining the rules and standards for the work that is to be done.

The employee must make available his services and remain in service in terms of the contract. A basic element of this duty is that an employee is expected to be at his workplace during working hours, unless he has an adequate reason to be absent.[73] In the event an employee fails to render his services to the employer he then must provide an employer with a satisfactory reason or explanation for his absence.[74] Wilful absence from work constitutes a breach in contract and is therefore a disciplinable offence.

In South African labour law a distinction is drawn between, absenteeism, abscondment and desertion.

Desertion occurs when an employee abandons his or her work with no intention of returning,[75] in other words the employee intends to terminate the employment relationship. Desertion is deemed to have taken place when evidence warrants the conclusion that the employee has formed a clear and unequivocal intention to abandon his or her employment.[76] The employee may indicate such intention to abandon work expressly or by implication.

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73 Grogan *Dismissal, Discrimination & Unfair Labour Practices* [2005] 237.

74 *Metal and Allied workers Union v Horizon Engineering (Pty) Ltd* (1989) 10 *ILJ* 782 (Arb).

75 *Khulani Fidelity Services Group v CCMA* [2009] 8 BLLR 767 (LC) 20; *SABC v CCMA* [2002] 8 BLLR 693 (LAC).

76 Grogan *Workplace Law* 186; *SACWU v Dyasi* [2001] 7 BLLR 731 (LAC) 19; *Ngindana & others v Grahamstown Municipality* [1994] 11 BLLR 68 (IC).

In *Ngindana & others v Grahamstown Municipality*[77] a group of employees engaged in essential services had been absent from work without leave after their leave request was declined. The employees proceeded and went on leave even though the leave was not approved. Subsequent to that, the employer terminated their services on the fourth day of their absence.

The employer first contended that the employees' conduct amounted to a repudiation of their contract of employment and therefore entitled the employer to cancel the contract on the grounds of repudiation. Secondly, the employer contented that since there was no dismissal, there was no need for an enquiry prior to terminating services.

With regard to the issue of repudiation, the Industrial Court held that repudiation occurs when whether by word or conduct, an employee evinces a clear and unequivocal intention not to perform the obligation due under the contract.[78] It further held that the test whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract. The court said, even if it could be said that the applicants had taken leave without authorisation, they did not repudiate their contracts as they had intended to carry on with their employment after they had taken leave**.** They had not evinced a clear and unequivocal intention not to return to work.

The court went on and held that an important distinction was to be drawn between repudiation and a breach of the contract, as the latter amounted to misconduct. It was held that their conduct amounted to a breach of contract, which is a form of misconduct, in respect of which an enquiry was required prior to their dismissal in terms of the LRA. Since the employer did not hold an enquiry before terminating the services, the dismissal was found to have been procedurally unfair.

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77 [1994] 11 BLLR 68 (IC).

78 *Ngindana & others v Grahamstown Municipality supra* 74.

There is a clear distinction between desertion, abscondment and unauthorized absence from work, this distinction can be can be established by the employee's conduct. The distinction will be discussed further below.

5.1 DISTINCTION BETWEEN DESERTION AND ABSCONDMENT

5.1.1 ABSCONDMENT

Abscondment refers to a situation where an employee has been absent from work for periods that warrant an inference that the employee does not intend to return to work.[79]

Whether an employee has absconded or not is determined by the actual period the employee has been absent and the nature of communication the employer has had with the employee during this period of absence.

The period of absence as well as the total lack of communication by the employee of his or whereabouts leads the employer to believe that the employee is not going to return. In other words the employer draws the inference from these facts that the employee does not have the intention of returning to work. It is important to note that, it is still an inference that is drawn, and is not confirmed by the employee.

The difference between desertion and abscondment is that in abscondment cases, an inference is made that the employee has no intention to return to work whilst a deserting employee expressly or by implication intimates that he or she has no intention to return to work.[80]

5.1.2 DISTINCTION BETWEEN UNAUTHORISED ABSENCE FROM WORK AND DESERTION

Unauthorized absence from work means an employee that is scheduled to work is absent from work but still intends to return to work. Absenteeism can take various

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79 Grogan *Dismissal* 177.

80 *Ngindana & others v Grahamstown Municipality supra*.

forms for example late coming, taking extended lunch breaks and being absent without leave.

In *SABC v CCMA & Others*[81] the Labour Appeal Court drew a distinction between desertion and absence without permission. It held that the test to differentiate between absence without leave and desertion is whether the employee has an intention not to return to work or not. A sequence of events that led to the LAC decision will be discussed below.

In *South African Broadcasting Corporation v CCMA*[82] an employee's employment contract was terminated by the employer after the employee had failed to comply with verbal and written instructions to report for duty. Subsequent to the employee's failure to report for duty, the employer notified the employee in writing that his employment contract had been terminated. The employee referred the matter to the CCMA which found that the employee had been dismissed, and that his dismissal was substantively fair but procedurally unfair. The employer then instituted proceedings in the Labour Court for the review and setting aside of that award.

The employer challenged the CCMA decision insofar as the conclusion that a dismissal occurred at all. SABC contended that there was no dismissal, the employee had deserted and therefore, the act of desertion on the part of an employee is the juridical event which terminates the employment relationship. Employer also argued that it was not necessary to afford an employee who "deserted" a hearing because no "dismissal".

It further contended that if a dismissal did occur, that the employer was in the circumstances excused from affording the employee a hearing, in which regard reliance was placed on paragraph 4 of the Code of Good Practice in relation to dismissals, contained in Schedule 8 of the LRA, which states in relation to fair procedure, that:

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81 [2002] 8 BLLR 693 (LAC).

82 (2001) 22 *ILJ* 487 (LC) 13.

> "In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."

The Labour[83] Court held that, mere absence from work is no indication that the employee has abandoned his work and has no intention of returning back. It held that the employer should establish whether the employee has communicated an unequivocal intention not to return to work or not, if the answer is yes then, the fact of desertion is established.[84] If the answer is no, then it means the employee is merely absent and has not deserted.

The LC upheld the CCMA finding that the employee had been dismissed since the act of desertion by an employee constitutes a repudiation of the employment contract, it is not the act of desertion which terminates the contract of employment, but the act of the employer who elects to exercise its right to terminate the contract in the face of that breach.[85]

With regard to desertion being a unilateral act like in resignation, the court held that even though a unilateral decision by an employee is not an act which is permitted by the terms of the contract and because desertion is not permitted by the terms of the contract, it constitutes a breach, resignation on the other hand is permitted and is not a breach.

Concerning whether the employee was entitled to a hearing or not, it was held that since the act of the employee was a breach and thus constituted misconduct, the employer should have held a disciplinary hearing since the whereabouts of the employee were known. The findings of the court are in line with the findings and decision of the Industrial Court in *Ngindana & others v Grahamstown Municipality.*[86]

It further held that the employer cannot be expected to hold a disciplinary enquiry in exceptional circumstances where an employee's whereabouts are not known.

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83 *Supra.*

84 At 12.

85 At par 17.

86 [1994] 11 BLLR 68 (IC).

Therefore, the employer's reliance on Clause (4)4 of the Code of Good Practice was misplaced, these were not exceptional circumstances.

The employer took the matter to the LAC[87] on appeal. The LAC held that a deliberate and unequivocal intention no longer to be bound by the contract of employment was never established, further to that, the employee was hoping that a disciplinary enquiry would be convened against him so that he could state his case.[88] It therefore could not be said that the employee had deserted.

The LAC also held that it cannot be deduced merely from the employee's failure to report for duty that he had deserted his post.[89] It concluded that the employee's failure to report for work did not amount to desertion. Since the employee did not desert, he had committed misconduct by failing to heed to the employer's call to return to work. It goes without saying that he was therefore entitled to a disciplinary enquiry prior to termination of his services to give effect to the *audi alteram partem* rule, the court held.

In *Seabolo v Belgravia Hotel*[90] an employee who worked as a barman for the respondent informed his employer that his mother was ill in Rustenburg, and that he was going to visit her. The employer agreed to give him one day's leave. However, the employee returned to work some six days later without informing the employer. On his return, he was informed that he had been dismissed and another person employed in his job.

The arbitrator was required firstly to establish whether the employee had deserted or abandoned his employment considering that the employer knew the circumstances and the whereabouts of the employee. Secondly, to consider whether the employee had been unfairly dismissed, taking into account that there was no disciplinary enquiry, and whether the reason for the dismissal was a fair reason.

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87 *SABC v CCMA* [2002] 8 BLLR 693 (LAC).

88 *SABC v CCMA supra* 13.

89 *Ibid*.

90 [1997] 6 BLLR 829 (CCMA), case number GA 1288.

The arbitrator found that no evidence emerged at the arbitration to indicate that the employee had no intention of returning to work the following day, as arranged with the employer since normally "the intention not to return to work" is one of the essential elements in concluding that a desertion has taken place as indicated in other judgements.[91] He held that the employer had acted prematurely in assuming a desertion. The arbitrator held that the employer could have enquired as to the whereabouts of the employee before drawing an inference that the employee has no intention of returning to work.

This contention is supported by the LC in *SABC v CCMA*[92] where it said:

> "the self-evident paradox in this decision is explained in terms of the rather more obvious question which every employer must ask in the face of the absence of an employee: why? In those instances where the employee communicates an unequivocal intention not to return to work, the fact of desertion is established".

The arbitrator's view is also supported by Dekker,[93] where he states that if the employee cannot be contacted, there seem to be three things that the employer must do to show that he has acted reasonably.

- First, he should show that he has made every effort to contact the employee before he is dismissed.[94] Whilst most deserters do not inform their employer that they are abandoning their job, the employer should make enquiries into the reasons for the absence, they could do this by for example asking colleagues, send telegrams to the employee's address. Employers need to warn and advise employees of possible consequences of not reporting for duty,[95] instruct them to return to work and to confirm whether in actual fact the employee has deserted.

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91 *SABC v CCMA supra* 13; *Ngindana & others v Grahamstown Municipality supra*.

92 (2001) 22 *ILJ* 487 (LC) [11].

93 Dekker *"*Gone with the Wind and Not Giving A Damn: Problems and Solutions in Connection with Dismissal Based on Desertion" 2010 22 *SA Merc LJ* 106 104–113.

94 *Mofokeng v KSB Pumps* (2003) 24 *ILJ* 1756 (BCA); *SABC v CCMA* (2001) 22 *ILJ* 487 (LC) [11].

95 *Ngindana & others v Grahamstown Municipality supra*. The court held that the employer could have warned the employees in writing about the consequences of their actions when it became clear that they were determined to taking leave regardless of the employer's instructions not to.

- Secondly, the employee should get an opportunity to be heard. This includes holding a disciplinary enquiry in *absentia* if the employee cannot be traced or does not heed to the employer's instruction to return to work. In the event that the employee appears after a decision to dismiss has been taken, a rehearing will be necessary in order to give the employee an opportunity to be heard to determine whether there were justifiable reasons for absence. This was also confirmed in *Old Mutual Life Assurance Co SA Ltd v Gumbi.*[96] The key principle entails that employees should get an opportunity to be heard before their employment is terminated by the employer however burdensome or frivolous that may be for employers.[97]

In *SACWU v Dyasi*[98] the Court deviated slightly from this view, remarking that where the employee cannot be traced, the employer may have no other option but to accept the employee's breach of contract. The effect would therefore be that the employee, not the employer, terminated the contract. Therefore, termination does not constitute a dismissal. In this case, the court held that the situation would be different in cases where the employee could be traced and reached however the employer still chooses to terminate employment, such termination would constitute dismissal.

According to Dekker,[99] this obiter remark by the court is not in line with the interpretation of dismissal in section 186 of the LRA.[100] Dismissal means an employer terminates a contract of employment, although the employee apparently does not wish to continue with the contract of employment and indicates this through his or her own actions, it is still the employer who must take the initiative to end the contract of employment in a manner recognised by law.

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96 [2010] (017/09) ZASCA 2

97 *Mabasa v JS Corporate Security* (2011) 32 *ILJ* 1456.

98 (2001) 7 BLLR 731 (LAC) 20.

99 Dekker *"*Gone with the Wind and Not Giving A Damn: Problems and Solutions in Connection with Dismissal Based on Desertion" 2010 22 *SA Merc LJ* 106 104–113.

100 Act 66 of 1995 "(a) an employer has terminated a contract of employment with or without notice".

In *SA Transport & Allied Workers Union obo Langa & others V Zebediela Brakes (Pty) Ltd*[101] a number of employees had been dismissed for participating in an unprotected strike. The employer offered to re-instate them and they accepted, however none of them returned to work even though they were repeatedly requested to do so. They referred an unfair dismissal dispute to the CCMA who for jurisdictional reasons referred to the dispute to the LC.

The employer argued that the employees had deserted, that is they were not only absent but had no intention to return to work. The court found that their absence and failure to respond to requests to return to work was serious enough to warrant dismissal. However, it held that the employer should have charged them for absence without permission, held a disciplinary hearing prior to dismissal. It held that the dismissal was procedurally unfair.

Generally when repudiation occurs, the other party has an election to either accept the repudiation or hold the employee to the terms of the contract. In *SACWU v Dyasi*[102] the court held that the choice is not always in fact real. An employer faced with desertion by employee who cannot be traced has no choice but to accept the repudiation.

