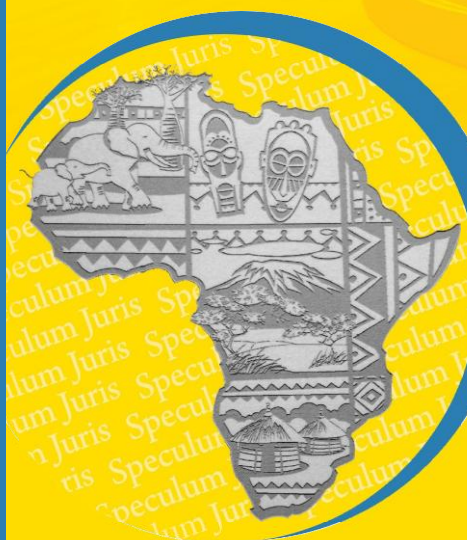




The Dilemma in the Application of Automatic Termination of Employment Contracts in South Africa

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Abstract

This article is a critical examination of the legal framework governing automatic termination of employment contracts in South Africa, focusing on its constitutional validity, practical application, and potential for abuse. Automatic termination, whether arising from statutory provisions or contractual clauses is increasingly used by employers to bypass the procedural safeguards of the Labour Relations Act, 66 of 1995 (LRA), often resulting in unfair labour practices. It is questioned whether such terminations align with section 23 of the Constitution, which guarantees fair labour practices, and whether they undermine the right not to be unfairly dismissed under section 185 of the LRA. Using a qualitative doctrinal methodology, the article analyses primary sources including the LRA, Public Service Act, 1994, Defence Act, 42 of 2002, Employment of Educators Act, 76 of 1998 and relevant case law

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dealing with this principle. It also engages with secondary literature and policy documents to trace the evolution of automatic termination clauses and their impact on vulnerable categories of workers, including fixed-term, probationary, and public service employees. The findings reveal a lack of procedural fairness, inconsistent judicial interpretation, and employer discretion that often prejudices employees without recourse. The article argues for the inclusion of automatic re-employment provisions in legislation and contracts to safeguard employees wrongfully affected by automatic termination. It proposes clearer statutory guidelines, judicial tests to distinguish legitimate termination from disguised dismissal, and a rebalancing of employer-employee power dynamics. It also explores the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) to ensure that prior to the automatic termination of employment contracts, the principle of natural justice be applied on the side of the employee to provide their side of the story prior automatic termination of employment contracts. This article contributes to the existing literature in the form of reference to legislations, policies and case law jurisprudence in the dilemma in the application of automatic termination of employment contract in South Africa. Finally, the authors propose reforms including the insertion of automatic re-employment clauses in the contract of employment to safeguard employee rights.

Keywords: Automatic termination; unfair dismissals; fair labour practices; constitutional rights; reinstatement and employment contract

1 INTRODUCTION

Automatic termination of an employment contract refers to contracts which are not terminated on the instance or discretion of an employer, but rather terminated *ex lege* (by operation of law).¹ This may occur through legislative provisions or contractual clauses.² Automatic termination clauses in employment contracts are often referred to as “self-executing” provisions, which provide that the employment relationship will come to an end automatically when a specified event occurs, such as the lapse of a fixed-term contract or the completion of a defined project.³

During the apartheid era in South Africa, prior to 1994, master and servants laws were promulgated to regulate employment relationships in different colonies.⁴ The objective of promulgating these laws was to protect labourers against exploitation and to add sanctions in the employment contracts.⁵ These sanctions were those that gave rise to automatic terminations as whites aimed to dismiss blacks on account of any misconduct. Succession laws followed between 1911 and 1918 which dealt with various industrial sectors and labour generally.⁶

South African employment relations evolved through various stages which led to the current dispensation initiated in 1994 by the democratic system.⁷ Since 1996, the Constitution has been determining labour law together with the Labour Relations Act (LRA).⁸ The automatic termination of employment contract clauses have been continual with no or little track record (history). It is only when case laws affirm automatic terminations that they are recognised as

1 Erasmus “Deemed Dismissals in South African Labour Law” 2022 *Consolidated Employers Organisation* <https://ceosa.org.za/deemed-dismissals-in-south-african-labour-law/> (accessed 30-03-2023).

2 *Ibid.*

3 Flanagan “Automatic Termination Clauses – Problematic Clauses in Employment Contracts” 2024 *Consolidated Employers Organisation* <https://ceosa.org.za/automatic-termination-clauses-problematic-clauses-in-employment-contracts/> (accessed 07-03-2026).

4 Ndezendze *Automatic Termination Clauses in Employment Contracts* (LLM-mini-dissertation, NMU, 2019) 6; Grogan *Collective Labour Law* 3 ed (2019) 2.

5 *Ibid.*

6 *Ibid.*

7 Landis and Grosset *Employment and the Law: A Practical Guide for the Workplace* 2 ed (2019).

8 Constitution of the Republic of South Africa, 1996; Act 66 of 1995.

valid and applicable. The Public Services Act⁹ (PSA) has also paved legality for automatic terminations when it included Section 17(3)(a)(i).

Currently, the South African labour market has been characterised by the high usage of non-standard employment contracts with the purpose of satisfying the employer's needs.¹⁰ The vibrant nature of business caused employers to notice a need for entering into flexible contracts with employees,¹¹ which encourages employers to sign up to non-standard agreements, for instance fixed term contracts. Consequently, a large number of employees have been subjected to terms and conditions of employment that are less favourable to them.¹²

A mechanism used often by employers to terminate an employment contract exclusive of constituting dismissal under the LRA,¹³ is the automatic termination of an employment contract, which may arise through either legislative or contractual provisions.¹⁴ A good example of how a contract could expire in the form of automatic termination through legislative provision, is when it expires in terms of section 59(1)(d) of the Defence Act.¹⁵ This section is applicable to Regular Force members' services. Another example of an instance where a contract will end in terms of automatic termination through contractual provisions, is when there is a clause in a contract which states that a contract will terminate automatically when the services of an employee are no longer needed. In these circumstances, employers will claim that there is no right of recourse for employees in terms of the LRA, as this does not constitute unfair dismissal under the Act. The employees' services will be terminated due to the agreed terms in the contract or by law and consequently unfair dismissal cannot be argued for under the Act.

A fixed-term contract expires automatically on a date or when a particular event occurs, after which the parties to a contract mutually agree that such an event will cease the employment contract, in terms of the common law.¹⁶ However, this is a threat to employees as employers may use this clause to protect themselves from potentially causing unfair dismissals under the LRA. Employers will put employees on various fixed-term contracts and thereby exploiting them.

The LRA's purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are to give effect to and regulate the fundamental rights contained in the Constitution and obligations incurred by the Republic as a member of the International Labour Organisation (ILO).¹⁷ Promotion and improvement of job security of employees is an essential objective of the LRA. It achieves this by prescribing conditions under which dismissal may be regarded as being fair or unfair and by putting remedies in place for employees who may be unfairly dismissed. The right of employees not to be subjected to unfair labour practices and unfair dismissals is

9 Act 103 of 1994. The provision allows public servants to be released from their employment when they abscond from work for more than 30 days without employers' permission.

10 Tshoose and Tsweledi "A Critique of Protection Afforded to Non-standard Workers in a Temporary Employment Services Context in South Africa" 2015 *LDD* 18.

11 Gericke "A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed-term Contracts as Opposed to Indefinite Employment" 2014 *PELJ* 105.

12 Cohen "The Effect of the Labour Relations Amendment Bill 2012 on Non-standard Employment Relationships" 2014 *ILJ* 2608.

