THE AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT AND ITS EFFECT IN SOUTH AFRICA

by

KAMOGELO MAKGABO RAMMAI

A mini-dissertation submitted in fulfilment of the requirements for the degree of

Master of Laws (LLM)

in

Labour Law

in the

FACULTY OF MANAGEMENT AND LAW

(School of Law)

at the

University of Limpopo

Supervisor: Adv. LT Nevondwe

2024

Table of Contents

ABSTRACT

The study will analyse the legal position of the automatic termination of employment contract and the consequences associated with it on both the employer and the employees. The study outlines events which lead to employment contracts terminating without a need of the either party informing the other. The study covered circumstances which can lead to the automatic termination of employment contract amounting to unfair dismissal. The study will further make a brief comparison with the labour law position relating to automatic termination of employment contract in the United Kingdom ("UK"). At the end, the study provides recommendations on how the automatic termination of employment contract may be invoked or carried out without the employer unfairly dismissing or committing unfair labour practices against the employees.

DECLARATION BY SUPERVISOR

I, Adv. Lufuno Tokyo Nevondwe, hereby declare that I has supervised this mini-dissertation by **Kamogelo Makgabo Rammai** titled **'the automatic termination of employment contract and its effect in South Africa'** for the degree Master of Laws (LLM) in Labour Law, and in my own view and its scope is suitable and be accepted for examination.

Signed 

Date: 11 December 2023

DECLARATION BY STUDENT

I, **Mr. Kamogelo Makgabo Rammai**, declare that this mini-dissertation for the degree of Masters of Laws in Labour Law in the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me or any other person for degree at this or any other university, this is my work in design and execution and all material contained herein has been duly acknowledged.

Signed  Dated: 11 December 2023

ACKNOWLEDGEMENTS

I begin by expressing my gratitude to the Almighty God for His guidance, wisdom, and protection throughout my academic journey. I am thankful for the courage and confidence He has bestowed upon me, enabling me to pursue my Master's Degree in Labour Law. Throughout, he has been my pillar of strength and shown unwavering support.

I would like to extend my sincere gratitude to my supervisor, Adv. Lufuno Tokyo Nevondwe, who continuously motivated me to excel in research and postgraduate studies. I had the honour of being his student during my postgraduate studies. His guidance and solid support have enabled me to produce quality research study, not only for myself but also for the University of Limpopo, School of Law. His comments and constructive criticism made this study possible. He continues to be a source of inspiration for me. He does not only inspire me to be an excelling scholar, but he also inspires me to be a fit and proper legal practitioner natured with excellence. He infected me with the spirit of being a consistent reader and writer.

Of utmost importance, I express my heartfelt gratitude to my mother, Maria Rammai, for her solid financial and moral support, and consistent encouragement during my entire academic journey, encompassing both undergraduate and postgraduate studies. The seed of reading and excellence you have planted in me did not go into vain. Your investment in my academic journey made me to be who I am today. In my native language I would say '*o mosadi wa go tshwara thipa ka bogaleng'*.

To my aunt, Kgadi Joyce, I am forever indebted to you. Your words of wisdom, prayers and support will forever remain with me.

DEDICATION

This mini-dissertation is dedicated to the following people:

1. To my parent, Maria Rammai for her financial, social and emotional support, and encouragement throughout my life more in particular for the support on my studies.

2. To my entire family, my aunts, uncle, sisters and brothers may this work inspire confidence in you, that the possibilities are limitless, and the sky has never been a boundary for anyone; there are still opportunities to go beyond the sky.

LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act,75 of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
EAT	Employment Appeal Tribunal
EEA	Employment Equity Act, 55 of 1998
ERA	Employment Rights Act of 1996
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act, 66 of 1995
MDSMA	Military Discipline Supplementary Measures Act ,16 of 1999
NPA	National Prosecuting Authority
PSA	Public Services Act,103 of 1994
SANDF	South African National Defence Force
SAPS	South African Police Services
SCA	Supreme Court of Appeal
TES	Temporary Employment Services
UK	United Kingdom

LIST OF INTERNATIONAL INSTRUMENTS

C158 – Termination of Employment Convention, 1982 (No.158).