In cases of absenteeism, the employee has the onus to contact the employer at the first reasonable opportunity and offer the employer an explanation for his absence. Whilst the employee has a duty to contact the employer and notify him of his absence, conventional wisdom however also indicate that the employer should also try and contact the employee in order to confirm the inferences the employer is drawing from the employees absence and lack of communication**.** This would avoid making negative inferences as evidenced in *Seabolo v Belgravia Hotel.*[103] A telegram, or registered letter sent to the last known address of the employee notifying the employee to report for duty or by a certain time to indicate whether he intends to return to work or not would suffice.

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101 (2001) *ILJ* 428 (LC).

102 [2001] 7 BLLR 731 (LAC) 20.

103 [1997] 6 BLLR 829 (CCMA), case number GA 1288.

This is by no means obligatory for an employer and in so doing the employer does not have to mount a search for the employee.

5.2 DEALING WITH INCARCERATED EMPLOYEES

Incarcerated employees pose a challenge for employers. In certain circumstances such cases are treated as some form of desertion whilst at times the termination of employment is treated as supervening impossibility of performance.

In *National Union of Metalworkers of SA on behalf of Magadla and AMT Services (Pty) Ltd*[104] an employee was absent for six weeks without an explanation, because he was held in custody. Upon his release from custody he returned to work and the employer advised him that his contract had been terminated for desertion.

The arbitrator held that the employer was only entitled to regard the employee as having repudiated his contract of employment, if it reached that conclusion after considering all the factors and after conducting its own enquiry to establish that he had indeed deserted his work and thus had no intention to return to work. Upon his return the employee had provided a good reason for his absence.

In *Mofokeng v KSB Pumps*[105] the applicant was absent from work for three weeks as a result of being imprisoned. After informing the respondent of his whereabouts, the respondent within two weeks of absence terminated his services based on operational requirements and uncertainty as to when the applicant would return to work. In this case it could not be held that the employee deserted since his whereabouts were known to the employer. Immediately after being released from prison, the applicant reported for duty only to be advised that his services had been terminated and a replacement had been found. The dismissal was found to have been unfair in that there was no enquiry held prior to taking a decision to dismiss him.

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104 (2003] 24 *ILJ* 1769 (BCA).

105 (2003) 24 *ILJ* 1756 (BCA).

In *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council*[106] the LAC was required to consider a LC decision where it was held that when an imprisoned employee is absent from work, he is not the cause of his incarceration, that is a factor beyond his control. It could therefore not be said that he is absent without permission.[107] The LAC held that the dismissal based on "operational incapacity" was substantively fair as the employer could not have been expected to keep the position of the employee open indefinitely. However, it ruled that dismissal of incarcerated employees could fall under dismissal based on incapacity. The court held that dismissal for incapacity should not be limited to incapacity due to ill health and poor performance. It reasoned that incapacity can take other forms including imprisonment.[108]

5.3 CONTRACT TERMS AND CODES OF CONDUCT

As discussed above, the primary duty of an employee is to render a service to an employer in exchange for remuneration. In the event that an employee fails to avail himself for rendering the service, he is in breach of the contract and thus not entitled to remuneration for the period not worked.

Employers may through employer's disciplinary procedure, disciplinary code, conditions of employment and sometimes individual employment contracts make provision that if employees have been absent from work for a period deemed by the employer, the period of absence amounts to desertion. The number of days differs and usually ranges between five to fourteen days. When the prescribed time expires, the employee will be deemed to have deserted. In such cases the employer often claims that the employee has in fact dismissed himself or herself. However, as discussed previously, it is the employer who takes the decision to terminate the employment contract thus dismissing the employee, it is highly unlikely that such disciplinary codes will stand the scrutiny of the courts unless agreed upon by the

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106 (2010) *ILJ* 1838 (LAC).

107 At par 7.

108 At par 9.

trade unions, in such cases they become collective agreements which are binding to all parties.

According to Grogan[109] disciplinary codes normally treat absenteeism on a graduated scale when it comes to sanctions. For a first offence an employee may be counselled or issued with a verbal warning, on the second occasion a written warning may be issued, on the third occasion a final written warning may be issued and finally an employee maybe dismissed however the employer is still required to prove the fairness of the dismissal.

In *SABC v CCMA*[110] it was held that the employer' disciplinary procedure contained a clause which provided for a disciplinary hearing to be held in the event that the employee had been absent from work without permission more than five consecutive days. However, in this case, the employer failed to comply with its own disciplinary procedure, instead of charging the employee and holding a disciplinary enquiry, it terminated his services and alleged that he had deserted. The court held that according to the above clause from the disciplinary procedure, it was obligatory for the employer to hold a disciplinary enquiry in respect of the offence that the employee had committed.

5.4 LOCAL GOVERNMENT SECTOR

In the local government sector, absenteeism is dealt with in terms of a disciplinary procedure which is contained in a collective agreement between the South African Local Government Association (hereinafter referred to as "SALGA", the Employer's Organisation) and Independent Municipal and Allied Trade Union (hereinafter referred to as "IMATU") and South African Municipal Workers' Union (hereinafter referred to as "SAMWU").

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109 Grogan *Dismissal* 177, *Workplace Law* 184.

110 *SABC v CCMA supra* [14].

The code stipulates that in the event that the employee has absented himself for a period of more than ten days without notification to the employer, such employee shall be deemed to have absconded from duty.

However, recognising the employer's obligation to enquire about the employee's whereabouts where an employee does not report for duty, the disciplinary code provides that the employer will endeavour to establish the employee's whereabouts and also issue him or her with a letter informing about the alleged abscondment. It also provides that in the event that the employee returns to work after ten days, he or she will be afforded an opportunity to make written representations prior to termination of employment.

In *Mopani District Municipality v SALG & others*[111] an employee was dismissed on grounds of desertion after he failed to report for duty in Tzaneen Fire Station subsequent to him being transferred to Giyani Fire Station based on section 197 of the LRA. The employee conditionally accepted the offer to transfer to Tzaneen subject to negotiations with the employer on relocation benefits and travelling cost. As contained on the transfer agreement, the employee was entitled to negotiate with the employer on the two issues. The employer failed to respond to the employee's letter with regard to engaging in negotiations about the transfer.[112]

On the day the employee was supposedly required to report for duty in Tzaneen, he reported for duty in Giyani. However, the employer dismissed him and alleged that he had deserted. The LAC found his dismissal to be both substantively unfair and procedurally unfair in that there was no indication that the employee had abandoned his work as he still tendered his services in Tzaneen and the employer knew well that the employee was at Tzaneen and consequently knew about his whereabouts.[113]

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111 Case number JA02/09 (LAC).

112 *Mopani v SALGA* (LAC) 20.

113 At 20.

With regard to procedural fairness, the court held that that very little notification was generated by the employer to the employee with regard to its decision to dismiss. Only after the letter of dismissal was generated, were there some attempts to hold a disciplinary enquiry. There can be no question that in this particular regard, procedural fairness had hardly been complied with in terms of which are required by the law.[114]

The employee, having been dissatisfied with the decision of the LAC of twelve months compensation order, appealed to the SCA.[115] The SCA held that the conduct of the LAC was inappropriate because the LAC had embarked on an investigation of the facts and had acted as if it was sitting as a tribunal of first instance as such misconceived its role. It found that desertion could not be justified in this case because in the first place, the employee had tendered his services at the Tzaneen Fire Station and the employee knew well that the employee was at Tzaneen and consequently knew about his whereabouts. The SCA also confirmed that consequent to the finding that the dismissal was substantively unfair

5.5 DESERTION IN THE PUBLIC SECTOR

Desertion in the public sector is governed by Public Services Act[116] (hereinafter referred to as "PSA") and Employment of Educators Act[117] (hereinafter referred to as "EEA").

These statutes contain clauses which are commonly referred to as "deeming provisions". A deeming provision means that legislation or an employer's code, procedure or conditions of employment provide that if an employee is absent from work for a certain number of days, the employee will be deemed to have deserted.

Where a statute provides that an employee is deemed to have been dismissed after a certain period of unauthorised absence, absence beyond that period does not

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114 Par 10.
115 [2012] 3 BLLR 266 (SCA).
116 103 of 1994.
117 76 of 1998.

constitute dismissal but constitute a termination by operation of law.[118] The CCMA, bargaining councils or the Labour Court do not have jurisdiction to deal with such cases since there is no dismissal.

5.6 EMPLOYMENT OF EDUCATORS ACT

Employees in both public and in the private sector are both covered by the LRA. However, public sector employees are also covered by other legislation including the Employment of Educators Act.[119] One of the reasons is that educators are affected by other aspects which apply to education and affects other parties namely, the learners. Therefore, the approach of the civil courts and Labour Courts over the procedures to be followed when public sector employees absent themselves without leave may sometimes differ to the approach followed when dealing with private sector employees.

As indicated above, Employment of Educators Act[120] provides for a deeming provision which stipulates that educators absent from work for periods exceeding fourteen days are deemed to have been discharged from service on account of misconduct. In such cases there is no dismissal as the termination is by operation of law. The EEA provides for the termination of employment of contract by operation of

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118 *Nkopo v Public Health & Welfare Bargaining Council & Others* (2002) 23 *ILJ* 520 (LC); *Public Servants Association of SA & Another v Premier of Gauteng & Others* (1999) 20 *ILJ* 2106 (LC).

119 76 of 1998.

120 S 14(1)(a) "An educator appointed in a permanent capacity who-

(a) is absent from work for a period exceeding 14 consecutive days
(b) …
(c) …
(d) …

shall, unless the employer directs otherwise, be deemed to have been discharged from service on account of misconduct, in the circumstances where-

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the …

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (l) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act. approve the reinstatement of the educator in the educator's former post or in any other post on such conditions relating to the period of the educator's absence from duty or otherwise as the employer may determine."

law and affords an employee who has been discharged by the deeming provision an opportunity to be heard if he or she wishes to be reinstated.[121]

In *Mogola v Head of Department of Education*[122] employees were discharged for being absent from work for more than fourteen days. It was held that discharge of an educator under section 14(1) of EEA does not constitute dismissal as defined in LRA but appeal in terms of section 17(2)[123] subject to review. The court also held that, an employer has to consider submissions made by an employee in terms of section 14(2). In this case an employer failed to consider the submissions made by the employee. The discharge was set aside and employer was ordered to reinstate the employees.

The court held that the state is obliged to consider submissions made by employees prior to making a decision to re-instate or not to re-instate, failure to do so would be against the principles of fairness and such a decision would be subject to review in terms of section 145 of the LRA.[124]

In *Phenithi v Minister of Education*[125] an employee challenged the constitutionality of the provisions on the EEA,[126] namely sections 14(1) and 14(2) in terms of which her dismissal was effected. She alleged that the provision offends her right to fair labour practice and lawful administrative action.

The Act provides that the employer has a discretion whether to hold a hearing or not when an employee who has been absent from unexplained period request re-instatement. The employee had initially approached the High Court and sought an order to set aside her dismissal and declaring her dismissal unfair and

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121 S 14(2) of Employment of Educators Act 76 of 1998.

122 [2012] 6 BLLR 584 (LC).

123 (2) The acquittal or the conviction of an educator by a court of law on a charge of any offence shall not preclude the taking of disciplinary steps against the educator in terms of this Act, even if the facts set out in the charge of misconduct, should they be proven, would constitute the offence set out in the charge on which the educator was so acquitted or convicted or any other offence on which the educator could have been convicted in the trial on the former charge.

124 S 145 provides for review of arbitration awards.

125 [2006] 9 BLLR 821 (SCA).

126 Act 55 of 1998.

unconstitutional. The High Court dismissed the application and held that the employer in electing not to re-instate her exercised a discretion vested in him terms of section 14(1) of EEA[127] correctly, properly and fairly.

The SCA relying on *Minister van Onderwys en Kultuur v Louw* [128] had the following to say about the right to be heard in the event that the deeming provision came into effect:

> "Should a person allege for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is then no question of a review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent upon any decision. There is thus no room for reliance on the audi rule which, in its classic formulation, is applicable when an administrative and discretionary decision may detrimentally affect the rights, privileges or liberty of a person."

It further held that the discharge is not the result of a discretionary decision but merely a notification as a result of which occurred by operation of law.

In dealing with the constitutionality issue, the court had to determine the following:

- Whether the provision violates the fundamental right to fair labour practice in terms of section 23(1) of the Constitution because it allows the employer to act without considering the substantive and procedural aspects of the case before termination; and

- whether the provision violates the fundamental right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33(1) of the Constitution in that it does not only fail to compel the employer to hear the other party but fails to compel the employer to give reasons for the decision.

The court held that the decision is not taken by the employer, it is an operation of law namely interpretation of section 14(1) (a)[129] and therefore there was no action by the

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127 Act 76 of 1998.

128 (1995) (4) SA 383 (A).

129 Act 76 of 1998.

employer but an operation of law. There was no unfairness created by the employer, the absence, according to the statute amounts to desertion.