13 Act 66 of 1995.

14 Labour Relations Act 66 of 1995.

15 Defence Act 42 of 2002.

16 Grogan *Workplace Law* 13 ed (2020) 170.

17 Section 1 of the Labour Relations Act 66 of 1995.

enshrined in section 185 of the LRA.¹⁸

The Constitution of the Republic of South Africa (the Constitution) stipulates that all individuals are entitled to fair labour practices.¹⁹ The term “fair labour practices” is not thoroughly expressed in the Constitution. In *NEHAWU v University of Western Cape*²⁰ the court held that the concept of fair labour practice is difficult to define precisely, and this is aggravated by the inherent strain in labour relations between the interests of workers and the employers’ interests — what is fair is determined by the facts of a given instance and is essentially a value judgment.²¹ This means each case will be decided on its own merit, and the courts will be flexible in deciding whether a certain conduct constituted a fair practice.

In the recent case of *Khum MK Investments and Bie Joint Venture (Pty) Ltd v CCMA and Others*,²² the employer attempted to justify the termination of employees fixed-term contracts by relying on an implied automatic termination clause. The court determined that there was no provision in the employment contract for it to be terminated automatically if the client had cancelled the contract with the employer. It also held that the contract provides for automatic termination by the passage of time, but that the employer issued letters of termination to its employees prior to the time specified in the contract, effectively terminating the employment contract with notice, and such conduct fell within the definition of dismissal in terms of section 186(1)(a) of the LRA.

The court’s decision in the above case, shows without a doubt that should there have been an automatic termination clause in the contract, the conduct of the employer to release the employees would not constitute dismissal. As such, dismissal sufficed because the employer relied on the clause that was not included in the contract. The employer should have followed the procedure in the LRA and provided employees with valid reasons other than just notifying them.

This article interrogates the legal and constitutional validity of automatic termination clauses, particularly their potential misuse to circumvent protections against unfair dismissal. It identifies a pressing research problem, that being, the absence of clear legislative and contractual guidelines regulating automatic termination, and the lack of mechanisms for automatic reinstatement of employees wrongfully affected. The article aims to assess the doctrinal and policy framework governing automatic termination; evaluate its alignment with constitutional and statutory protections; and propose reforms including the insertion of automatic re-employment clauses to safeguard employee rights.

The article employs a qualitative doctrinal methodology to examine the legal and constitutional dimensions of automatic termination of employment contracts in South Africa. It begins with a legislative overview of automatic termination of employment contract clauses, then outline the foundational requirements for valid employment contracts and identifies categories of workers most vulnerable to automatic termination, such as those in temporary employment services, fixed-term, probationary, and public sector employees.

The analysis proceeds to evaluate statutory and contractual grounds for termination, assessing their compatibility with constitutional protections and labour rights. Key case laws, including

18 Labour Relations Act 66 of 1995.

19 Section 23 of The Constitution of Republic of South Africa, Act 106 of 1996.

20 2003 3 SA 1 (CC) (6 December 2002) para 33.

21 *Ibid.*

22 *Khum MK Investments and Bie Joint Venture (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA52/2018) [2020] ZALAC 1.

Grootboom,²³ *Maswanganyi*,²⁴ *Sindane*,²⁵ and *Enforce Security Group*²⁶ are used to illustrate judicial responses to employer discretion and procedural fairness. It concludes with reform proposals advocating for automatic re-employment clauses and clearer legislative guidance to ensure fair and constitutionally sound application of termination provisions.

2 LEGISLATIVE OVERVIEW OF AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT

This article investigates the concept of automatic termination of employment contract through an analysis of provisions in the LRA: the Code of Good Practice; dismissal in general; journal articles; case law; and the Constitution of the Republic of South Africa²⁷ in order to scrutinise the extent of protection afforded to employees against exploitation. The article also examines whether such clauses are consistent with the constitutional right to fair labour practices and the broader objectives of South African labour law. Furthermore, it considers the extent to which judicial interpretation has either strengthened or weakened employee protections in this context.

The Public Services Act states that employees who do not register their presence at work for a period exceeding a month without the permission from the Head of Department (HOD), such employees shall be deemed to have been discharged from their duties based on misconduct, with effect from the day of their last attendance at work.²⁸ This section allows for an employee to be discharged under law without a hearing or notice. The Act further states that such an employee who has been deemed to have been discharged, and should they return to work after the expiry of the period referred to in section 17(3)(a)(i), may be reinstated based on the commission's recommendation.²⁹

In the case of *Grootboom v National Prosecuting Authority*,³⁰ the question was whether leave to appeal should be granted and if the jurisdictional requirements of section 17(3)(a)(i) to dismiss the applicant have been met. Mr Grootboom was an employee of the National Prosecuting Authority (NPA), and he was suspended because of allegations of misconduct. After a disciplinary hearing he was dismissed.³¹ He was shortlisted to study in the United Kingdom (UK) while on suspension and requested the NPA for study leave, which responded that the leave would be without pay.³²

The NPA later informed him that in terms of Section 17(3)(a)(i) of the PSA he was deemed to have been discharged from his duties in terms of the of law.³³ This caused him to leave for the UK. He appealed by querying the application of section 17(3)(a)(i) of the PSA as applied by the NPA.³⁴ The applicant advanced that the respondents failed to prove that by him going to the UK, he had absented himself from his official duties, as he was already on suspension

23 *Grootboom v National Prosecuting Authority* (CCT 08/13) [2013] ZACC 37 para 19.

24 *Maswanganyi v Minister of Defence and Military Veterans* (2020) 41 ILJ 1287 (CC), 2020 6 BCLR 657 (CC), 2000 4 SA 1 (CC) and [2020] 9 BLLR 851 (CC).

25 *Sindane vs Prestige Cleaning Services* [2009] ZALC 156 para 4.

26 *Enforce Security Group v Fikile and others* [2017] 38 ILJ 1041 (LAC) and [2017] 8 BLLR 745 (LAC).

27 South African Constitution, 1996.

28 Act 103 of 1994, s 17(3)(a)(i).

29 Section 17(3)(b).

30 (CCT 08/13) [2013] ZACC 37 para 19.

31 *Grootboom v National Prosecuting Authority* para 4.

32 *Ibid* para 6.

33 *Ibid* para 10.

34 Public Service Act 103 of 1994; *Grootboom v National Prosecuting Authority* para 40.

and that made it impossible to be absent in terms of Section 17(3)(a)(i) of the PSA.³⁵ The Constitutional Court overturned the decisions of the Labour Court and the Labour Appeal Court which stated he was absent without the employer's permission and upheld the appeal.³⁶ The position undertaken by the Labour Court and Labour Appeal Court was a misdirection and miscarriage of the applicability of the principle contained in Section 17(3)(a)(i) of the PSA.³⁷

In the case of *Maswanganyi v Minister of Defence and Military Veterans and Others*³⁸ the applicant was charged with rape and subsequently sentenced by the trial court, after which his services with the SANDF were terminated *ex lege*. The question in this case was that when he had been sentenced irrespective of his appeal against the sentence and conviction, whether Section 59(1)(d) of the Defence Act had been properly interpreted.³⁹ The court held that the Section 59(1)(d) wording of the words "conviction" and "sentence" of the Defence Act in cases where an appeal is lodged, must be interpreted to refer to the convictions and sentences which are valid and final.⁴⁰ The court held that as soon as the decision of the trial court is set aside, there was no more lawful conviction and sentence, as such, the factors outlined in section 59(1)(d) of the Defence Act are no longer applicable.⁴¹ As the member (an SANDF employee) will no longer have a criminal record, no purpose will be served by the continued application of the penal provisions of the section on the member.⁴² The court further held that the applicant's success on appeal defeated the connection between Section 59(1)(d) purpose and the applicability of the provision on him.⁴³ When factors in section 59(1)(d) can no longer be applied, the applicant's termination of employment was reversed by *ex lege*.⁴⁴

The court's conclusion in *Maswanganyi v Minister of Defence and Military Veterans*⁴⁵ gives clear direction of the purported purpose of the principle. It exposes the lack of understanding and employers' abuse of their discretion when it comes to reinstating employees.