Equality Act 2010.

International Labour Organization, www.ilo.org.

Law Reform (Frustrated Contracts) Act 1943.

The Employment Rights Act 1996.

LIST OF CASES

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

National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) at par [33].

Nongcantsi v Mnquma Local Municipality (2017) 38 ILJ 595 (LAC).

NUM v CCMA 2009 8 BLLR 777 (LC).

Old Mutual Life Assurance Co SA Ltd v Gumbi [2007] 8 BLLR 699 (SCA).

PSA obo R ROUSSEAU-GEDULD v Head of Department, Department of Education, Northern Cape and Another (C986/14) [2017] ZALCCT 10 (22 March 2017).

PSA obo Van der Walt v Minister of Public Enterprise 2010 1 BLLR 78 (LC).

Public Protector v South African Reserve Bank 2019 (9) BCLR 1113 (CC).

SA Transport & Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd (2011 32 ILJ 428 (LC).

SAAPAWU v HL Hall & Sons (Group Services) (2001) 22 ILJ 2290 (LAC).

Sidumo and Another v Rusternburg Platinum Mines Ltd and others [2007] 12 BLLR 1097 (CC).

Sindane v Prestige Cleaning Services (JS594/07) [2009] ZALC 156; (2010) 31 ILJ 733 (LC) (28 August 2009).

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

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

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

LIST OF STATUTES

Code of Good Practice: Dismissal

Defence Act 42 of 2002.

Employment of Educators Act 76 of 1998.

Equality Act 2010.

Insolvency Act 24 of 1936

Labour Relations Act 66 of 1995.

Law Reform (Frustrated Contracts) Act of 1943.

Military Discipline Supplementary Measures Act 16 of 1999.

Public Services Act 103 of 1994.

South African Police Services Act 68 of 1995.

The Constitution of Republic of South Africa, Act 106 of 1996.

The Employment Rights Act of 1996.

CHAPTER ONE: INTRODUCTION

1.1. HISTORICAL BACKGROUND TO THE STUDY

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]

During an apartheid era in South Africa, prior 1994, Master and Servants laws were promulgated to regulate employment relationships in different colonies.[3] The objective of promulgating these laws were to protect labourers against exploitation and to add sanctions in the employment contracts.[4] These sanctions were those that gave raise 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.[5]

South African employment relations evolved through various stages which led to the current dispensation initiated in 1994 by the democratic system.[6] Since 1996, the Constitution has been determining our labour law together with Labour Relations Act (LRA).[7] The automatic termination of employment contract clauses have been continuous with no or little track record (history). It is only when case laws affirm automatic terminations that we are acquainted that they are valid and applicable. Public Services Act[8] (PSA) has also paved legality for automatic terminations when it included section 17(3)(a)(i).

The South Africa labour market has been currently characterized by high usage of non-standard employment contract with the purpose of satisfying the employer's

---

[1] Erasmus, J 'Deemed dismissals in South African Labour Law' (2022) *Consolidated Employers Organisation.* < https://ceosa.org.za/deemed-dismissals-in-south-african-labour-law/ > accessed 30 March 2023.
[2] *Ibid.*
[3] Ndezendze, K 'Automatic termination clauses in employment contracts', (2019) *NMU* p6; Grogan, J *Collective Labour Law* (3rd ed, JUTA 2019) 2.
[4] *Ibid.*
[5] *Ibid.*
[6] Landis, H & Grosset, L *Employment and the Law: A Practical Guide for the Workplace* (2nd ed, JUTA 2019).
[7] Constitution of the Republic of South Africa, 1996; Act 66 of 1995.
[8] 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.

needs.[9] The vibrant nature of business left employers to see a need to enter into flexible contracts with employees.[10] This is what makes employers more persuaded to sign up to non-standard agreements, for instance fixed term contracts. Consequently, large number of employees have been subjected to terms and conditions of employment that are not more favourable.[11]