The court further held that an employer cannot be expected to give reasons other than the fact that termination of the employment contract was the consequence of the deeming provision that is the only plausible reason. The court[130] held that the employer cannot suspend the operation of the statute in order to afford an educator or employee an opportunity to be heard. It ruled that this provision of the statute does not render it unconstitutional.[131]

There are competing interests of which consideration of both is necessary. The teacher's right to be heard should be weighed against the learner's right to learn, another constitutional imperative. The court highlighted the following in justifying the deeming provision:

- For 14 days the learners are left without a teacher;

- the Department cannot appoint a substitute or a temporary educator immediately;

- major disruptions are caused as a reshuffling of both educators and learners is required; the Department has to remunerate such educator while he/she is not fulfilling his/her obligations; and

- the principal of the school concerned has a grave dilemma regarding what to do during the educator's absence.

The court further held that:

> "The reasons given by Ms Rossouw are confirmed by Mr Eben Boshoff, Director of Legal and Legislative Services, responsible for the drafting of education legislation, who adds that having a teacher in the classroom is an important aspect of giving

130 At par 20.

131 At par 21.

substance to a child's right to education. Education, he continues, has the unique responsibility of balancing the rights of children with the competing rights of others, such as educators. Section 28 (2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. The intention behind section 14 of the Act, he says, is to limit the potential harm that learners could suffer because of the absence of an educator without leave, while still allowing for a period of 14 days before the right of the educator is affected by operation of law."

Section 14(2) still affords an educator an opportunity to be heard and to be reinstated on good cause shown.

In the public sector the courts have held that coming into operation of the deeming provision is not dependent upon any decision by an employer. The deemed dismissal provisions in the public sector will continue to withstand judicial scrutiny especially in the light of the SCA judgment where the court held that provisions of section 14(1)(a) and section 14(2) of the EEA are not unconstitutional.[132]

5.7 PUBLIC SERVICES ACT

The Public Services Act[133] stipulates that if a public sector employee is absent from work without proper authorisation for more than one calendar month, that employee is deemed to have been dismissed due to misconduct. The employer is required to reconsider the effect of the deeming provision. The PSA also provides for the termination of employment of contract by operation of law and afford an employee who has been discharged by the deeming provision an opportunity to be heard if he

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132 *Phenithi v Minister of Education* (2006) 9 BLLR 821 (SCA).

133 S 17(5)(a)

"(i) An officer, other than a member of the services or an educator or a member of the Agency or the Service, 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 discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

(ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as foresaid irrespective of whether the said period has expired or not.

(b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the relevant executing authority may, on good cause shown and notwithstanding anything to the contrary contained in any law, approve the reinstatement of that officer in the public service in his or her former or any other post or position, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the said authority may determine."

or she wishes to be reinstated.[134] If there is a valid reason for absence, officers discharged in terms of section (17) (5) (a) (i) of PSA can refer their cases to the head of department and also take the head of department's decision on review.

When an employee is afforded an opportunity to be heard, in terms of section of 17(5)(b) of PSA and section 14(2) of Employment of Educators Act, the employer's refusal to reinstate the employee does not change into a dismissal. An employer, in this case, the state has discretion either to reinstate or refuse to re-instatement. Refusal to re-instate an employee whose employment has been terminated by operation of law does not constitute dismissal.[135]

In *Weder v MEC for Department of Health,*[136] the LC issued a judgment where the deeming provision was abused by the employer in the Public Service. In this case, the employer was aware that the employee was sick but still discharged in terms of section 17(3)(a)(i) read with section 17(2)(d) of the PSA.[137] The employee had submitted medical certificates and had advised the employer of the reasons for the absence.[138] Relying on section 17(3)(b) of the PSA,[139] the employee challenged the deemed dismissal, however in response the employer confirmed the deemed dismissal without furnishing any reasons.

On review, the LC reviewed the decision and set it aside and reasoned that it found it difficult to assess whether a decision by the employer could have been reasonable and rational when the decision-maker offers no reasons for the decision. It also held that, on the evidence submitted, the MEC's decision could not have been rational.[140] It was common cause that the employee was in fact sick. The absence from work was not wilful or deliberate.[141]

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134 S 17(5)(b) of Public Service Act 103 of 1994.

135 *MEC Public Works, Northern Province v Commission for Conciliation Mediation and Arbitration & Others* (2003) 24 *ILJ* 2155 (LC) 2158 H-J.

136 *Weder v MEC for Department of Health* C 993/11.

137 Act 103 of 1994.

138 Par 16.

139 Act 103 of 1994.

140 Par 35.

141 Par 36.

In *Grootboom v National Prosecuting Authority*[142] the employee was put on precautionary suspension. Whilst on suspension he went on study leave to the UK (this was after there was no agreement between him and the employer about some issues surrounding the leave). Two months later his salary was stopped and he was informed that his contract of employment had been terminated by operation of law, the deeming provision. He challenged the termination of his contract. Both the LC and LAC held that there was no dismissal but termination by operation of law. The SCA also dismissed his appeal.

However, the Constitutional Court held that for the deeming provision to apply, one of the jurisdictional requirements that has to be met is that the employee must be absent from work without the employer's permission. In the present case the employee had been absent from work because he had been suspended by the employer, therefore the deeming provision did not apply.

This shows how strict the courts are when it comes to these deeming provisions, understandably so since they deprive the employee of an opportunity to refer a dismissal dispute for conciliation and arbitration at the CCMA or bargaining council and also to the LC.

142 [2014] 1 BLLR 1 (CC).

CHAPTER 6
INSOLVENCY

Insolvency occurs when one is unable to pay one's debts or discharge one's liabilities.[143] Insolvency of either party in an employment relationship may terminate the contract of employment. The Insolvency Act[144] was passed in 1936 and has been amended many times. When dealing with insolvency or liquidation, there are other statutes that are applicable namely, the Insolvency Act,[145] the Companies Act,[146] the Close Corporations Act,[147] the Labour Relations Act[148] (hereafter referred to as "LRA") and the Basic Conditions of Employment Act[149] (hereafter referred to as "BCEA").

Section 197A of LRA applies to the transfer of a business as a going concern where the old employer is insolvent or a scheme of arrangement or compromise is being entered into to avoid winding up or sequestration.

6.1 INSOLVENCY OF AN EMPLOYEE

Generally, an employee's insolvency has no effect on the employment contract unless there is a term to that effect in the contract.[150] The employer is entitled to terminate the employment contract if the insolvency of the employee precludes him from performing his or her duties. In such cases the employer is required to prove that the insolvency of the employee renders the continuation of the contract of employment impossible, such termination is treated as dismissal due to operational requirements.

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143 Van der Walt, Le Roux and Govindjee *Labour Law in Context* (2012) 98.
144 24 of 1936.
145 *Ibid*.
146 61 of 1973.
147 69 of 1984.
148 66 of 1995.
149 75 of 1997.
150 Grogan *Workplace Law* 84.

Section 23(3) of the Insolvency Ac[151]t states that:

> "an insolvent may follow any profession or occupation or enter into any employment, but he may not, during the sequestration of his estate without the consent in writing of the trustee of his estate, either carry on, or be employed in any capacity or have any direct or indirect interest in the business of a trade who is a general dealer or a manufacturer: Provided that any one of the creditors of the insolvent's estate or the insolvent himself may, if the trustee gives or refuses such consent, appeal to the Master, whose decision shall be final".

The insolvent's ability to enter into an employment contract is dependent on the trustee's consent when it comes to general dealer. The insolvency then limits one's freedom to contract when it comes to these.

6.2 INSOLVENCY OF AN EMPLOYER

Insolvency of the employer can either be as a result of voluntary liquidation or sequestration or compulsory winding-up of an employer. Sequestration refers to the insolvency of an individual while the terms liquidation and winding-up are used in the context of the insolvency of companies, close corporations and other legal entities.[152] Companies and close corporations can only be declared insolvent by:

- a court order,
- on application of either the company or close corporation (employer),
- on application of creditors.

In *SAAPAWU v HL Hall & Sons (Group Services) Ltd & others*[153] the court was required to pronounce on whether the automatic termination of employment contracts under the then section 38 of Insolvency Act[154] was in conflict with the LRA and whether termination of employment due to employer's insolvency constitute a dismissal or not. The court held that the fact that the LRA was silent on the issue of consequences of termination of employment contract due to insolvency does not

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151 24 of 1936.

152 Basson *et al Essential Labour Law* 181.

153 (1999) 20 *ILJ* 399 (LC).

154 *Supra.*

mean there is a conflict. Employees who lost their employment due to insolvency of the employer were confined to a claim for damages and the court held that such termination did not constitute dismissal. It further held that the reach of LRA halts once the insolvency enters the picture.

The Labour Appeal Court (hereafter referred to as "LAC") held that the termination of the employment contract as a result of voluntary liquidation or winding-up of an employer constitutes a dismissal.[155]

The LAC distinguished between the effects of *voluntary* and *compulsory* winding-up on the termination of employment contracts. The court held that *voluntary* winding-up, being an act of the employer that brings employment contracts to an end, constitutes a dismissal within the meaning of section 186(1)(a) of the LRA. It held that only voluntary winding-up had the effect of an employer terminating the contract; that is when the company passed a resolution to wind up the company, the contracts of employment automatically terminates as the then section 38 kicked in. In effect the employer terminates the employment contracts, thus dismissing the employees in terms of the LRA.[156] Since employees whose services are terminated as a result of voluntary liquidation are deemed to have been dismissed, they are entitled to be consulted in terms of section 189 of the LRA.

When it comes to *compulsory* winding-up, the court reasoned that the court still has a discretion whether or not to wind up the company, therefore, such decision does not rest with the employer but with the High Court. If the court decides to wind up the company, it cannot be said that the employer terminates the employment contract because that is the decision of the court.

The court's decision in this matter is not surprising considering the fact that an employer can manipulate the process to get rid of its employees by liquidating itself. Section 38 of the Insolvency Act was amended in 2002 and the changes became effective on 1 January 2003. The fact that the contracts of employment are

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155 *NULAW v Barnard NO* [2001] 9 BLLR 1002 (LAC) 23-26.

156 S 186.

suspended in terms of section 38 and are not terminated suggests that the amendments were informed amongst other things to prevent the mischief by resulting in the suspension and not termination of the contracts.

Once the application proceeds to the High Court for winding-up, the court will not make a final declaration of insolvency but will first place the entity in provisional liquidation. In practice this means the employer could enter into negotiations with a prospective buyer and creditors about the survival or continuation of the business of the employer. If the negotiations fail and the parties fail to come to some form of arrangement, a final winding-up order will be made.

6.3 EFFECTS AND IMPLICATIONS OF SEQUESTRATION

In view of the provisions that disadvantaged employees of employers under sequestration or liquidation, there was a need to amend the Act and the old section 38 of the Insolvency Act[157] has been replaced by Insolvency Amendment Act.[158] The amendment was intended to address the issue of the right to fair labour practices and to protect worker's rights in the event of insolvency and to give more consideration to worker's rights and reciprocal duties of the employer in the event of insolvency.[159]

The termination of contracts of employment for the above reason meant that employees were not considered as dismissed and therefore they did not receive any protection or benefits, the law offered for example severance pay in terms of the BCEA or the right not to be unfairly dismissed in terms of the LRA.

One of the significant improvements of the Act is that section 38[160] no longer provides that the sequestration of the estate of the employer terminate the contract of employment. It states that:

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157 *Supra.*

158 Act 33 of 2002.

159 Carolus, Tiemeni and Ziervogel "Effects on the employment relationship of the insolvency of the employer: A worker perspective" 109 -120.

160 Act 24 of 1936.

"(1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from date of granting of a sequestration order.

(2) Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)-

(a) An employee whose contract is suspended is not required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract; and

(b) No employment benefit accrues to an employee in terms of the contract of service which is suspended.

(3) An employee whose contract of service is suspended is entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), from the date of such suspension, subject to the provisions of that Act."

The employment contracts are suspended until a final trustee or liquidator has been duly appointed at the first meeting of creditors.

Another improvement in terms of the section 38 is that an appointed trustee or liquidator is required to consult with a registered trade union whose members are likely to be affected or the suspended employees directly if they are not represented by a trade union. The purpose of the consultation is to attempt to reach consensus on appropriate measures to save the employee's jobs.

The consultation process referred to in section 38 of the Insolvency Act is almost identical to section 189 of the LRA which deals with dismissals based on operational requirements of the LRA[161] and states the following:

"5) A trustee may not terminate a contract of service unless the trustee has consulted with

a) any person with whom the insolvent employer was required to consult, immediately before the sequestration, in terms of a collective agreement defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

b) i) a workplace forum defined in section 213 of the Labour Relations Act, 1995; and

ii) any registered trade union whose members are likely to be affected termination of the contract of service

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161 Act 66 of 1995.

if there is no such collective agreement that existed immediately prior to the sequestration;

c) a registered trade union representing employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service, if there is no such workplace forum; or

d) the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the termination of the contract of service or their representatives nominated for that purpose, if there is no such trade union.

6) The consultation referred to in subsection (5) must be aimed at reaching consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer

a) by the sale of the whole or part of the business of the insolvent employer; or

b) by a transfer as contemplated in section 197A of the Labour Relations Act, 1995; or

c) by a scheme or compromise referred to in section 311 of the Companies Act, 1973; or

d) in any other manner.