In the case of *Sindane v Prestige Cleaning Services*,⁴⁶ the applicant was hired in terms of a Fixed Term Eventuality Contract of Employment.⁴⁷ The applicant was employed for a definite period, which would come to an end when the contract between the respondent and their client expired.⁴⁸ When the contract period was reduced, the applicant was informed thirty days before the date of termination.⁴⁹ The question was whether or not it constituted a dismissal.⁵⁰ The court referred to section 186(1) of the LRA which defined dismissal.⁵¹ It outlined a number of ways employment can be terminated without constituting dismissal, with one relating to fixed term

35 *Ibid.*

36 *Grootboom v National Prosecuting Authority* paras 45–46.

37 Act 103 of 1994.

38 (CCT170/19) [2020] ZACC 4.

39 *Maswanganyi v Minister of Defence and Military Veterans* 41 ILJ 1287 (CC) para 21; Act 42 of 2002.

40 *Ibid* para 41.

41 *Ibid.*

42 *Ibid.*

43 *Ibid* para 45.

44 *Ibid.*

45 (CCT170/19) [2020] ZACC 4.

46 (JS594/07) [2009] ZALC 156 para 4.

47 *Ibid.*

48 *Ibid.*

49 Paragraph 8.

50 Paragraph 9. Dismissal occurs when a contract of employment between an employer and employee is terminated by the employer. In other words, against the will of the employee. The LRA provides that every employee with the right not to be unfairly dismissed.

51 *Ibid.*

contracts.⁵² Due to the fact that the contract stipulated a definite time and the applicant having being informed of the scaling down of the contract, the court held that the applicant had not been dismissed.⁵³ This affirms the contract to have been automatically terminated.

In the case of *Enforce Security Group v Fikile and Others*,⁵⁴ the court pointed out two scenarios to be considered when assessing automatic termination clauses. Firstly, where automatic termination clauses are triggered by a third party, the court deems them to be permissible and thus ensure that no grounds for termination by dismissal arise under the LRA. This case is a good example as well as the case of *Sindane*, discussed above.⁵⁵ The second is where the automatic termination clause is triggered by the employer in situations where the employer attempts to circumvent the provisions of the LRA by relying on the automatic termination clause.⁵⁶ In such circumstances, the termination of the contract of employment would give rise to an unfair dismissal, as has happened in the case of *South African Post Office v Mampeule*.⁵⁷ The test, as outlined in the case of *Enforce Security Group v Fikile and Others*⁵⁸ is paramount, in that it seeks to curtail unwarranted application of this principle by the employers.

Danielle Nel's study holds the view that the use of any provision or clauses that terminates the employment contracts automatically results in the evasion of the protection afforded to employees in terms of the LRA.⁵⁹ She holds the view that this statutory and contractual provisions should be allowed to be in use only as a measure of last resort where the employer has no other option.⁶⁰ She further states that they should be applied with caution.⁶¹ This article based on the case of *Enforce Security Group v Fikile and Others*⁶² and the case of *Sindane vs Prestige Cleaning Services*,⁶³ hold the opposing view and cannot agree with Nel's opinion.

Krian Rathinam is of the view that automatic termination clauses put the courts in a precarious position, where the court has to balance between the employees' rights to fair labour practices as contained in the LRA and upholding contractual law.⁶⁴ Prior to implementing automatic termination clauses, it is crucial that employers take into account the specifics of each situation and the part they played in the events that gave rise to such clauses being applied.⁶⁵ Employers ought to evaluate the aim of the fixed-term contract, as to whether it is used legitimately or to circumvent the protection employees have under the LRA.⁶⁶ The justifiability of using fixed-

52 Paragraph 16.

53 Paragraph 18.

54 (DA24/15) [2017] ZALCD 2.

55 *Ibid.*

56 *Ibid.*

57 *Ibid*; *South African Post Office v Mampeule* (2010) 31 ILJ 2051 (LAC).

58 (DA24/15) [2017] ZALCD 2.

59 Nel *The Validity of Automatic Termination Clauses in Employment Contracts* (LLM-dissertation, UP, 2015) 4.

60 *Ibid.*

61 *Ibid.*

62 (DA24/15) [2017] ZALAC 9.

63 (JS594/07) [2009] ZALC 156.

64 Rathinam "Automatic Termination Clauses in a Fixed-term contract – What Employers Should Consider Prior to Relying on Automatic Termination Clauses" 2020 *Consolidated Employers Organisation* <https://ceosa.org.za/automatic-termination-clauses-in-a-fixed-term-contract-what-employers-should-consider-prior-to-relying-on-automatic-termination-clauses/> (accessed 18-05-2023).

65 *Ibid.*

66 *Ibid.*

term contracts in accordance with section 198B of the LRA must be considered.⁶⁷

Kutala Ndzendze's study had a problem with the application of automatic termination clauses, as they are applied unfairly in most cases, without employees being given a chance to present their cases.⁶⁸ Ndzendze further held that the termination of employment contract automatically means that the contract of employment does not terminate by an act of the employer but in terms of the law.⁶⁹ This means employers should not be triggering the termination. The gap in the automatic termination provision is created where the employment contract is terminated without the principle of *audi alteram partem* being given effect.⁷⁰

The Commission for Conciliation, Mediation and Arbitration (CCMA) and the Business Unity of South Africa (BUSA) outlined ways in which employment contracts may terminate automatically without constituting dismissal in terms of common law. That is when a contract is terminated by mutual agreement; when a certain task is complete or upon a fixed-term period expiry; death of an employee; supervening performance impossibility; insolvency or liquidation; when retirement age or time has been reached; and by resignation.⁷¹ These circumstances, for as long as they are applied for a fair reason, they do not infringe on the employee's right not to be unfairly dismissed.

Cohen affirmed the view of the CCMA and the BUSA by stating that the employment contract may be terminated automatically when it is not possible for the employee to carry out their duties permanently without it being the employee or employer's fault.⁷² Such automatic termination will not constitute dismissal as it has become impossible for the employee to perform.⁷³ Supervening impossibility of performance may occur as a result of superior force preventing the performing of an obligation, such force may have not been guarded against.⁷⁴ This includes physical impossibility which can also be in the form of employee's imprisonment (just as in the case of *Maswanganyi*, where he was automatically dismissed due to being convicted by the trial court).⁷⁵ However, the impossibility should be absolute and no fault of either party.⁷⁶

3 GENERAL REQUIREMENTS FOR VALIDITY OF EMPLOYMENT CONTRACT

Before there could be any termination in any form of an employment contract, an employment relationship should exist, underpinned by an employment contract.⁷⁷ *Locatio conductio operarum* gave birth to the contract of employment.⁷⁸ *Locatio conductio operarum* represents a legal relationship where an individual agrees to perform work or provide services for another

67 *Ibid.*

68 Ndzendze *Automatic Termination Clauses* 50.

69 *Ibid* 51.

70 *Ibid* 55.

71 CCMA and BUSA, "Ending Employment by Common Law (Part 1)" (2018) Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa (accessed 20-05-2023).

72 Cohen "Termination of Employment Contracts by Operation of Law – Bypassing the Unfair Dismissal Provisions of the Labour Relations Act" 2006 *Stell LR* 91; Cohen "The Legality of the Automatic Termination of Contracts of Employment: Notes" 2011 *Obiter* 670.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 LEAD *Labour Dispute Resolution* (LSSA 2023) 5.