7) If any party referred to in subsection (5) wishes to make proposals concerning any matter contemplated in subsection (6), that party must submit written proposals to the trustee or liquidator within 21 days of the appointment of the trustee in terms of section 56, or the appointment of the liquidator in terms of section 375 of the Companies Act, 1973, or the appointment of a co-liquidator in terms of section 74 of the Close Corporations Act, 1984, or if a co-liquidator is not appointed, the date of the conclusion of the first meeting, unless the trustee or liquidator and an employee agree otherwise."

Unlike the provisions of the old section 38, termination of the employment contract is subject to the trustee or liquidator to consult with relevant parties unless the parties come to some form of agreement. Trade unions and employees need to be notified of both the application for as well as the granting of a liquidation order. This allows quicker intervention and engagement by the trade union in appointing their own liquidators or in opposing liquidation.

Also until 1 January 2003 section 38 provided for the automatic termination of employment contracts on the insolvency of the employer. After that date the amended section 38 provides for the suspension of employment contracts.

In the event that the parties fail to reach an agreement, the suspended contracts terminate 45 days after the appointment of the liquidator or trustee.[162] The contracts of employment will be revived and automatically transferred to the new business in

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[162] S 38(9) Insolvency Act 24 0f 1936.

the event that the company is transferred as a going concern due to insolvency. The discussions on transfer of business due to insolvency will be dealt with below.

6.4 TRANSFER OF EMPLOYMENT DUE TO INSOLVENCY

Section 197A of LRA[163] states that:

> "197A Transfer of contract of employment in circumstances of insolvency –
>
> (1) This section applies to a transfer of a business-
> a) if the old employer is insolvent; or
> b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.
> 2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197(6)-
> a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;
> b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;
> c) anything done before the transfer by the old employer in respect of each employee is considered to have been done by the old employer;
> d) the transfer does not interrupt the employee's continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.
> 3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).
> 4) Section 197(5) applies to a collective agreement or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.
> 5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section."

The section regulates the transfer of employments contract in circumstances of insolvency and it applies despite the provisions of the Insolvency Act.[164]

It was mentioned above that trustee or liquidator of an insolvent employer is required in terms of section 38(5) and (6) of the Insolvency Act to consult with the affected employees and their representatives with the purpose of allowing the parties an

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163 Act 66 of 1995.

164 24 of 1936.

opportunity to reach consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer. These measures include amongst other things a scheme or compromise under section 311 of the Companies Act.

The new employer is substituted for the old employer in respect of all contracts of employment in existence immediately before "the old employer's provisional winding up or sequestration" rather than immediately before the date of transfer as in the case of section 197 of the LRA.

Section 197A(2)(b) of the LRA provides that if a scheme of arrangement or compromise during the consultation process was entered into to avoid winding-up or sequestration for reasons of insolvency, the contracts of all employees automatically transfer to the new employer and the continuity of employment is preserved. However, the obligations between the old employer and each employee at the time of transfer remain rights and obligations between the old employer and each employee, they do not transfer automatically to the new employer. The purpose is to make it more attractive to potential investors to rescue ailing business and maintain the integrity of the employer's estate for purposes of winding-up, sequestration or compromise.[165]

An employer that is buying an insolvent business is already taking a risk, to burden the new employer with the rights and obligations that existed between the old employer and its employees would serve as a disincentive for prospective buyers and could leave to liquidation of companies that might have been saved.[166] Also, transferring obligations between an old employer and each employee to the buyer would be contrary to the spirit of the purpose of the Act namely; to advance economic development for both employees and the new employer.

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165 Du Toit *et al Labour Relations A Comprehensive Guide* (2006) 457.

166 Van der Walt *et al Labour Law in Context* 155.

The primary purpose of section 197A is to preserve employment. It is only fair that the new and old employers are not jointly and severally liable for claims against the old employer that arose before the transfer.

6.5 CURRENT CHALLENGES OF SECTION 38 OF INSOLVENCY ACT

Without a doubt and even after the amendment of the Act, the insolvency law still favours the employer and disadvantages the employee. Carolus *et al* states that:

> "This means that there are significant organisational and political challenges faced by trade unions in ensuring the development of the law to their advantage."

In order to address this concern, unions should play a more proactive role in order to respond to these challenges in the interest of their members. There need to be a shift in the focus and mind set of trade unions in order to expand the scope of collective bargaining process. It is suggested that organised labour should spend more time scrutinising the company's audit and financial reports. They could also influence other provisions of legislation for the benefit of their members for example unemployment legal framework should allow claims from workers in respect of suspended contracts to receive their salaries and benefits instead of only unemployment benefits and provide for shorter time frames for payment.

Section 38(4) of Insolvency Act states that:

> "A trustee appointed in terms of section 56, or a liquidator appointed in terms of section 375 of the Companies Act, 1973 (Act No. 61 of 1973), or a liquidator who, in terms of section 74 of the Close Corporations Act, 1984 (Act No. 69 of 1984), remains in office after the first meeting and a co-liquidator, if any, appointed by the Master may terminate the contracts of service of employees, subject to subsections (5) and (7)."

6.6 PROPOSALS TO IMPROVE THE CURRENT SITUATION

Carolus *et al* proposes that in order for the Insolvency Act to be more effective in protecting the interest of the workers, company assets should not be bought

piecemeal from the estate after the liquidation order has been granted to avoid the application of section 197[167] of the LRA.

Fraudulent dealings in cases of insolvency and failure to disclose information to employees and their trade unions regarding the employer's financial status an ownership should be criminalised.

Claims for wages and severance pay should be treated as secured claims as they are explicitly recognised in labour legislation. SARS should be treated as concurrent creditor to ensure effectiveness of a pay-out to employees which is difficult when the liquidator has to first pay SARS and other banks.

It looks like further amendments in terms of the insolvency legislation framework are still needed. For example, section 186 of LRA should include termination of employment contracts in cases of insolvency; this should not be left to various interpretations by courts.

6.7 TERMINATION OF EMPLOYMENT CONTRACT DUE TO INSOLVENCY V A RIGHT TO FAIR LABOUR PRACTICES

Section 23 of the Constitution[168] provides everyone a right to fair labour practices. "Everyone" refers to both employees and juristic persons, notwithstanding the fact that in terms of the Constitution all rights are not absolute, there are limitations.[169]

In insolvency cases a consideration of conflicting interests from different stakeholders has to be made namely, interests of the employees, employer and the creditors. An

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167 Transfer of employment contracts when a business is transferred as a going concern.

168 Constitution of Republic of South Africa of 1996.

169 S 36(1) of the Constitution of South Africa, 1996 provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

employee's right to fair labour practices might conflict with a creditor's right to be treated equally and an employer's right to freedom of trade and to terminate employment as a result of economic hardship. The conflicting interests are obviously influenced by other relevant legislation in cases of insolvency namely, LRA, Companies Act, Insolvency Act and the Constitution. In fact Van Eck *et al*[170] states that:

> "the juncture at which insolvency and labour law meet is an area of legal regulation where the tension between commercial interests, on one hand, and, the general right of employees to social protection on the other, is arguably at its greatest".

The LRA[171] provides that every employee has a right not be unfairly dismissed. The requirements for a fair dismissal are that it must be in accordance with a fair procedure and a fair reason (substantive fairness).[172]

Other aspects of procedural fairness also encompass an investigation into the matter, an opportunity to be heard and to be allowed sufficient time to make representations. It is not surprising that the then section 38 which provided for automatic and immediate termination of employment contract was challenged on the basis of an infringement of a right to fair labour practices.

Van Eck *et al*[173] postulate that in the event of a trustee or liquidator wish or decide to terminate an employment contract to make the business more attractive in order to be able to sell as a going concern, he only needs to comply with the procedures laid down in terms of Insolvency Act. The writer concurs with him in his suggestion that this seems to be a misalignment in the respective labour and insolvency legislative framework.

The LRA also recognises that the a right to fair labour practices also extends to employers hence it is recognised that an employer may dismiss an employee based

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170 Van Eck *et al* "Fair Labour Practices in South African Insolvency Law" 2004 902-925 *SALJ* 907.

171 S 185.

172 Schedule 8 Code of Good Practice LRA.

173 Van Eck *et al* "Fair Labour Practices in South African Insolvency Law" 2004 902-925 *SALJ* 910.

on operational requirements of which economic hardship is encompassed in the definition of the term operational requirements.[174]

Even though employees are entitled to claim from the estate of the insolvent employer they are not regarded as number one priority. There is also a limitation in terms of the amounts that they could claim in terms of salaries and wages.

The recourse that is available to employees whose contract have been terminated by the liquidator or trustee without following the procedures contained in the LRA and Insolvency Act would be application for an interdict to the High court or Labour Court[175] to halt the process of termination of the employment contract.

In *CPI v CCMA & others*[176] the LC held that dismissal of an employee without being consulted by an employer that has been put on provisional liquidation before the expiry of the 45 days contemplated by section 38(9) of Insolvency Act was unfair.[177] The dismissal also did not comply with section 197B of the LRA which also requires and employer to consult with the employee.

It is submitted that there is no apparent reason as to why termination of employment due to insolvency initiated by or on behalf of the shareholders should not be included to form part of section 186 of LRA.

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174 S 213 LRA.

175 S 152(2) LRA, s157(2) Labour Court has concurrent jurisdiction with the High Court in respect of any fundamental right entrenched in the Constitution arising from the application of any law for the administration of which the Minister of Labour is responsible.

176 Case number C212/2011 (LC).

177 At par 22.

CHAPTER 7
EFFLUXION OF TIME

Some employment contracts have a specific start date and a specific end date. There are also contracts that are concluded for a specific project or purpose. These contracts are referred to as fixed-term contracts. Fixed-term contracts are often used in the labour field for different reasons for example for projects that are for a specific time period or to fill positions where an employee is on maternity leave. In the construction industry, fixed-term contracts could be terminated at the arrival of a specific event, for instance a plasterer's contract will terminate if that portion of the project is finalised.

These contracts come to a natural end at the time stipulated in the contract or at the arrival of a specific event. Should such a contract expire, there is no dismissal because the contract terminates due to effluxion of time and not by means of an act of an employer.

The termination of a fixed-term contract by effluxion of time and the attainment of agreed or implied retirement age give rise to the lawful termination of an employment contract. The CCMA and the Labour Court have no jurisdiction to deal with disputes arising out of such termination because there is no dismissal.

In *National Union of Metalworkers v SA Five Engineering*[178] employees were contracted to reconstruct and refit a ship. The project had specific stages and was by nature, of a limited duration. The employees were employed for limited periods. The contracts of employment were vague as they had no specific dates of termination, but rather the time of termination was linked to the completion of project goal. The employees argued that all their contracts should have been terminated at the completion of the project. The employer argued that their tasks for which they were employed were completed and therefore they needed to be retrenched. The court found that the termination of these fixed-term contracts was not unfair because

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178 (2007) 28 *ILJ* 1290 (LC).

the tasks were completed and there was no further work for them. The LC held that the contract clearly indicated it would end once the task was completed and indeed the task was completed and there was no dismissal.

In *Nkopane & others v Independent Electoral Commission*[179] the IEC needed to retrench a number of employees as there was no work for them. Their letters of appointment stated that they were employed on contract for "two to three years". Later the parties agreed upon termination dates. The court found that these were fixed-term contracts and that the IEC could not terminate them before the end of the term. The court confirmed the common law rule.

The difference in findings of the court in these two cases is based on the facts of the matter. In the *IEC*[180] case, there were specific dates to which the parties committed themselves. If the employer had no further work for the employees it had only one option and that is to pay out the remainder of the contract. In the *National Union of Metalworkers*[181] case there was no commitment to a specific date but rather that the contracts would automatically terminate upon the completion of each employees task for which they were appointed. The principle remains that, fixed-term contracts cannot be terminated prior to the date agreed upon unless there is material breach or repudiation of the contract.

In the case of fixed-term contract, the employment relationship terminates at the expiry of the term on a specified date or when a specified future event occurs for example at the end of a particular project if the contract expressly provides that the contract will end at the completion of the project.

In *Potgieter v George Municipality*[182] the contract contained a phrase that indicated that the employment contract was "linked to the terms of office of the executive mayor". The contract also clearly stipulated that it would come to an end a month after the then executive mayor left office. When the mayor's term ended the

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179 (2007) 28 *ILJ* 670 (LC).

180 *Ibid*.

181 *Supra*.

182 (2011) 31 *ILJ* 104 (WCC).

applicant's contract was terminated and he was given a month's notice. He claimed that he had been dismissed. The claim was dismissed as his contract was on a fixed-term basis and there was no dismissal.

In *Malinga & Others and Pro-Al Engineering CC*[183] the arbitrator held that employees who had signed limited duration contracts had failed to prove that they had a reasonable expectation that their contracts would be renewed. So, when their contracts were terminated there was no dismissal.

The employment contract also terminates when an employee reaches normal or agreed retirement age. In circumstances like these it is said that the employment contract has terminated due to effluxion of time. Section 187(2)(b) of the LRA[184] states a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

7.1 RETIREMENT

Agreed retirement age is normally based on contractual principles usually at the commencement of employment relationship where an employee is told in advance that his or her employment would end at a specific retirement age. The onus of proving that the employee has reached an agreed or normal retirement age rests with the employer unless the parties have concluded a new employment contract post retirement date. In such cases the onus rests with the employee to prove the existence of such a contract.[185] The agreement could either be between the employer and the trade union or between the employer and individual employees.

It has also been held that voluntary contribution to a pension fund which sets a retirement age denotes agreement between the employer and the employee that the employer will retire at that age.[186]

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183 (2003) 24 *ILJ* 2030 (BCA).

184 Act 66 of 1995.

185 *Rockliffe v Mincom* (Pty) Ltd (2008) 29 *ILJ* 399 (LC).

186 Grogan *Dismissal* 121.

There is neither requirement in terms of the LRA nor any labour legislation for that matter that there must be an agreement in advance on the retirement age, where there is no agreement, the "normal" retirement age applies.

The agreed retirement age should not be discriminatory by for example providing for a different age lower for a particular group of employees like female employees. Even if an agreement between an employee and an employer with regard to retirement age exists, an employer challenged for unfair discrimination on the basis of an impermissible ground in this case gender, will have challenges defending such a claim.

Section 6(1) of the Employment Equity Act[187] prohibits policies or practices that discriminate against employees on certain grounds which include age and gender. However, discrimination on age can be regarded as fair in certain circumstances for example refusal to employ someone below the age of fifteen. Employment of children less than fifteen years of age is prohibited in terms of BCEA.[188]

Section 187(1)(f) of the LRA provides that a dismissal is automatically unfair if the reason for the employer's decision to dismiss the employee is direct or indirect discrimination against the employee on any arbitrary grounds which includes amongst other things, age of the employee.

Section 187(2)(b) of the LRA states that:

> "(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

In essence this means that when an employee has reached the agreed or normal retirement age, an employer can terminate the contract of employment relying only on the fact that the employee has reached agreed or normal retirement age.

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187 55 of 1998.

188 S 43, Act 75 of 1997.

An employer who wishes to dismiss older employees that have become incapacitated or infirm before reaching agreed or normal retirement age, may not rely on the provisions of section 187(2)(b) of the LRA but may terminate the employment contract by following the procedure for termination of employment due to incapacity. Also, an employee may not disguise dismissal for operational requirements as termination of employment contract based on section 187(2)(b) but will have to follow the provisions of section 189 of the LRA.

According to Grogan,[189] the norm in normal retirement age is determined by the capacity in which the person is employed and presumably by reference to the practice in the particular enterprise or sector. Normal retirement age is the age at which employees employed in the same category have generally retired and does not become "normal" merely because the employer declares it to be such.[190] The court held that:

> "A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period - so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age."

If for example, in the absence of an agreed retirement age, employees in a particular organisation have in the past twenty years been retiring at age 63 without fail, age 63 could be regarded as normal retirement age for that organisation. This means that the period must be sufficiently long and the number of employees who have retired at that age must be sufficiently large to justify that it is a norm for employees to retire at that particular age.

The court further held that even if the period is long enough but the number of employees that have retired is not large enough, it could be difficult to prove that a norm has been established and also if the period is not long enough but the number is large enough it could be difficult to prove that a norm had not been established.

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189 Grogan *Workplace Law (*2008) 149.

190 *Rubin Sportswear v SACTWU & Others* [2004] 10 BLLR 986 (LAC) [22].

"Agreed" retirement age will always take precedence over "normal" retirement age. This means that an employer cannot rely on the fact that it has always required its employees to retire at a certain age if the employee's employment contract that has been transferred to another employer as a going concern specified a later retirement age.[191]

This was confirmed in *SA Clothing and Textile Workers Union v Rubin Sportswear*[192] where Rubin Sportswear and Val Hau et Cie, a company that previously employed the employees reached an agreement to sell a company as a going concern on the same terms and conditions of employment. The employees were between ages 60 and 63 years of age. Subsequent to the transfer, there was no further agreement between the parties with regard to retirement age. When Rubin Sportswear informed the employees that the retirement age was 60 years, and offered them fixed-term contracts valid for a year they declined and were subsequently dismissed on the basis that they had reached the normal retirement age. The court held that the dismissal was automatically unfair.

On appeal the LAC[193] upheld the decision of the LC and held that where the employment contract is silent on the retirement age, the employer cannot unilaterally impose a retirement age. It found that the appellant's conduct in unilaterally fixing the retirement age at 60 constituted a unilateral change on the employees' terms and conditions of employment which it had no right to do. The purported change in employment conditions was unlawful, wrongful and of no legal effect.[194] A similar principle was adopted in *Randall v Karan.*[195]

In the event that there is no agreed retirement age and the employer wants to introduce one, the court held that the employer should negotiate with the employees on what should be the retirement age until an agreement has been reached, if there

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191 Grogan *Workplace Law* 150.

192 (2003) 24 *ILJ* 429 (LC).

193 *Rubin Sportswear v SACTWU & Others* [2004] 10 BLLR 986 (LAC) [25].

194 *Rubin Sportswear v SACTWU & Others supra* [9], [11].

195 (2010) 31 *ILJ* 2449 (LC) 37.

is an agreement that would be an agreed retirement age however only applicable to those employees in agreement, it cannot be imposed on other employees.

The second option for an employer would be to institute a lock out in terms of section 67 of the LRA and compel the employees to agree on the proposed retirement age. The court held that these are the only two options that could have been followed by *Rubin Sportswear* and not impose the retirement age on the employees.

In *Botha v Du Toit Very & Partners CC*[196] the LC held that an employer was entitled to dismiss an employee who had reached the age of 66 even though there was no agreed or normal retirement age that could be established within the employer's business. It further held that this did not entitle the employee to remain in employment until he chose to resign. The court reasoned that age 65 was accepted as a normal retirement age for the work that he was engaged in. The employer was only faulted for not consulting with the employee prior to termination of employment.

Whilst it is not disputed that age 65 is accepted as normal retirement age, the decision in *Rubin Sportswear*[197] and in *Botha*[198] seem to be in conflict with each other. In the former the court rightfully held that the employer cannot unilaterally impose a retirement age if there is no agreement or the contract is silent, whereas in the latter the court held that the employer can impose as the employee cannot be expected to continue working until he chose to resign. The reasoning of the court is flawed in the sense that is unfair to expect the employee to leave with the consequences of the employer's failure to deal with the matter at the commencement or during the contract period. The employer determines the employment conditions, in this particular case *Du Toit Very & Partners* should have made provision for retirement age. If the age of the employee was 64, it is not clear whether the decision of the court would have been any different as it is accepted that normal retirement age in certain circumstances is 63.

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196 [2006] I BLLR (LC) 17.

197 *Supra.*

198 *Supra.*

Whilst it is accepted that the employee cannot expect to work until he decides to resign, the court did not give reason as to why the parties could not negotiate and agree on retirement age instead of imposing. It only faulted the employer for failure to consult, it is submitted that consulting as it is suggested does not constitute negotiating as required.

An employer cannot *carte blanche* dismiss employees by giving them the requisite notice. If they do so they will have to face the consequences of their actions.[199]

The concept of retirement age is arbitrary in that employees who have reached normal or agreed retirement age may still perform their duties adequately. The retirement age could purely be for reasons of making way for new and younger employees.

Importantly, with the provision of section 187(2)(b) is the wording at the end of the section which reads "for persons employed in that capacity". In *Rubin Sportswear*[200] the court had this to say about the wording:

> "However, it is important to bear in mind that that word is used in relation to persons employed in the same capacity as the person whose dismissal on the basis of having reached normal retirement age is in issue. Sec 187 (2) (b) must, therefore, not be read as if it says "(d)espite subsection 1 (f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age." It includes the words at the end "for persons employed in that capacity." What the section does not make clear is whether the words "persons employed in that capacity" refer to such persons who are in the same employer's employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general."

The wording proves that is quite possible for an employer to have different retirement age for its workforce depending on the capacity they are employed. For example, retirement age for executives could be different to that of artisans.

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199 *Randall v Karan* (2010) 31 *ILJ* 2449 (LC [31].

200 At par 19.

7.2 DOES REACHING NORMAL OR AGREED AGE RETIREMENT AGE CONSTITUTE DISMISSAL?

What is of interest with section 187(2)(b) of the LRA is that it states that termination of an employment contract is a dismissal whereas it has been argued that an employment contract terminates by effluxion of time when an employee has reached normal or agreed retirement age, and does not constitute dismissal.

When employees reach agreed or normal retirement age, termination of the employment contract is consensual between two parties, it is not a decision of the employer, and such termination does not fit the definition of dismissal as per section 186 of the LRA.[201] Perhaps the legislature had intended section 187(2)(b) to include dismissal after the employee has gone past the agreed or normal retirement age. The wording of section 187(2)(b) states that a dismissal is fair if the employee has reached the normal or agreed retirement age. It does not state "when" he reaches normal or agreed retirement age.

The key issue is whether termination of an employment contract because the employee has reached retirement age constitutes a dismissal or is merely termination of the contract due to effluxion of time. On the face of it, the wording of the section seems to suggest that when an employee reaches retirement age termination of the contract of employment will constitute a dismissal. This would then require that such a dismissal would then have to be procedurally and substantively fair.

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201 "Dismissal" means that

(a) an employer has terminated a contract of employment with or without notice;

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

(c) an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date,

of the birth of her child;

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

Grogan[202] seems to believe that it does constitute dismissal but a fair dismissal. Section 187(2)(b) does not state that an employee who is compelled to retire on reaching agreed or normal retirement age is not dismissed; it states that if such an employee challenges the fairness of his or her dismissal, the dismissal cannot be ruled unfair.

However, the courts are divided in this in that in certain decisions it has been held that if an employee has reached the agreed or normal retirement age and the employer terminates the employment contract, termination under those circumstances does not constitute dismissal.[203]

In *Schmahmann v Concept Communications*[204] the applicant's services were terminated having been notified by the employer that her employment contract would be terminated to coincide with its changeover to a computerized system of bookkeeping, and that she would be retired at the age of 65 years. The applicant alleged that she was dismissed and that the dismissal was automatically unfair on the basis of age. This was due to the fact that the employer had not agreed on a retirement age with the applicant, and that, on the evidence of an expert witness, there was no normal retirement age for persons employed in the capacity as the applicant.

The Labour Court held that, in terms of the definition of a dismissal in section 186 of the LRA there had been no dismissal, and as a consequence thereof the applicant could not claim to have been dismissed. It held that an employee is not dismissed if that person is retired by his or her employer on attaining the agreed or normal age of retirement. In this case the court failed to consider the fact that there was no agreed

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202 Grogan *Dismissals (*2010) 36-37.

203 *Venn v Moser Industries Ltd* (1997) 18 *ILJ* 1402 (LAC); *Schmahmann v Concept Communication Natal (Pty) Ltd* [1997] 8 BLLR 1092 (LC) 1097.

204 [1997] 8 BLLR 1092 (LC).

or normal retirement age, the employer imposed the retirement age on the applicant.[205]

The court held further that, when an employer and an employee agree specifically or by implication on normal retirement age in advance that the effluxion of time is to operate as the "guillotine which severs their employment relationship", then it cannot be said that when this date arrives there has been a dismissal by the employer although the relationship and the contractual obligations are terminated.

The implication of this ruling is that when an employment contract is terminated on the grounds set out in section 187(2)(b), the employer is not required to comply with the requirements of procedural and substantive fairness.

According to Bosch[206] "there was no agreement on retirement age and it could thus not be said that the applicants" contract had been terminated by any means other than the employer's action in bringing it to an end. She was thus "dismissed" and entitled to claim that such dismissal was unfair. Bosch goes on to say that "the court in *Schmahmann* should not, have been so quick to find that once a retirement date had been attained, there was no 'dismissal' within the meaning of the LRA".

In *Gqibitole v Pace Community College*[207] the employee, Ms Gqibitole, claimed that she had been dismissed, and that the dismissal was automatically unfair based on age. In perusing the facts of the case the court came to the conclusion that the agreed retirement date was set at 1 March 2000, but that the applicant was dismissed on 30 June 1998, before the agreed retirement date as per the retirement policy of the respondent. It held that the employer unfairly discriminated against the applicant directly on the basis of age. The court also found that there was no "normal" retirement age for employees employed in the applicant's capacity because there were other teachers employed with the respondent who taught well beyond the age of 60, and even into their early 70's. The Labour Court held that it was

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205 Bosch "Section 187(2)(b) and the Dismissal of Older Workers - Is the LRA Nuanced Enough?" 1285.

206 *Ibid*.

207 (1999) 20 *ILJ* 1270 (LC).

automatically unfair to dismiss an employee based on age before attaining an agreed retirement age thus agreeing with the applicant.

In *Schweitzer v Waco Distributors*[208] the court reasoned that when an employee reaches retirement age, the employment contract expires by effluxion of time and terminates automatically and does not constitute dismissal. It also held that:

> "The conditions which must exist in order for a dismissal to be fair in terms of section 187(2) (b) are the following:
> (a) the dismissal must be based on age;
> (b) the employer must have a normal or agreed retirement age for persons employed in the capacity of the employee concerned;
> (c) the employee must have reached the age referred to in (b) above."

Once all these three conditions are present, as is the case in this matter, section 187(2)(b) states that the "dismissal is fair". The court has no competence to enquire into the fairness of the dismissal save, maybe to declare what the statute says anyway.