78 *Ibid* 4.

party in exchange for payment or other benefits.⁷⁹

There must be a clear offer of employment made by the employer and a definite acceptance of the offer by the employee.⁸⁰ Both parties should be in agreement about the employment terms and conditions.⁸¹ The parties entering into the employment contract must have the legal capacity to do so.⁸² This means that the employee must be of legal working age and mentally competent to understand the terms of the contract, and the employer should have the authority to employ.⁸³ In terms of the BCEA it remains a criminal offence to make use or exercise child labour.⁸⁴

Both the employer and the employee must be free to enter into the contract voluntarily without any form of coercion or duress.⁸⁵ Consent must be genuine, and neither party should be forced into the agreement against their will.⁸⁶ There should be consideration exchanged between the employer and the employee. Typically, this consideration refers to the wages or salary paid by the employer in exchange for the services rendered by the employee and the terms of payment should be clearly specified in the contract.⁸⁷

The employment contract must have a legal purpose and cannot involve any illegal activities.⁸⁸ It should comply with applicable laws, regulations, and standards related to employment, such as minimum wage requirements and working hour restrictions. However, due to the precedent in the case of *Kylie v CCMA*,⁸⁹ an employee tasked with carrying out illegal activities can still be able to claim unfair dismissal, provided the employer is not ordered to do anything illegal.⁹⁰ This means the parties to the employment contract must intend to create legal relations, indicating that the agreement is legally binding.⁹¹ This means that the contract is enforceable by law, and both parties have certain rights and obligations under the contract.⁹²

The employment agreement's terms and conditions should be clearly stated and specific enough to avoid ambiguity or misunderstanding.⁹³ This includes details such as employment position, tasks and obligations, working schedule, salary, incentives, termination clauses, and any other relevant provisions.⁹⁴ In the case of *Old Mutual Life Assurance Co SA v Gumbi*,⁹⁵ it was determined that a hearing prior to termination of employment is a component of our common law in relation to employment contracts, it is enforceable in civil courts.⁹⁶ A hearing will therefore be a pre-requisite before termination. The employment contract must comply with all relevant laws and regulations governing employment relationships in the republic. This includes labour laws, anti-discrimination laws, health and safety regulations, and any other

79 *Ibid* 5.

80 Grogan *Employment Rights* 3 ed (2019) 59.

81 *Ibid*.

82 *Ibid*.

83 *Ibid*.

84 *Ibid*.

85 *Ibid* 60.

86 *Ibid*.

87 *Ibid* 61.

88 *Ibid*.

89 2010 4 SA 383 (LAC).

90 *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 4 SA 383 (LAC); Grogan *Employment Rights* 61.

91 Grogan *Employment Rights* 61.

92 *Ibid*.

93 *Ibid* 67.

94 *Ibid*.

95 2007 4 All SA 866 (SCA).

96 *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA); LEAD 6.

legal requirements.

4 EMPLOYEE TYPES WHO CAN BE AFFECTED BY AUTOMATIC TERMINATIONS

4.1 Temporary Employment Services (TES) Employee

A Temporary Employment Services (TES) employee is commonly known as a labour broker employee. This is a person hired and paid by an agency (the TES), but sent to perform work under the supervision and control of a separate client business. The main contention of this arrangement is to ensure that where an employee is employed through TES after few renewals of that contract, the employee is no longer an employee of TES but rather the employee of the actual employer.

Temporary or contract workers are typically engaged for a specific duration or to fulfil a particular purpose with no expectation of becoming permanently employed.⁹⁷ It is contained in the contract that the employment will cease to exist upon elapsing of a particular time.⁹⁸ Such employees are normally employed to assist with a specific project.⁹⁹ Once the agreed-upon period or task is completed, the employment contract may automatically terminate without requiring further action.

In many instances the TES clients employ permanent employees through labour brokers. In such circumstances, TES can be deemed to have been used as an attempt to bypass the safeguards provided to full-time employees under the LRA and labour law.¹⁰⁰ If the services of a TES employee are terminated by either the labour broker or the TES client to circumvent such protections, the employee will be deemed to be dismissed.¹⁰¹

In the case of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa*¹⁰² the Constitutional Court ruled that the meaning of section 198A should be understood in relation to the right to fair labour practices as outlined in section 23 of the Constitution and the overall purpose of the Labour Relations Act (LRA).¹⁰³ The court determined unanimously that, based on the interpretation of sections 198(2) and 198A(3)(b), that the TES considered by the employer for the initial three months, after which the client becomes the exclusive employer.¹⁰⁴ The court concluded that the wording used in section 198A(3)(b) of the LRA is clear, and when considering the context, it supports the interpretation of a single employer.¹⁰⁵

4.2 Fixed-term Contract Employees

Fixed-term contracts terminate automatically upon the completion of a specified period or project, as opposed to the traditional retirement date.¹⁰⁶ Once the pre-determined date is reached, the employment contract ends without the need for further action or notice. Employees with

97 LEAD 11.

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 LEAD 16.

102 [2018] 9 BLLR 837 (CC).

103 *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] 9 BLLR 837 (CC).

104 *Ibid.*

105 *Ibid.*

106 LEAD 16.

fixed-term contracts exceeding three months must be treated equally with permanent employees performing the same work.¹⁰⁷

The LRA created an exception or rather an instance where automatic termination will not suffice, and reliance upon it will be deemed as an unfair dismissal. In terms of the LRA, if an employee reasonably expected their employer to extend or renew their fixed-term employment contract with similar conditions, they would be considered unfairly dismissed.¹⁰⁸ However, the employer has presented two options: either renewing the contract with less favourable terms or opting not to renew it altogether.¹⁰⁹ This also applies where the employee has a justifiable anticipation that the employer would maintain their employment on an ongoing basis, with terms similar to their previous fixed-duration employment contract.¹¹⁰ However, the employer either offered to retain the employee with inferior conditions or the employee was not presented with a retention offer at all.¹¹¹

In the case of *MEC for the Department of Finance v De Milander*¹¹² it was held that for the employee to be eligible for contract renewal, the employee must have genuinely anticipated the renewal of the fixed-term contract, and that this expectation must have been reasonable. If an employee is employed on a fixed-term agreement that extends beyond twenty-four months for a valid reason, they are entitled to receive severance pay when the contract expires.¹¹³

4.3 Probationary Employees

In many employment contracts a probationary phase is implemented by the employer to gauge the employee's competence for the position. If the employer determines that the employee is not a good fit or fails to comply with the prescribed benchmarks, the contract may automatically terminate without the need for formal dismissal procedures.

In accordance with schedule 8 of the code of good practice, an employer has the option to require a recently appointed employee to undergo a probationary phase before confirming their appointment.¹¹⁴ The employer utilises the probationary period to evaluate the employee's performance before making a final decision on their employment.¹¹⁵ It is significant to note that the utilisation of probation should not be employed as a method to refuse employees the opportunity for permanent employment status, as this contradicts the intended objective of probation as stated in the code of good practice.¹¹⁶ For example, it is considered an unfair labour practice to dismiss employees who have completed their probationary periods to replace them with new employees.¹¹⁷

During the probationary period, the employer should assess the employee's performance.¹¹⁸ The employer should provide reasonable evaluations, instructions, training, guidance, or counselling to enable the employee to provide satisfactory service.¹¹⁹ At the conclusion of the probation

107 *Ibid.*

108 Section 186(1)(b)(i).

109 *Ibid.*

110 Section 186(1)(b)(ii).

111 *Ibid.*

112 *MEC for the Department of Finance, Eastern Cape v De Milander* [2011] 9 BLLR 893.

113 LEAD 17.

114 Schedule 8 of Labour Relations Act Code of Good Practice: Dismissal.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

period, it is not appropriate for an employer to terminate service, based on unsatisfactory performance, unless they have provided the employee with suitable evaluation, instruction, training, guidance and counselling and if the employee has been given a reasonable amount of time to improve their performance but continues to perform inadequately.¹²⁰

In such circumstances the employer may consider taking action and it will not amount to dismissal. Despite the inclusion of a clause in the employment agreement allowing for termination of the employee's services after the probationary period, any such automatic dismissal must adhere to the guidelines outlined in the Code of Good Practice. However, in the case of *Nongcantsi v Mnquma Local Municipality*¹²¹ the court held if a new employee willingly acknowledges that their suitability for a position will be assessed through a vetting process, with the understanding that their employment will end automatically if the vetting yields a negative outcome, termination will be activated automatically if the vetting clearly and objectively reveals that the employee is unsuitable for the position.

4 4 Public Services Employees

The employment contracts of public services employees may be terminated automatically under certain circumstances outlined in the legislation governing their employment. The employment contracts of public services employees may, in certain instances, terminate automatically in terms of provisions contained in the legislation governing their employment. These circumstances typically arise where specific statutory conditions are met, such as prolonged unauthorised absence, reaching a prescribed retirement age, or loss of a required qualification or legal status necessary for the position. In such cases, the termination is deemed to occur by operation of law rather than through a conventional dismissal process initiated by the employer.