It was further held that a decision to dismiss was fair and that the employer was not required to follow a fair procedure. Van der Walt *et al*[209] agrees with this court decision and states that the employment contract terminates automatically when the employee reaches agreed or normal retirement age.

Thus, as far as the question as to whether or not dismissing an employee, or otherwise put ending to the employment relationship upon reaching an agreed or normal retirement age is concerned, it seems as though the courts have stayed hard to the finding that such a state of affairs does not amount to a dismissal as defined in section 188 of the LRA, and where an employer does dismiss an employee before reaching the agreed or normal retirement age, once such an age is determined, it will be regarded as an automatically unfair dismissal based on age.

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208 [1998] 10 BLLR 1050 (LC) 27.

209 Van der Walt *et al Labour Law in Context* 30.

7.3 WORK BEYOND NORMAL OR AGREED RETIREMENT AGE

In cases where an employee was permitted to work beyond the agreed or normal retirement age, the courts have adopted different approaches.

The one view is that the dismissal is not automatically unfair and that section 187(2)(b) is a complete defence. The other is that section 187(2)(b) is not a complete defence and the dismissal is automatically unfair.[210]

In *Schweitzer v Waco Distributors*[211] the applicant's employment was terminated when he was 67 years old, the agreed retirement age being 65, he was therefore allowed to work beyond the agreed retirement age.

The termination was not based on any complaints regarding his work performance or conduct and the court found that he had not been afforded a fair hearing before the decision was taken to terminate his services. The applicant claimed that his dismissal was automatically unfair in terms of section 187(1)(f) of the LRA. The question in this case was whether it is required to afford an employee sufficient opportunity to make representations before he is dismissed, so as to bring it in line with the requirement of procedural fairness, after he has reached the "normal or agreed" retirement age. It was held that there are no requirements of fairness in retiring an employee on reaching the "normal or agreed" retirement age. What if that employee is not dismissed on reaching such an age and is allowed to carry on working past that age, is he then allowed the opportunity of fairness? In this case Zondo J found that there is no such requirement. On the plain wording of section 187(2)(b), it was held, the dismissal of an employee who has passed the normal age of retirement "is fair", thus leaving the court no scope to pursue the inquiry any further.

In *Datt v Gunnebo (Pty) Ltd*[212] the applicant had signed a revised retirement age agreement shortly before his 65th birthday setting the retirement age at 65 with the

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210 (2010) 31 *ILJ* 2449 (LC) 29.

211 [1998] 10 BLLR 1050 (LC).

option to continue working "with the agreement of the company". His original contract did not specify a retirement age. The applicant continued to work for the company even after he had turned 65 and the Managing Director requested him to continue to work until such time the parties mutually agree on a date when the applicant should retire.

Two years later a new Managing Director informed the applicant that he must retire based solely on grounds that he had passed the normal retirement age. The LC found that the conduct of the employer constituted an automatically unfair dismissal in that the new agreement had extended the retirement age to an unspecified date and precluded the respondent from reliance on section 187(2)(b) of the LRA.[213] It further held that the conduct of the employer constituted a unilateral termination of employment contract on notice, which constitutes a dismissal for purposes of the meaning of dismissal.[214]

The situation would have been different if the new agreement included a specified date new retirement date. Steenkamp J stated that in this case, the employer cannot rely on section 187(2)(b) of the LRA as a justification to unilaterally terminate the applicant's employment based on age. Although an employer should always be able to dismiss an employee in circumstances like this, where the parties had agreed to an amended retirement age, the provision must still be a fair reason and the employer must follow the fair procedural rules of dismissal. Age being the reason does not constitute a fair dismissal.

The company alleged that the applicant was a risk to the company and should make way for new employees.[215] Even though this point was not explored further by the court, this suggests that the real reason for termination of employment contract was not due to the fact that he had worked past his retirement age but that he was a risk to the company. It is possible that if the applicant was not viewed as a risk to the

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212 [2009] 5 BLLR 449 (LC).
213 At par 34.
214 At par 21.
215 At par 7.

company, the company would have been very happy to keep him in its employ irrespective of his age.

In *Solidarity obo Dobson v Private Security Industry Regulatory Authority*[216] an employer had employed the applicant when she was 68 years of age; the retirement age in terms of the company's retirement policy was 65. The applicant's services were terminated three years after she was employed and the employer argued that he was entitled to do so based on the fact that she had reached the normal retirement age. The CCMA held that by knowingly employing the applicant when she was past the normal retirement age the respondent had ignored and breached its own policy and rendered the dismissal unfair.

In certain cases where an employee's employment contract has been terminated due to employee reaching retirement age, the courts will not only rule on the fairness of the dismissal but also on whether the employer's conduct amounts to discrimination or not, noting that that there is nothing precluding dual claims. In the event that the conduct of the employer amounts to discrimination, the court can award compensation amounting to a maximum of twenty four month's remuneration for automatically unfair dismissal and an additional amount of damages in respect of the employer's unfair discrimination.[217]

It is the view of the writer that when employees work beyond the normal or agreed retirement age, the employment contract is not terminated by effluxion of time. When an employer decides to terminate the employment contract past retirement date by giving notice to the employee, an employer cannot claim that such termination is by effluxion of time, such termination is the decision of the employer. Such an employer will be required to provide a fair reason for the termination and to follow a fair process.

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216 [2004] 12 BALR 1546 (CCMA).

217 In *Evans v Japanese School of Johannesburg* [2006] 12 BLLR 1146 (LC) the court awarded an additional amount of R200 000 in damages in respect of the employer's unfair discrimination.

As suggested above, an employee who wishes to terminate employment contracts of employees that have worked beyond normal or agreed retirement age will have to consult the affected employees and negotiate a new retirement date.

A fair dismissal is a fundamental right and it cannot just be assumed that employees have waived that right the moment they work beyond retirement age. The writer tends to agree with other court decisions which states that an employee must be given notice prior to termination of employment.[218]

7.4 FIXED-TERM CONTRACT

A fixed-term contract of employment is a contract for a limited and specified period of time.[219] It automatically ends when the period agreed to has lapsed or when the project for which the employee was employed for has been completed. Such employment contract terminates by effluxion of time and is not terminated by the employer. This means that no dismissal has taken place. Consequently, an employee is precluded from seeking protection in terms of section 186(1) of the LRA.

On the other hand, premature termination of an employee's fixed-term contract is an invitation to challenges of unfair dismissal based on repudiation. In *Buthelezi V Municipal Demarcation Board*[220] the court held that even though the LRA, specifically section 186 does not specifically deal with premature termination of contract constitutes dismissal and is still manifestly unfair.

The parties enter into a valid fixed-term contract with the intention that it will endure until the end of the contract, therefore employers may not retrench employees for operational requirements if they are on fixed-term contracts. The LAC in this case held that there is no right to terminate a fixed employment contract in the absence of repudiation or material breach of the contract even on notice unless the contract expressly makes such a provision. In further held that no party is entitled to later seek

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218 *Rubin Sportswear v SACTWU & Others* [2004] 10 BLLR 986 (LAC), *Botha v Du Toit Very & Partners CC* [2006] 12 BLLR (LC).

219 Van der Walt *et al Labour Law in Context* 28.

220 (2004) 25 *ILJ* 2317 (LAC) [13], Grogan *Dismissal* 42.

to escape its obligations in terms of a contract on the basis that it's assessment of the future had been erroneous.[221]

In *FP Dennis v Kouga Municipality*[222] Mr Dennis, the applicant approached the High Court alleged that he was dismissed without due notice and without any disciplinary hearing being held into the allegations levelled against him in a charge sheet, which was given to him some time before his dismissal. He sought a declarator to the effect that his purported termination of employment contract with the respondent be declared to be unlawful, and in breach thereof.

The applicant in this case chose to refer his case to the High Court instead of the Labour Court. The High Court held that the facts of his case enabled him to plead a cause of action that would be sustainable in both the High Court and the Labour Court. He pleaded his case to fall within the High Court's jurisdiction as a breach of contract, which he was entitled to do so.[223]

The court held that the fact that the respondent's conduct towards him also violated his right to fair labour practices, that his dismissal was not for a fair reason, and it was procedurally unfair, does not alter his position. The High Court ruled that the termination of the applicant's contract of employment without a hearing constituted a breach of contract and ordered his reinstatement.[224] It further held that the respondent was not precluded from conducting a disciplinary hearing if it believed there were grounds to do so, once the applicant has resumed his duties.

In *Abdulla v Kouga Municipality*[225] the applicant whose fixed-term contract was prematurely terminated contended that his dismissal was in breach of his contract of employment. He alleged that the termination itself amounted to a repudiation of his contract because it was in breach of the employer's fundamental obligation not to terminate the contract without lawful cause. The applicant also claimed that the

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221 At par 8.
222 EC High Court Case number 644/2011.
223 At par 33.
224 At 36.
225 *Abdullah v Kouga Municipality* Case number P01/12 (LC).

failure to follow a proper procedure before terminating his services was also in breach of his contract. The respondent's reason for terminating the contract was based on the fact that it had lost confidence in him. The respondent contended that mere existence of such a lack of confidence constituted sufficient grounds for the lawful termination of the contract.

The LC was required to determine whether the municipality was entitled to terminate the employment relationship summarily. It ruled that summary termination of the applicant's services was an unlawful, but given the breakdown of trust an order of reinstatement would not be appropriate.[226]

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226 At 18.

CHAPTER 8
THE LEGALITY OF AUTOMATIC TERMINATION IN TRIPARTITE EMPLOYMENT RELATIONSHIP

8.1 THE AUTOMATIC TERMINATION OF LABOUR BROKER'S EMPLOYEES

Section 198 of the LRA[227] regulates the employment relationship between a Temporary Employment Services (hereafter referred to as "TES"), a worker (the employee) of TES and a client. It also regulates the liability aspect of the relationship.

Employers, or "clients" make use of TES often referred to as labour brokers for various reasons including temporal replacement of staff for example replacement of employees that are on maternity leave, to meet employer's business demands for staff during certain periods or seasons, the relative ease with which under-performing or misbehaving placements can be replaced and to avoid the cost associated with unfair dismissal proceedings and remedies that could be afforded to employees.

Generally, employers find the use of labour brokers to be less costly than indefinite contracts for example employers are not obligated to pay benefits like medical aid and pension fund contributions for employees on fixed-term contracts. The client does not acquire any liability for unfair dismissal if the labour broker decides to terminate the services of the unwanted employee, liability lies with the labour broker.

The contracts of the labour brokers would typically include automatic termination clauses that provide for the automatic termination of employment contracts between the labour brokers and their employees in circumstances where the labour broker's clients no longer requires the services of such employees, where the labour broker's contract with the client expires[228] or for whatsoever reason. In essence this means the employment contracts can be terminated for no reason at all.

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227 Act 66 of 1995.

228 *NUMSA v SA Five Engineering (Pty) Ltd* 2007 28 *ILJ* 1290 (LC).

Typically what would happen is that, the client would just advise the labour broker that the services of the employee are no longer needed, the labour broker would merely inform the employee that the contract with the client had been terminated and consequently, in the absence of alternative positions being found for the employee, the latter's services would no longer be required.

That means there would then be no hearing[229] or consultation[230] with the employee and no severance benefits would be paid either, the TES or labour broker would simply argue that the contract terminated automatically. It is clear that the motivating factor for clients in the engagement of labour broking services is to circumvent the gamut of statutory rights and obligations that would typically arise in a standard employment relationship. Their contractual obligations are circumscribed by the commercial contract concluded and generally indemnify them against any responsibility towards the labour broker's employees.[231]

Section 198 of the LRA reads:

> **"Temporary Employment Services**
>
> (1) In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons-
> (a) who render services to, or perform work for, the client; and
> (b) who are remunerated by the temporary employment service.
> (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
> (3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.
> (4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes-
> (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
> (b) a binding arbitration award that regulates terms and conditions of employment;
> (c) the Basic Conditions of Employment Act; or

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229 As required in terms of Schedule 8 Code of Good Practice: Dismissal of the LRA.

230 In terms of s 189, Dismissals based on operational requirements.

231 Labour Bulletin, Education Labour Relation Council in association with Labour and Social security Law Unit of the Nelson Mandela Metropolitan University July 2013, 1-16, 2.

(d) a determination made in terms of the Wage Act …"

Section 198(2)[232] stipulates that the temporary employment service is the employer of the person whose services have been procured for a client. Section 198(4) limits the client's liability to joint and several liability with the employer to a contravention of the terms and conditions of a collective agreement, arbitration award, sectoral determination or provision of the BCEA. This working arrangement is endorsed by International Labour Organisation (ILO) Recommendation 197 of 2006.[233]

In the recent case of *NUMSA v Abancedisi Labour Services*[234] the Supreme Court of Appeal (hereinafter referred to as "the SCA") overturned an earlier decision of the Labour Appeal Court in *National Union of Metalworkers of SA & others v Abancedisi Labour Services*[235] (hereinafter referred to as *Abancedisi*) and found that the respondent labour broker, *Abancedisi* did indeed dismiss its employees who had been placed with a client after the client excluded them from its premises. Although the employees remained nominally on the labour broker's payroll, it did not pay them and made no effort to secure them alternative work. The SCA found that nothing resembling an employment relationship remained between the parties and that the employees had been unfairly dismissed.

Background to this case is that during 2001, Kitsanker (Pty) Ltd (hereinafter referred to as Kitsanker) concluded an agreement with *Abancedisi* to provide it with employees. The employees who were employed directly by Kitsanker entered into voluntary retrenchments and were immediately re-employed by *Abancedisi* on a limited duration contract for which their services would be at Kitsanker's disposals but the location and terms and conditions of employment remained precisely as before.

After a work stoppage during July 2001, Kitsanker required the employees to sign a code of conduct to regulate industrial action. Kitsanker refused to allow any employee who did not sign the code of conduct onto its premises. Upon enquiry from

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232 *Supra.*

233 Labour Bulletin, Education Labour Relation Council in association n with Labour and Social security Law Unit of the Nelson Mandela Metropolitan University July 2013, 1-16, 2.

234 [2013] ZASCA 143 (30 September 2013).

235 Case number JS1284/01 (LAC), 25 March 2010.

the Union of Metalworkers of SA (hereinafter referred to as NUMSA), *Abancedisi* confirmed Kitsanker's position and stated that the employees would not be paid any wages since they were only paid for work performed. An unfair dismissal dispute was referred to the Bargaining Council in which *Abancedisi* claimed that the employees had not been dismissed but in fact remained on their payroll. Thereafter, the dispute was referred to the Labour Court where the same point *in limine* was raised and upheld.

On appeal to the LAC[236] the court maintained the view that the employment relationship had continued and that the employees' situation had merely amounted to an indefinite suspension.

The employees thereafter appealed to the SCA. In reference to the employment contract, the SCA found that it was specifically linked to the Kitsanker project[237] as *Abancedisi* had made no effort to secure alternative work for the employees after the expulsion of employees by Kitsanker, and Kitsanker filled the employees' posts, the contract of employment had been terminated.[238] The SCA further found that *Abancedisi* had not paid the employees any wages, and there was nothing even slightly resembling the characteristics of an employment relationship remaining between the parties beyond the illusory retention of employees on *Abancedisi's* payroll. The effect of *Abancedisi's* conduct was that there was material breach of the employment contract that entitled the employees to cancel it.[239] The court found that the employees had been dismissed in terms of section 188(1) of the LRA and that the dismissal was unfair. *Abancedisi* was ordered to pay the employees twelve months' compensation each and costs.

The lesson for labour brokers in this case is that when a client notifies a labour broker that it no longer wants the labour broker's employees on its premises, the labour broker has an obligation to source alternative employment for such employees

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236 *Supra.*

237 At par 13 and 14.

238 At par 13.

239 At par 15. The court also relied on the decision of *Council for Scientific & Industrial Research (CSIR) v Fijen* (1996) 17 *ILJ* 18 (A).

failing which consult with its employees in terms of section 189 of the LRA.[240] The court noted that the fact that *Abancedisi* did not start retrenchment procedures confirmed the notion that the employees had already been dismissed. It also echoed the views that had been made in earlier judgements[241] that employment contracts containing automatic termination clauses conflict with the employee's right not to be unfairly dismissed under the LRA and Constitution and offends public policy.[242]

In *Sindane v Prestige Cleaning Services*[243] the Labour Court had to consider the legality of the automatic termination clause in the employment contract. The issue in this case was whether an employee previously on a fixed-term contract was dismissed or not within the meaning of section 186[244] of the LRA. The employment contract stipulated that upon termination of the contract between the TES and the client to whom the employee rendered services, the employee's employment contract would automatically terminate. The employment contract had been terminated as a result of the client scaling down its contract with the TES by cancelling a contract in terms of which an extra cleaner had been provided to them. The court held that the termination of employment did not constitute dismissal because the reason for the termination of employment contract is not due to the conduct of the employer, that is the labour broker but it is due to the conduct of the client.[245] The court relied on the wording of section 186 of LRA.[246]

In *SA Post Office v Mampeule*[247] *t*he court was required to consider the legality of the automatic termination clause however in this case there was no involvement of a labour broker. In this case an employee was appointed as Chief Executive Officer (hereafter referred to as "CEO") on a fixed-term contract of employment contract. Mr Mampeule was also appointed as an executive director of the company. The

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240 At par 17.

241 *Mahlamu v CCMA & others* [2010] 4 BLLR 381 (LC); *Nape V INTCC Corporate Solutions* [2010] 8 BLLR 852 (LC); *Chilibush v Johnston* [2010] 6 BLLR 607 (LC); *SA Post office V Mampeule* [2009] 8 BLLR 792 (LC); *South African Post Office V Mampuele* [2010] 10 BLLR 1052 (LAC).

242 At par 17.

243 [2009] 12 BLLR 1249 (LC) 1250.

244 Meaning of dismissal.

245 This view was supported by Cohen in "The legality of the automatic termination of contracts of employment" *Obiter* 665-677 666.

246 *Supra.*

247 (2009) 30 *ILJ* 664 (LC).

employer's articles of association stipulated that the employee's appointment as executive director was an inherent job requirement and that if he ceased to hold an office for any reason whatsoever including removal by shareholders, his employment contract would automatically terminate. Mr Mampeule was removed by shareholders as a director and was advised that his employment contract had terminated automatically.

In reaching its decision, the LC held that any act by an employer that directly or indirectly results in the termination of the employment contract constitutes a dismissal. The employer terminated the employment contract by severing the umbilical cord that ties the employee's contract to his membership of the employer's board of trustees.[248] It further stated that such clauses are impermissible, against public policy and incapable of consensual validation as parties cannot contract out of their rights conferred to them in terms of the LRA.[249]

In *Sindane*[250] the court distinguished the findings of *Mampeule*[251] on the basis that in *Mampeule* the employment contract was terminated based on the employer's decision to remove him from the board of directors following allegations of misconduct. In such circumstances the court held that he ought to have been given an opportunity to state his case and contest the fairness of his termination.

On the other hand in *Sindane* the court ruled that there was no dismissal since the termination of employment was not the result of an act of an employer but was triggered by a third party. It held that the employment contract was terminated as a result of a specified event as opposed to an overt act on the part of the employer. In circumstances when an act of the employer is not the proximate cause of the termination of the employment contract it does not constitute dismissal.[252]

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248 At 793.

249 At 803.

250 *Supra.*

251 *Supra.*

252 Cohen "The legality of the automatic termination of contracts of employment" *Obiter* 665-677 666.

On appeal the LAC[253] upheld the decision of the LC but based its findings on reliance on sections 5(2)(b) and 5(4) of the LRA.[254] Section 5(2)(b) provides that no person may or threaten to prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act. Section 5(4) provides that a provision in any contracts that directly or indirectly contradicts or limits any provisions of section 4 and 5 is invalid unless the contractual provision is permitted by the LRA.

It held that parties cannot contract out of the protection against unfair dismissal whether by means of an automatic termination clause or otherwise. It further held that the onus rested with the employer to establish that the automatic termination clause prevailed over the relevant provisions of the LRA.

The LAC held that section 5 of the LRA trumped the contractual provision as the employer had failed to offer a clear explanation as to why the automatic termination clause had been independently triggered and the only explicable motive appeared to be to circumvent the unfair dismissal provisions of the LRA.

In *Chillibush v Johnston*[255] the court held that a term in the contract of employment providing for automatic termination of employment contract when a board member who is also an employee is removed from the board contravenes section 185(a) of the LRA and cannot be permitted. In this case, the shareholder's agreement had a provision that states that should any shareholder cease to be a director or employment terminated by other shareholder, that shareholder would be obliged to resign as director and offer his shares for sale to other shareholders. However, the employer argued that the employment contract terminated automatically. The court held that it was not permissible to allow an employer to contractually negotiate the terms of a dismissal in advance in a contract of employment as that contravenes section 5(2)(b) of the LRA. It also held that the removal of the employee from his post constitutes dismissal.

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253 *South African Post Office V Mampuele* [2010] 10 BLLR 1052 (LAC).

254 66 of 1995.

255 [2010] 6 BLLR 607 (LC).

In *Mahlamu v CCMA*[256] the Labour Court echoed a similar approach and held that a contractual device that renders a termination of a contract of employment to be something other than dismissal, with the result that the employee is denied the right to challenge the fairness thereof in terms of section 188 of the LRA, is precisely the mischief that section 5 of the LRA prohibits. The court noted that statutory protection against unfair dismissal is a fundamental component of the constitutional right to fair labour practices that serves to protect the vulnerable by infusing fairness into the contractual relationship and the LRA must be purposively construed to give effect to this.

In *Nape V INTCC Corporate* Solutions,[257] the court correctly criticised the court finding in *Sindane* and noted that it placed too much emphasis on the rights of parties to contract out of the protection of the Act. It stated that it is important to note the legality of the relationship on one hand and also the terms of the contract on the other hand. This means that an employment relationship might be lawful but not all its terms may be. The TES and its clients are not at liberty to enter into agreements that exploit employees. Clients have a responsibility not to harm the dignity of employees and undermine their right to fair labour practice.

Mr Nape was employed by a TES (INTCS Corporate Solutions (Pty) Ltd whose client was Nissan (Pty) Ltd. The employee committed misconduct at the client's premises, subsequent to that, the client invoked its contractual rights and demanded that the TES remove Mr Nape from its premises. Mr Nape was disciplined and given a sanction of a 12 month Final Written Warning. However, the client was still not happy and refused to allow the employee on its premises. The TES alleged that it had no choice but to invoke the provisions of section 189 of the LRA.[258] An approach which the SCA[259] noted should have been followed in *Abancedisi*.

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256 *Mahlamu v CCMA & others* [2010] 4 BLLR 381 (LC) 21.

257 [2010] 8 BLLR 852 (LC) [51], [60].

258 Dismissals based on operational requirements.

259 [2013] ZASCA 143 (30 September 2013) 17.

In *Nape* the court held that the employer was legitimately entitled to dismiss the employee on grounds proven by the client to be reasonable and or substantively and procedurally fair. It was also held that the employer was legitimately entitled to invoke section 189 of LRA.

However, the contract between the client and the labour broker permitted termination of employment on any ground. The employer argued that it simply exercised its right permitted by the contract and also that it had no alternative other than to retrench the employee. Whilst the legality of the relationship between the client and the labour broker was lawful, the court held the terms of the contract on the other hand were not all lawful in that the provision that permitted termination of the employment contract for any reason was contrary to public policy, is in breach of the employee's right to fair labour practices and was unenforceable.

The court held that the client of a labour broker has a legal duty not to undermine an employee's right to fair labour practices unless the limitation is justified by national legislation. It noted further that there is nothing in section198 of the Act that indicates that a labour broker and a client may limit the right of an employee not to be unfairly dismissed and that the court is not bound by contractual limitations created by parties through an agreement that conflicts the fundamental rights of workers.

According to Bosch[260] there may be cases of extreme unfairness that might mean that the agreement is contrary to public policy and thus unenforceable. He further states that the common law supplements the provisions of the written Constitution which is the supreme law. However, the common law derives its force from the Constitution. A right to fair labour practice and employee's dignity can be said to have been violated by such clauses, thereby deemed to be against public policy and therefore unenforceable.

The court viewed that labour brokers are not powerless when forced by the client to treat their employees unfairly. They have options for example approaching a

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[260] Bosch "Contract as Barrier to Dismissals: The Plight of Labour Broker's Employees 2008 *ILJ* 813-840 820.

competent court to order the client to refrain from such conduct and also ordering the client to reinstate an unfairly dismissed employee.

The challenge is that practical application of this view, since it has already been mentioned that clients are motivated to use labour brokers because of the relative ease to free themselves of their statutory obligations of which labour brokers are aware of. It does not make sense as to why a labour broker would go to such extent and jeopardise its relationship with the client by ordering its client to reinstate the unfairly dismissed employee. The practicality of this view could have a potential to harm the future financial and business opportunities between client and the labour broker.

What is of note from the decision is that labour brokers my no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal as evidenced in *Sindane*. As to why the court did not consider ordering the labour broker to consult the employees in terms of section 189 of LRA is not clear assuming that labour broker had other clients and could have tried to look for employment for the employee elsewhere. It seems that the appropriate approach in such circumstances is the one followed in the recent judgement by the SCA in *NUMSA v Abancedisi Labour Services*.[261]

The labour broker should redeploy the employee to other or clients. Section 189(7) requires than an employer select employees to be dismissed for operational requirements according to a criteria to be agreed upon by the employer and representatives of the employees to be dismissed. If no agreement reached, criteria that is fair and objective which may include Last In - First Out (hereafter referred to as “LIFO” must be followed.

These court decisions clearly show that exploitation of employees of labour brokers will not escape judicial scrutiny and intervention.

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[261] [2013] ZASCA 143 (30 September 2013).

8.2 TERMINATION AT THE INSTANCE OF A THIRD PARTY

As discussed previously, in recent cases the courts have said termination at the insistence of third party, be it a client of a labour broker or a shareholder constitutes a dismissal.[262]

In *Livhadelo & Others v J&A Labour Contractors CC*[263] a TES dismissed the applicants after its client advised that the applicants were guilty of a serious misconduct, the client did not have concrete evidence to substantiate the allegations. The commissioner held that the TES, instead of taking the dismissal for operational requirements route, had chosen to take disciplinary action based on inadequate evidence and unfairly dismissed the applicants. The applicants were awarded compensation.