5 AUTOMATIC TERMINATIONS *EX LEGE*

5 1 Public Services Employees

The employment of Public Services Employees is governed by the PSA, in terms of which the officers, with the exception of educators, service members, or intelligence service personnel, will be considered as having been dismissed from their jobs due to misconduct should they be absent from their official duties without permission from their department head or institution for more than one month. This dismissal will be effective from the day following their last day of work.¹²² Regardless of whether the specified period has passed or not, if such an officer takes on another job, it will be deemed that they have been discharged in the same manner as mentioned in section 17(3)(a)(i).¹²³

If an officer who has been discharged as mentioned above decides to return to duty after the specified period mentioned in paragraph (a), the commission has the authority to recommend their reinstatement in the public service, either in their previous position or in a different role, the approval of the executing authority is required for such reinstatement.¹²⁴ The conditions of reinstatement will be determined by the commission's recommendations.¹²⁵ In this case, the duration of time during which the officer was not present for official duty will be considered as

¹²⁰ *Ibid.*

¹²¹ (2017) 38 *ILJ* 595 (LAC).

¹²² Section 17(3)(a)(i) of the Public Services Act 103 of 1994. This position in s 17 is analogous to s 59 of the Defence Act, there is no distinction on their purpose and consequences.

¹²³ *Ibid.* Section 17(3)(a)(ii).

¹²⁴ *Ibid.* Section 17(3)(b).

¹²⁵ *Ibid.*

unpaid vacation leave or leave under any other conditions recommended by the commission.¹²⁶ However, in the case of *Dendy v University of Witwatersrand*¹²⁷ it was held that the absence of written explanations has a significant impact on determining whether the people or person relevant to make decisions acted in good faith or were influenced by hidden or inappropriate intentions.¹²⁸

In the case of *Motsamai v Department of Public Safety, Security and Liaison*¹²⁹ where an employee returned to work. After being away for a period of five months, upon returning and undergoing a disciplinary enquiry, he was notified of his termination in accordance with the PSA.¹³⁰ The arbitrator determined that the employer's decision to only apply section 17(3) once the applicant resumed work, along with conducting a disciplinary inquiry and granting the employee the right to appeal, indicated that the employer had relied on the disciplinary code instead of section 17(3).¹³¹ The arbitrator found that the employee's employment had been terminated by the employers.¹³²

In the case of *PSA obo Van der Walt v Minister of Public Enterprise*¹³³ in which Francis J determined that the termination of the employee's employment in accordance with the statutory provision does not qualify as administrative action or dismissal, due to such termination taking place without any decision being made by the employer.¹³⁴ Furthermore, the Labour Court ruled that an employee's automatic discharge under the deemed dismissal provision of the PSA was in terms of the law, rather than an administrative action. Therefore, such a dismissal cannot be reviewed by a court of law.¹³⁵

Section 14 of the Employment of Educators Act¹³⁶ (Educators Act) carries similar wording as section 17 of the PSA.¹³⁷ In terms of section 14(1)(a)–(d), an educator who: holds a permanent position and is absent from work for more than fourteen consecutive days without obtaining permission from the employer: or who takes up another job without the employer's consent while being absent from work: or who resigns or takes up another job without permission while being suspended from duty: or who resigns or takes up another job without permission while disciplinary actions against them are pending: will be considered to have been terminated from their position due to misconduct, unless otherwise instructed by the employer.¹³⁸

In terms of section 14(2) if an educator whose employment has been terminated according to section 14(1) presents themselves for duty at any point, the employer has the authority, based on valid reasons and disregarding any conflicting provisions in this legislation, to grant reinstatement of the educator in their previous position or any other position, subject to conditions specified by the employer and such conditions may pertain to the duration of the educator not being present at the workplace or any other relevant factors, as determined by

126 *Ibid.*

127 2005 5 SA 357 (W) [2005] 2 All SA 490.

128 *Dendy v University of Witwatersrand* 2005 5 SA 357 (W) [2005] 2 All SA 490 para 53.

129 (2001) 22 ILJ 487 (LC).

130 *Motsamai v Department of Public Safety, Security and Liaison* (2001) 22 ILJ 487 (LC).

131 *Ibid.*

132 *Ibid.*

133 2010 1 BLLR 78 (LC).

134 *PSA obo Van der Walt v Minister of Public Enterprise* 2010 1 BLLR 78 (LC); Cohen 2011 *Obiter* 676.

135 2010 1 BLLR 78 (LC).

136 Act 76 of 1998.

137 Act 103 of 1994.

138 *Ibid.*

the employer.¹³⁹

In the case of *PSA v Department of Education*,¹⁴⁰ Ms Raquel Rousseau-Geduld, a teacher, was informed by her HOD that she was dismissed, as she had been absent from work for a period exceeding fourteen consecutive days without acquiring the necessary permission.¹⁴¹ She appealed to the Member of the Executive Council (MEC) for reinstatement. However, despite four years having passed, the MEC had not provided any response to her appeal.¹⁴²

The PSA representing Ms Raquel Rousseau-Geduld filed an application under section 158(1)(h) of the LRA to seek a review and setting aside the decision made by the head of department, alternatively, they requested a review to nullify the MEC's failure to assess and make a decision regarding the representations made by the employee in accordance with section 14(2) of the Educators Act.¹⁴³ Since the MEC did not make any decision nor responded, the court repudiated the MEC's verdict not to reinstate Ms Raquel Rousseau-Geduld.¹⁴⁴

The court held that one of the main goals of the LRA, as stated in section 1(d)(iv), is to facilitate the efficient resolution of labour disputes.¹⁴⁵ Section 14(2) of the Employment of Educators Act complements this objective by granting the authority to the MEC to determine whether an employee has presented valid reasons for reinstatement.¹⁴⁶ However, in this case, the MEC omitted or neglected to exercise this authority, which goes against the intended purpose of achieving the effective resolution of disputes.¹⁴⁷

This legislation (PSA) regulates the automatic termination of employment of employees in the public service. Based on the judgments referred to above, improper or incorrect application of the PSA may result in what is, in effect, an unfair dismissal by the employer. The same concern arises in relation to the employment of educators, where statutory provisions governing their employment may similarly be misapplied. In both contexts, strict compliance with legislative requirements and principles of fairness are essential to prevent the circumvention of employees' rights. Failure to do so exposes employers to legal challenges and undermines the constitutional guarantee of fair labour practices.

5.2 Desertion

Desertion occurs when an employee is not present at the workplace without any motive or intent of coming back.¹⁴⁸ If there is no motive for absenteeism, then it does not qualify as desertion but rather it constitutes misconduct in the form of unauthorised absence.¹⁴⁹ Desertion represents a violation of a fundamental term within the employment contract, and it is considered that the employee has effectively breached and renounced the contract.¹⁵⁰

The question arises whether the deserting employee effectively terminates the employment relationship and implicitly resigns through their conduct, or whether it is the employer who

139 *Ibid.*

140 (C986/14) [2017] ZALCCT 10 (22 March 2017).

141 *PSA obo R Rousseau-Geduld v Head of Department, Department of Education, Northern Cape* (C986/14) [2017] ZALCCT 10 (22 March 2017) para 2.

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 Act 66 of 1995; *PSA obo Rousseau-Geduld v Head of Department* para 28.

146 *Ibid.*

147 *Ibid.*

148 Cohen 2011 *Obiter* 672.

149 *Ibid.*

150 *Ibid.*

terminates the employment relationship by taking action against the desertion.¹⁵¹ If the termination is a result of the employer's actions, it would be considered a dismissal under the LRA and would require adherence to the principles of substantive and procedural fairness.¹⁵² However, if the act of desertion itself leads to the termination of the employment contract, it would not be considered a dismissal, and the provisions of the LRA would not be applicable.¹⁵³

In the case of *SA Transport and Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd*,¹⁵⁴ after employees engaged in an unlawful work stoppage, they were subsequently dismissed. However, as per a subsequent agreement with the employer, they were all unconditionally reinstated.¹⁵⁵ Despite this, they did not report for work, even after a High Court interdict was issued, which mandated their return to work.¹⁵⁶ The employees also ignored numerous pleas from the employer urging them to return to work.¹⁵⁷

In the latter case, due to adduced evidence, the court determined that the majority of employees did not intend to resume work and they effectively deserted their positions.¹⁵⁸ The court determined that their act of desertion was evident, as a result, the court concluded that the employees were not dismissed and therefore were not entitled to a pre-termination hearing, given the automatic termination resulting from their desertion.¹⁵⁹

This means that when an employee does not attend a hearing, they will be deemed to have been automatically dismissed and not unfairly dismissed by the employer. However, this will be absurd as no mechanism exists to ensure that an employee's hearing attendance is secured. It therefore creates a risk that employees may be deprived of procedural fairness without any meaningful opportunity to be heard.

5.3 Termination of the Contract by the Effluxion of Time or Fixed-term Period Expiry

When an employer and employee establish a contract of employment, they have the option to mutually agree that the employment arrangement will have a pre-determined duration or conclude upon the fulfilment of a specific task.¹⁶⁰ Terminating such a contract on the agreed date or time will not be considered dismissal.¹⁶¹ The employee will therefore not have recourse to or grounds for an unfair dismissal.

A contract formulated in this manner cannot be terminated prior to its designated duration, unless there are valid grounds for termination or unless the contract explicitly allows for early termination.¹⁶² However, employers are barred from relying on early terminations when they are not stipulated in the contract.

The termination of such a contract occurs solely when the specified period has lapsed and is not initiated by the employer, which effectively bypasses the safeguards provided by the

¹⁵¹ *Ibid.*

¹⁵² *Ibid* 673.

¹⁵³ *Ibid.*

¹⁵⁴ 2011 32 ILJ 428 (LC).

¹⁵⁵ *SA Transport and Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd* 2011 32 ILJ 428 (LC); Cohen 2011 *Obiter* 674.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ CCMA and BUSA "Ending Employment in Terms of the Common Law (Part 1)".

¹⁶¹ Van Niekerk *et al.* *Law@Work* 5 ed (2015) 97.

¹⁶² Du Plessis *et al.* *Practical Guide to Labour Law* 5 ed (2004) 23.

LRA.¹⁶³ The allegation of dismissal under the LRA can only arise if a fixed-term contract is not renewed, despite the employee having a reasonable expectation of renewal in the given circumstances.¹⁶⁴ In the case of *MEC for the Department of Finance v De Milander*¹⁶⁵ it was held that for the employee to be eligible for contract renewal, firstly, the employee must have genuinely anticipated the renewal of the fixed-term contract, and secondly, this expectation must have been reasonable.¹⁶⁶ Based on the test in the latter case, the employee may allege to have been dismissed.

If an employer repeatedly renews an employee's fixed-term contract without any discussion, and then decides not to renew it due to operational needs, an employee who had a reasonable expectation of contract renewal may have valid grounds to claim fair dismissal.¹⁶⁷ In such cases, the employer would need to demonstrate that the non-renewal was derived from valid operational requirements in order to justify the fairness of the dismissal.¹⁶⁸ In this case automatic termination will not apply even though the contract expired naturally.

5 4 Termination Due to Retirement Age

It is common knowledge that when an employee reaches the typical or mutually agreed retirement age established by the employer, the contract of employment will conclude by mutual agreement and is not considered a dismissal.¹⁶⁹ However, should an employee be dismissed in an arbitrary manner, solely because of their age, it may be classified as an unfair dismissal according to section 187 of the LRA.¹⁷⁰ This could occur if one employee is compelled to retire at a specific age while such requirements do not generally apply to other employees.¹⁷¹

In the case of *Evans v Japanese School of Johannesburg*¹⁷² there was no designated retirement age agreed upon in the employment agreement, but previous practice had set a precedent that staff members typically retire at the age of 65 at that school. However, the court concluded that the employer's independent choice to enforce a retirement age of 60 and force a 63-year-old worker to retire, constituted an unjust termination because of age discrimination.

In the case of *Bedderson v Sparrow Schools Education Trust*¹⁷³ where the employee was employed at the age of 64 and dismissed for being above the age of 70 in 2006, the court concurred with the view put forth in the latter case and concluded that the termination of the applicant was automatically considered unjust, as it constituted discriminatory treatment. For retirement age to constitute automatic termination of an employment contract, the employer must have made it clear from the beginning when the contract was agreed upon. This should not be applied arbitrarily.

163 Section 186(1)(a) LRA 66 of 1995.

164 *Ibid.*

165 [2011] 9 BLLR 893.

166 *MEC for the Department of Finance, Eastern Cape v De Milander* [2011] 9 BLLR 893.

167 LEAD 32.

168 *Ibid.*

169 CCMA and BUSA "Ending Employment in Terms of the Common Law (Part 1)".

170 *Ibid.*

171 *Ibid.*

172 (2006) 27 ILJ 2607 (LC).

173 (JS 70/07) [2009] ZALC 167.

5 5 Termination Due to Death of the Parties

An employment contract ceases to exist in the unfortunate event of an employee's demise.¹⁷⁴ As a general rule, the employment contract endures beyond the employer's death, whereas the demise of the employee does result in termination due to the impracticality of fulfilling the obligations.¹⁷⁵ An employer's demise can terminate the contract if the employee was engaged in informal domestic work. Supervening impossibility of performance arises when the fulfilment of an obligation is hindered by an unforeseen and uncontrollable force, such as the death of an employee, which could not have been reasonably anticipated or prevented.¹⁷⁶

5 6 Termination Due to Insolvency

Section 38 of the Insolvency Act prior to January 2003, stipulated that when an employer's estate undergoes sequestration, the implementation of such sequestration will lead to the cessation of the employment agreement between the employer and their workforce, however, any employee whose contract of service has been terminated due to sequestration has the right to seek compensation from the insolvent estate of their former employer, and the compensation aims to cover any losses experienced by the employee as a result of the premature termination of their employment contract.¹⁷⁷

Section 38 has now been amended and post January 2003, it was declared that the employment agreements of employees whose employer is placed under sequestration will be put on suspension from the day the sequestration order is granted.¹⁷⁸ The employment contract remains unaffected by an employee's insolvency, unless there exists a specific clause within the contract indicating otherwise.¹⁷⁹ The trustee may not cancel employment contracts without consulting relevant individuals, as set out in the section 38(5) of the Act.¹⁸⁰ That includes trade unions, workplace forums and employees whose contracts have been temporarily halted by invoking section 38(1).¹⁸¹

In the case of *SAAPAWU v HL Hall and Sons (Group Services)*¹⁸² the court had to answer the question whether the automatic termination of employment contracts as stipulated in section 38 of the Insolvency Act, was in conflict with the LRA and the court also had to establish whether the termination of employment resulting from the employer's insolvency should be considered a dismissal or not.¹⁸³ The court determined that absentia of explicit guidelines in the LRA regarding the consequences of contract cessation due to insolvency did not indicate inconsistency between the LRA and the Insolvency Act.¹⁸⁴ Employees who experienced job losses as a result of their employer's insolvency were limited to seeking damages, and the court determined that the termination did not fulfil the requirements for it being considered a

174 CCMA and BUSA "Ending Employment in Terms of the Common Law (Part 1)".

175 Du Plessis *et al. Practical Guide to Labour Law* 5 ed (2004) 22.

176 Brassey "The Effect of Supervening Impossibility of Performance on Contract of Employment" 1990 *Acta Juridica* 22 23; Cohen 2011 *Obiter* 670.

177 Insolvency Act 24 of 1936; CCMA and BUSA "Ending Employment in Terms of the Common Law (Part 1)".

178 *Ibid* s 38(1).

179 Grogan *Workplace Law* 13 ed (2020) 84.

180 Insolvency Act 24 of 1936.

181 *Ibid*.

182 22 ILJ 2290 (LAC).

183 *SAAPAWU v HL Hall and Sons (Group Services)* (2001) 22 ILJ 2290 (LAC).