In *Nkosi v Fidelity Security Services (Pty) Ltd*[264] the same principle was set out, where it was held that dismissal for misconduct is not the appropriate way of dealing with demands by an irate client who has no evidence of employee's wrongdoing. However, in this case an employee had unreasonably refused another position he was offered and therefore compensation was limited to one month's salary.

With regard to the question of whether employees can contract out of protection by the LRA, this has also been answered in *Mahlamu v CCMA.*[265] It was held that employees when acting as individuals seldom have power to waive or abandon rights that have been given to them by the legislature. Further to that, an employee cannot contract out of his protection against unfair dismissal or renounce his right to bring such a claim whether that is expressly stated in a contract of employment. This is exactly what section 5(2)(b) and 5(4) of the LRA[266] are against. Contracting out of the right not to be unfairly dismissed is not permitted by the LRA.

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262 *Mahlamu v CCMA & others* [2010] 4 BLLR 381 (LC); *Nape V INTCC Corporate Solutions* [2010} 8 BLLR 852 (LC); *Chilibush v Johnston* [2010] 6 BLLR 607 (LC); *SA Post office v Mampeule* [2009] 8 BLLR 792 (LC); *South African Post Office V Mampuele* [2010] 10 BLLR 1052 (LAC).

263 [2012] 5 BALR 439 (MEIBC).

264 [2012] 4 BALR 432 (CCMA).

265 [2011] 4 BLLR 381 (LC) 20.

266 Act 66 of 1995.

Bosch[267] states that it is of no consequence if the contract did not expressly exclude the application of the LRA to the relationship, what is of importance is the effect of such a clause, in this case the fact that employment would end automatically if the client advised for whatsoever reason. If its intention is to limit the right conferred on the applicant by the LRA and Constitution, it is invalid, against public policy and unenforceable. Bosch further stated that contracting out of protection against unfair dismissal is as good as contracting out of a right to fair labour practices.

The BCEA[268] states that an employer must give written particulars to an employee of the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate. In *Khumalo v ESG Recruitment*[269] it was held that by not specifying an end date to the contract, the employer has created an opportunity for itself to avoid its obligations in terms of labour legislation and consequently deny employees their constitutional employment rights.[270]

In *Mampeule*[271] the LC further held that labour brokers must themselves adhere to the requirements of fairness before terminating the services of employees who have been dismissed by their clients. This view was echoed in *Nape v INTCS Corporate Solutions.*[272] The LRA[273] protects employees against those who prevent them from exercising any right conferred by the Act. Further to that a provision in any contract that limits or contradicts the provision of this section is invalid unless the contractual provision is permitted by this Act.

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267 Bosch "Contract as Barrier to Dismissals: The Plight of Labour Broker's Employees 2008 *ILJ* 820.

268 S 29(1)(m), BCEA Act 77 of 1997.

269 (2008) JOL 21490 (MEIBC) [5], [19], [20].

270 *South African Post Office V Mampuele* (2009) *30 ILJ* 664 (LC), *Mahlamu v CCMA* [2011] 4 BLLR 381 (LC).

271 *Supra.*

272 [2010] 8 BLLR 852 (LC) [7].

273 S 5(2)(b) and s 5(4) Act 66 of 1995.

In *Khumalo v ESG Recruitment*[274] it is stated that cancellation of labour broking contract by a client such termination is viewed as a dismissal for operational requirements.

In *Fidelity Supercare Services*[275] the employer relied on an automatic termination clause in an employment to terminate the contract, accordingly did not follow the procedure set in section 189 of the LRA. It was held that the termination of employment constituted a dismissal that is both procedurally and substantively unfair. The arbitrator awarded severance pay in terms of section 41 of BCEA.

8.3 TERMINATION DUE TO IMPOSSIBILITY OF PERFORMANCE

In terms of the common law principles of contract, a contract terminates automatically when it becomes permanently impossible to perform the terms of the contract due to no fault on the part of either party. The consequence would be the automatic termination of such a contract and will not constitute a dismissal.[276]

Supervening impossibility of performance occurs when performance of the obligation is prevented by superior force that could not reasonable have been guarded against.[277] The impossibility of performance must be absolute and be of a permanent nature otherwise such a claim will not withstand judicial scrutiny. For example, death of an employee, imprisonment of an employee, strike action that prevents employees from working or employer from providing employment. As indicated earlier, death of an employer does not necessarily mean termination of the employment contract.

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274 [2008] JOL 21490 (MEIBC) [3].

275 [2009] 5 BALR 510 (CCMA).

276 Labour Bulletin, Education Labour Relation Council in association with Labour and Social security Law Unit of the Nelson Mandela Metropolitan University July 2013, 1-16, 5.

277 Cohen "The legality of the automatic termination of contracts of employment" Obiter 665-677 670.

8.3.1 TERMINATION AT THE INSTANCE OF SHAREHOLDERS

In *PG Group (Pty) Ltd v Mbambo NO*[278] the court rejected the defence of impossibility of performance where it had to consider whether a resolution by members of a company, removing the employee from office constituted a dismissal or not. In terms of section 220 of the Companies Act[279] the members of a company in a general meeting may by extraordinary resolution remove directors before the expiration of their terms of office. The employer argued that as the action of the shareholders were imposed on it by virtue of the articles of association and it had neither alternative nor discretion but to treat the appointment of the employee as having been terminated due to supervening impossibility of performance. The court reasoned that one of a company's primary rules of attribution is that the decision of members in a general meeting constitutes a decision of the company itself,[280] it concluded that it was the employer, not its shareholders that dismissed the employee.[281]

While shareholders have an unfettered discretion to terminate the directorship of any of its directors, they must bear in mind that the principles of fairness in terms of the LRA will prevail when it comes to dismissal of employees and not the principles of lawfulness, hence many a times employers relying on the impossibility of performance to justify automatic termination of the employment contract often do not succeed. This was also confirmed in *SA Post Office v Mampeule*[282] *and Chillibush v Johnston.*[283] The mere fact that the employee is lawfully removed in terms of the Companies Act[284] does not mean that he is deprived of the right to protection against unfair dismissal as labour law and company law essentially operate in their own spheres.

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278 [2005] 1 BLLR 71 (LC).
279 61 of 1973.
280 At par 73.
281 At par 74.
282 [2010] 10 BLLR 1052 (LAC).
283 [2010] 6 BLLR 607 (LC).
284 61 of 1973.

8.3.2 INCARCERATED EMPLOYEES

In *NUM v CCMA*[285] the LC was required to consider whether the inability of an employee to render services to the employer as a result of the employee's incarceration gives rise to the impossibility of performance. The employer argued that the incarceration resulted in the termination of the contract by operation of law. The Labour Court noted that when impossibility of performance of the contract is temporary, the employment contract is suspended for the period of incapacity however if permanent or for a lengthy period of time the contract terminates automatically by operation of law. The court found that the commissioner had failed to enquire on whether the incapacity was permanent or temporal.

In the absence of clear guidelines delineating temporary from permanent impossibility, this approach is likely to be fraught with uncertainty.[286]

The LAC in *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council*[287] has advocated that such cases as incarceration of employees should be treated as incapacity and an employee should be given an opportunity to consider the reasons for incapacity and explore other alternatives to dismissal prior to taking a decision. In this case the employee, after having been incarcerated for 150 days was advised in writing by means of a letter addressed to the police station of his dismissal due to operational incapacity.

The LAC noted that dismissals for incapacity should not be confined to the usual incapacity arising from ill-health, injury or poor performance. It held that the determination of the fairness of a dismissal for incapacity depends on the facts of the matter.

In view of the employer's business requirements to fill the employee's position and due to the uncertainty on the period of incarceration, the court ruled that the

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285 [2009] 8 BLLR 777 (LC).

286 Labour Bulletin, Education Labour Relation Council in association with Labour and Social security Law Unit of the Nelson Mandela Metropolitan University July 2013, 1-16, 6.

287 (2010) *ILJ* 1838 (LAC).

dismissal of the employee due to operational incapacity was substantively fair even though procedurally unfair. The procedural fairness was due to the fact that even though the employee was given an opportunity to be heard after his release, the fact that the same person who took a decision to dismiss presided over the post dismissal hearing appeared to be nothing more than a rationalisation of the earlier decision and rendered the process unfair.[288]

This approach adopted by the LAC serves to reconcile the common law and statute by accommodating the common law principles of impossibility with the regulatory framework of the LRA. In this way the employer's common law rights to the employee's uninterrupted services can be fairly balanced against the employee's entitlement to a procedurally and substantively fair dismissal.[289]

The Code of Good Practice: Dismissals[290] acknowledges the fact that each dismissal case relating to the conduct and capacity is unique and departures from the norms established by the code may be justified in proper circumstances.

Such circumstances anticipated in the code can be found in *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council.*[291] The uncertainty about the period of absence due to the incarceration posed a serious challenge for the employer hence a decision for replacement of the employee was justified. As to whether a temporary replacement could have been employed is a question that would depend on facts for example the size of the enterprise and also on the nature of the incarcerated employee's work. It is of significant importance that in this case the period of incarceration was not known.

The key principle in the code[292] is that there should be balance on the interest of the employee and interests of the business. Employees should be protected from

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288 *SamancorTubatse Ferrochrome v Metal & Engineering Industries Bargaining Council* (2010) *ILJ* 1838 (LAC) 16.

289 Labour Bulletin, Education Labour Relation Council in association with Labour and Social security Law Unit of the Nelson Mandela Metropolitan University July 2013, 1-16,

290 Item 1(1).

291 *Supra.*

292 Item 1(3).

arbitrary actions whilst employers are entitled to satisfactory conduct and work performance from their employees.

CHAPTER 9
CONCLUSION

An employment contract can be terminated by the general law of contract or common law principles and in part by specific statutory provisions of labour law.

Under common law, the only requirement for termination of employment contract to be lawful was for the employer to give the required notice of termination of employment in terms of the contract. Evidently, common law was not sufficient hence the employment contracts are regulated through various labour legislations including, the LRA, the BCEA and the EEA.

In chapter three it was established that in resignation cases, an employee initiates the termination of the employment contract even if he or she later claims constructive dismissal and later argues that he had no choice but to terminate due to the employer making the conditions of employment intolerable for continued employment. The concept of constructive dismissal is non- existent under the common law.

The death of either party was dealt with in chapter four of the treatise. It was stated that the death of the employee will lead to the termination of the employment contract. However, in terms of the common law, the death of an employer, a juristic person, its members or even a sole member will not necessarily lead to the termination of the contract.

Chapter four dealt with desertion which occurs when an employee evinces a clear and unequivocal intention to abandon his work. There is a distinction between desertion, asbcondment and absenteeism. In abscondment cases an inference is made that an employee has no intention of returning to work while in absenteeism case an employee is merely not at work but intends to return to work.

Desertion in the public sector is regulated by the PSA and EEA which contain “deeming provisions” stating that if an employee is absent from work for a certain

number of days, the employee will be deemed to have deserted, in such cases the courts have held that there is no dismissal as the termination is by operation of law. It the employment contract is terminated by operation of law an employee cannot refer a dismissal dispute to the CCMA or bargaining council.

The constitutionality of the deeming provision has been challenged on the basis that it offends the right to fair labour practices as provided in section 23 of the Constitution. However the Constitutional court has held that it does not.

In chapter six, it was discussed that the insolvency of the employee does not necessarily have an effect on the employment contract unless it is specified in the employment contract and if the insolvency of the employee precludes the employer from performing his or her duties. Insolvency of the employer can either be as a result of voluntary liquidation or sequestration or compulsory winding-up of an employer.

The courts have held that the termination of the employment contract as a result of voluntary liquidation or winding-up of an employer constitutes a dismissal since it is the decision of the employer to liquidate.

In compulsory winding-up cases, the decision whether to wind up the company or not rests with the High court. Therefore, the employment contract is not terminated by the employer and such termination does not constitute dismissal.

Chapter seven dealt with termination of employment contract due to effluxion of time due to an employee reaching normal or agreed retirement age or due to the contract coming into being. In such an instance there is no dismissal.

Section 187(2)(b) of the LRA provides that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. The wording of the section suggests that there is a dismissal however that the dismissal is fair if the employee has reached normal or agreed retirement age.

The courts are divided as to whether there is a dismissal or not. In some judgements they have held that termination of the employment relationship on reaching an agreed or normal retirement age does not constitute a dismissal as defined in section 188 of the LRA. Where an employer does dismiss an employee before reaching the agreed or normal retirement age, once such an age is determined, it will be regarded as an automatically unfair dismissal based on age.

When a fixed-term contract of employment comes to being, there is no dismissal; employment contract terminates by effluxion of time unless it is terminated prematurely.

The employers' reliance upon automatic termination clauses in employment contracts in order to to circumvent dismissal provisions of the LRA have been rejected by the courts. The courts have also said that a contractual provision that has an effect of limiting legislative protection is invalid and contrary to the spirit and purport of the LRA.

The abuse of automatic terminations has led to the need for an amendment of section 198 of the LRA through the insertion of section 198A which provides for a new type of dismissal namely, the termination by TES whether at the instance of the TES or client of employee's assignment.

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