184 *Ibid*.

dismissal.¹⁸⁵

It can be deduced that, whether sequestration or liquidation is voluntary or compulsory, it does not in itself render the termination of employment unfair, as such termination occurs by operation of statutory provisions rather than through an employer-initiated dismissal. In these circumstances, the employment relationship is affected as a consequence of legal processes associated with insolvency. However, this does not mean that employees are left without protection, as the relevant statutory framework and judicial oversight seek to ensure that their rights are not unjustifiably violated.

5 7 Termination of Employment of Incarcerated or Convicted Employees

A contract is deemed to be automatically terminated when it is no longer feasible to carry out the responsibilities stated in the contract on a permanent basis, without either party attributing fault.¹⁸⁶ In the case of an employment contract, if the terms of an employment contract become impossible to fulfil, the contract will be automatically terminated, and this termination will not be regarded as a dismissal.¹⁸⁷

It is commonly known that convict employees are unable to render their services as they are locked behind bars. Incarceration therefore deters employees from being available to render their services at the employer's workplace. The Labour Court has examined the question of whether an employment contract can be lawfully terminated due to the employee's inability to provide services to the employer resulting from their incarceration, based on the concept of impossibility of performance.

In the case of *NUM v CCMA*,¹⁸⁸ the employer contended that the employee's imprisonment hindered their ability to fulfil the contractual obligations, which they also argued amounted to a repudiation of the employment contract.¹⁸⁹ The employer further claimed that accepting this repudiation automatically terminated the contract *ex lege*.¹⁹⁰ In an *obiter dictum*, the Labour Court stated that when the impossibility of performing the contract is of a temporary nature, the employment contract is suspended during the period of incapacity.¹⁹¹ However, if the impossibility of performance is permanent or expected to last for a significant period, the contract terminates automatically by operation of law.¹⁹²

This case highlights that where an employee is incarcerated for a short period of time, the incapacity is merely temporary and therefore cannot justify automatic termination of employment. In such instances, the employer is expected to consider alternatives short of termination, given that the employee may resume their duties within a reasonable time. Impossibility of performance, however, may arise where the period of incarceration is prolonged to such an extent that continued employment becomes untenable. Although the precise duration that distinguishes temporary incapacity from impossibility of performance has not yet been definitively established, it must be assessed on a case-by-case basis, taking into account the

185 *Ibid.*

186 Cohen 2011 *Obiter* 670.

187 *Ibid.*

188 2009 8 BLLR 777 (LC).

189 *NUM v CCMA* 2009 8 BLLR 777 (LC).

190 *Ibid.*

191 *Ibid.*

192 *Ibid.*

nature of employment and the operational requirements of the employer.

In the case of *Maswanganyi v Minister of Defence and Military Veterans and Others*¹⁹³ the question was whether the applicant's services with the SANDF has been terminated *ex lege* when he was sentenced, irrespective of his appeal against the sentence and conviction (he was charged with rape and subsequently sentenced by the trial court). It was also questioned whether section 59(1)(d) of the Defence Act was properly interpreted.¹⁹⁴ The court held that the section 59(1)(d) of the Defence Act wording "conviction" and "sentence" in cases where an appeal is lodged, they must be interpreted to refer to the convictions and sentences which are valid and final.¹⁹⁵ The court held that as soon as the decision of the trial court was set aside, there could be no more lawful conviction and sentence, and as such, the factors outlined in section 59(1)(d) of the Defence Act were no longer applicable.¹⁹⁶ As the SANDF employee will no longer have a criminal record, no purpose would be served by continued application of the penal provisions of the section on the member.¹⁹⁷ The court further held that applicant's successful appeal defeated the connection between section 59(1)(d) and how it applied to him.¹⁹⁸ When factors in section 59(1)(d) can no longer be applied, the applicant's termination of employment was reversed by *ex lege*.¹⁹⁹

In the aforementioned case, the court determined that the employer should have invoked section 42(1) of the Military Discipline Supplementary Measures Act²⁰⁰ (MDSMA) rather than relying on section 59(1)(d), as this particular section allows for the suspension of a convicted individual from their duties until the appeal or review process reaches its conclusion.²⁰¹ Furthermore, the court determined that the employer had the option to utilise section 59(3) of the Defence Act as an alternative or substitution of MDSMA.²⁰²

Incarcerations and convictions in relation to members of the South African Police Services (SAPS), are regulated by the South African Police Services Act.²⁰³ The Act made a provision for presumed dismissal, and it was stated as follows:

A member who is convicted of an offence and is sentenced to a term of imprisonment without the option of a fine shall be deemed to have been discharged from the Service with effect from the date following the date of such sentence: Provided that, if such term of imprisonment is wholly suspended, the member concerned shall not be deemed to have been so discharged.²⁰⁴

However, an SAPS member may apply to the National Commissioner of SAPS for reinstatement if their conviction is undergoing review or appeal or has been overturned on appeal or review.²⁰⁵ Such a request for reinstatement should be submitted within thirty days after the reversal of their conviction.²⁰⁶ This provision ensures that employees are afforded an opportunity to regain

193 (CCT170/19) [2020] ZACC 4.

194 *Maswanganyi v Minister of Defence and Military Veterans* para 21; Act 42 of 2002.

195 *Maswanganyi v Minister of Defence and Military Veterans* para 41.

196 *Ibid.*

197 *Ibid.*

198 Paragraph 45.

199 *Ibid.*

200 Act 16 of 1999.

201 *Maswanganyi v Minister of Defence and Military Veterans*.

202 *Ibid.*

203 Act 68 of 1995.

204 Section 36(1) of South African Police Services Act 68 of 1995.

205 *Ibid* s 36(2).

206 *Ibid.*

their employment when the basis for their termination no longer exists.

From the case of *Maswanganyi v Minister of Defence*,²⁰⁷ it can be seen that for the incarceration or conviction of the employee to constitute automatic termination of employment, it must be absolute, and the sentencing should be final without an appeal or review being lodged. The view of the latter case is analogous to a provision of section 36(3) of the South African Police Services Act, in that the provision requires the National Commissioner to reinstate members of the SAPS who have been sentenced to imprisonment without the option of a fine and are later acquitted as a result of a review or appeal, setting aside the previous conviction.²⁰⁸ If the imprisonment is not absolute, employees are not deemed to be dismissed.

5 8 Automatic Termination Due to Supervening Impossibility of Performance

Supervening impossibility to perform employment duties occurs when there is an external factor beyond employment relationship and outside control of either party which hinders the fulfilment of their responsibilities within an unjustifiably long duration. According to the principles of contract under common law, a contract is deemed automatically terminated if it becomes impossible to fulfil its terms permanently, without any fault on either party's part.²⁰⁹

In the context of an employment contract, when performance becomes impossible, the contract ends automatically, and it does not count as a dismissal. The employer can rightfully terminate the employee's contract due to the occurrence of an unforeseen circumstance that makes it impossible to fulfil the obligations.²¹⁰ Examples of situations that can arise as supervening impossibility are strikes, natural disasters and/or actions taken by the government.²¹¹

The fulfilment of the obligation is hindered by an unforeseeable and unavoidable force that could not have been reasonably anticipated or prevented.²¹² The impossibility of performance must be total and absolute, not just limited to one party's circumstances.²¹³ Furthermore, the impossibility should not be caused by the fault or negligence of either party involved.²¹⁴ The occurrence of impossibility to perform will not have an effect if the employer or employee has willingly accepted the risk of such a situation happening.²¹⁵ As that would mean one of either of the parties may have had reasonable expectation of the situation occurring.

In the case of *FAWU obo Meyer v Rainbow Chicken*,²¹⁶ the applicant who was hired to slaughter chickens following Halaal standards, his employment was terminated due to the withdrawal of his certification from the Muslim Judicial Council, which constituted an unforeseen circumstance rendering performance impossible. The Commissioner held that there was no dismissal which ensued because the contract had become objectively impossible to fulfil, without any fault on

207 (CCT170/19) [2020] ZACC 4.

208 Act 68 of 1995.

209 Cohen 2011 *Obiter* 670.

210 CCMA and BUSA "Ending employment in terms of the common law (Part 1)".

211 *Ibid.*

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

213 *Ibid* 25.

214 *Ibid* 26.

215 *Ibid* 28.

216 (2003) 2 BALR 140 (CCMA).

the part of either party.²¹⁷

The latter case is analogous to the case of *Themba v Springbok Patrols*²¹⁸ where the employment contract of the employee, who worked as a security guard, was considered to have automatically terminated due to his failure to meet the requirements set forth by the Security Officers Act. This is because it is an offence for a person to be employed as a security officer without compliance with the Act and Private Security Industry Regulatory Authority regulations.

Supervening impossibility therefore terminates an employment contract automatically whether there was no provision in the statute or contract, outlining automatic termination. This is so as there will not be any active employment relationship and ultimately no performance will be possible for either of the parties.

6 SECTION 17(3)(B) OF THE PUBLIC SERVICE ACT VERSUS THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA)²¹⁹

Before the application of section 17(3)(a)(i) of the PSA, section 14(1) of the Educators Act and section 59(1)(d) of the Defence Act, the principle of fair administrative action must be applied before the application of the automatic termination of the employee's contract. The PAJA gives effect to the constitutional right to lawful, reasonable and procedurally fair administrative action which need to be applied before automatic termination.²²⁰ The PAJA requires that administrative bodies follow fair procedures and provide written reasons for their decisions when requested.²²¹ It also grants the public the right to challenge administrative decisions in court.²²²

The PAJA sets the general standards for fair administrative action, including the right to notice, reasons and review for decisions affecting the employee right.²²³ In contrast, the PSA²²⁴ is a specific provision that automatically deems an employee dismissed if they are absent from duty for a certain period without leave, creating "deemed dismissal" that bypasses standard procedure, although the PAJA may still apply to challenge the lawfulness of the underlying decision-making process.

The PAJA provides the legal framework for reviewing administrative actions, while the PSA²²⁵ is a specific legislation that also governs the reinstatement of public servants who have been deemed dismissed. The PAJA applies to the decision-making process under the PSA, meaning that any decision made by an HOD to approve or deny a reinstatement application under section 17(3)(b) of the PSA is subject to principles of lawfulness, reasonableness and procedural fairness as envisaged in the PAJA.²²⁶ The core difference is that the PAJA is the overarching law for how administrative decisions are made and reviewed, while the PSA²²⁷ is the specific rule within the

217 *FAWU obo Meyer v Rainbow Chicken* (2003) 2 BALR 140 (CCMA).

218 *Themba v Springbok Patrols* (1997) 18 ILJ 1465 (CCMA).

219 Act 3 of 2000.

220 Section 34 of the Constitution of the Republic of South Africa, 1996. See also s 3 of the Promotion of Administrative Justice Act, 3 of 2000.

221 Section 5 of the Promotion of Administrative Justice Act, 3 of 2000.

222 *Ibid* s 6.

223 *Ibid*.

224 Section 17(3)(a)(i) of the PSA.

225 *Ibid* s 17(3)(b).

226 Section 3 of the Promotion of Administrative Justice Act, 3 of 2000.

227 Section 17(3)(b) of the PSA.

public service that dictates a particular process (deemed dismissal and potential reinstatement).

The decision of the HOD cannot be reasonable, fair and lawful when it is merely guided by own discretion that cannot be accounted for. There is no standard or guidelines the HOD should consider when making a decision on the question of reinstatement. The legality will be questioned because in terms of the PSA, the Defence Act and the Employment of Educators Act, the decision can be made without notice, giving effect to the right of *audi alteram partem*.²²⁸

7 CONCLUSION

The LRA entitles each employee to be protected from unfair dismissal and unfair labour practices.²²⁹ The common law remains applicable where the codified labour system fails to govern the relationship between the employer and employee.²³⁰

It became clear from the judicial precedents in various cases that the automatic termination of employment contracts is legal and valid and its constitutional validity cannot be in question. The only issue lingering is fairness and consistency in the application of automatic termination of contract. In other situations, such as death, retirement age, uncoerced resignation and supervening impossibility of performance, the fairness is not questionable when it is clear that an employee is unable to render the services employed for.

The discretion of employers on whether to reinstate employees or not, and the concept that employees may be re-employed, however, with the employer choosing whether in the same position or a different one, could cast aspersions on automatic termination of employment contract. Those on the negative side of the employer could question the principle of equality before the law and the right to fair labour practices as embodied in the Constitution.²³¹

The public policy which seeks the balancing between the employees' and employers' interests should be given careful consideration. Before terminating an employment contract, it is essential to ensure that a just and equitable procedure is followed.²³² The principle of fair administrative action in terms of the PAJA must be applied before the application of the PSA, Defence Act and the Employment of Educators Act.

Automatic termination of an employment contract is valid, applicable and constitutional for as long as the employer handles it in an effective manner that does not impede the right to just administrative action or the principles of fairness. It remains fair as long as the employer does not invoke it to circumvent the protections granted by the LRA and other labour legislations. Contractual clauses, section 14 of Employment of Educators Act, Section 59 of Defence Act, and section 17 of the PSA should be invoked in an unbiased manner.²³³

The maxim that says "the law is not an ass" which was affirmed by Mogoeng CJ must be borne in mind when dealing with automatic terminations of employment contract. Mogoeng CJ

228 The *audi alteram partem* rule is a cornerstone or principle of natural justice which means "hear the other side" and requires that no person should be judged without a fair hearing where they have the opportunity to present their case and respond to allegations. This principle ensures procedural fairness by requiring proper notice of proceedings, a fair opportunity to be heard and the right to present evidence and cross examine witnesses before an impartial decision-maker. Failure to adhere to this rule can render a decision null and void.

229 Sections 185(a) and 185(b) of Act 66 of 1995.

230 Cohen 2011 *Obiter* 677.

231 Sections 9 and 23 of the Constitution.

232 Ndezendze *Automatic Termination Clauses* 54.

233 Act 76 of 1998; 103 of 1994; Act 101 of 1994.

affirmed the maxim and elucidated it as follows:

After all, courts exist not to crush or destroy, but to teach or guide, caution or deter, build and punish constructively. And that ought to be the purpose of the law in our constitutional dispensation, considering our injustice-riddled past. The law ought not to be applied mechanically, regardless of whether the outcome yields justice or inequity. For then it could be the ass that it has occasionally been allowed to be prior to our current constitutional dispensation.²³⁴

When the concept is not legally applied, the law becomes the ass that the constitution seeks to eradicate. Employees should not be subjected to precarious employment.

The LRA does not prohibit automatic terminations, it merely prohibits negations of dismissal terms in the contract particularly if they are not in line with the dismissal procedure in the LRA and the Code of Good Practice. The specific conditions under which an employment contract can be automatically terminated may vary based on factors such as legislation, contractual agreements, and relevant case law.

Since the legislation does not provide clear guidelines on the application of automatic terminations, employers should apply the principle sparingly and often as a measure of last resort. It would suffice to apply the principle of *audi alteram partem* when employees are terminated due to a section of the PSA.²³⁵ That is so because the section does not have internal limitations of circumstances under which the section may not apply. It is prudent to take into account the prescripts of PAJA when exercising the discretion on the reinstatement of employees, otherwise the decisions on reinstatement will be absurd and subject to perpetual scrutiny.

The employer is given a discretion which they must exercise in deciding whether they re-employ the employee. If they decide to re-employ, they have the prerogative to decide on whether in the same position as previously held or a different one. In terms of the legislation employees are re-employed at the discretion of the employer. Based on these reasons, employees should be given an opportunity to advance their reasons why they have been absent from work before the employer can uphold the automatic termination. The legislation falls short as it does not provide guidelines on the circumstances that automatic termination may not be applicable, inclusion of such guidelines will be necessary to prevent unfair practices of this principle.

234 *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC) para 40.

235 Section 17(3)(a).