Mechanism used often by employers to terminate an employment contract exclusive of constituting dismissal under LRA[12] is the automatic termination of an employment contract, which can arise through either legislative or contractual provisions.[13]

A great example of where a contract will cease in a form of automatic termination through legislative provision, for example, it is when a contract ceases due to section 59(1)(d) of the Defence Act.[14] This section is applicable to Regular Force member's services. Then an 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 perpetually claim that there is no right of recourse for employees in terms of LRA as this will not constitute unfair dismissal under the Act. The employees' services will be terminated due to the agreed terms in the contract or through operation of law and consequently unfair dismissal cannot be argued for under the Act.

A fixed-term contract ceases automatically consequent to a date or when a particular event erupts which the parties to a contract mutually agreed that such an event will cease the employment contract, in terms of the common law.[15] However, this is a threat to employees as employers may use this clause to

---

[9] Tshoose, C & Tsweledi, B 'A critique of protection afforded to non-standard workers in a temporary employment services context in South Africa', (2015) 18 *Law, Democracy and Development.*

[10] Gericke, SB '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) 11 *PELJ* 105.

[11] Cohen, T 'The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships' (2014) 35 *ILJ* 2608.

[12] Act,66 of 1995.

[13] Labour Relations Act 66 of 1995.

[14] Defence Act 42 of 2002.

[15] Grogan, J *Workplace law* (13th ed, JUTA 2020) 170.

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).[16] 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 subjected to unfair labour practices and unfair dismissals is enshrined in section 185 of the LRA.[17]

The Constitution of the Republic of South Africa (the Constitution) stipulates that all individuals are entitled to fair labour practices.[18] The term 'fair labour practices' is not thoroughly expressed in the Constitution. In *NEHAWU v University of Western Cape*[19] 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.[20] This mean each case will be decided on its own merits, 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*,[21] 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 the contract to be automatically terminated if the client cancelled the

[16] Section 1 of the Labour Relations Act 66 of 1995.
[17] Labour Relations Act 66 of 1995.
[18] Section 23 of The Constitution of Republic of South Africa, Act 106 of 1996.
[19] 2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) at par [33].
[20] National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others (CCT2/02) [2002] ZACC 27; 2003 (2) BCLR 154; 2003 (3) SA 1 (CC) (6 December 2002) at par [33].
[21] *Khum MK Investments and Bie Joint Venture (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JA52/2018) [2020] ZALAC 1.

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.

With the decision taken by the court in the above case, it is without a doubt that should there have been 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 provide employees with valid reasons other than just serving them with notice.

This dissertation will amongst other things discuss and focus on legislative and policy framework guiding automatic termination of employment contract; validity and effects of automatic termination of employment contract; critiques centred around automatic termination; provide for insertion of automatic re-employment of employees wrongfully affected the termination clause; and lastly, discussion of case laws centred around this clause.

1.2. STATEMENT OF THE RESEARCH PROBLEM

The study is mainly focused on how the automatic termination of employment contract may be used to bypass unfair dismissals and unfair labour practices. There is an increase in the use of automatic termination of employment mechanisms. There is inconstancy on the side of employers when invoking this concept of automatic termination. At times employers act frivolously and end up unfairly dismissing employees and hide behind this concept even though it is not applicable at that time. There are no clear guidelines as to how this concept may be regulated in order to protect the interest of both employers and employees.

When instituting legal proceedings, the honours of proof will be placed on the employees to prove that the dismissals were carried out unfairly or rather, the automatic termination clauses were not operative. Most legislations, for example, the Defence Act and PSA only provides guidelines for when an employee's contract can be automatically terminated. They do not give guidelines for when

an employee may be automatically reinstated if found to have been affected wrongfully. Contractual provisions also provide for instances when an employee may be released from performing his or her duties but never give provisions to protect employees in case they are wrongfully affected. The lack of guidelines leads the courts to be inconsistent when dealing with cases of automatic termination, especially in the instances where employers does not want to give recourse wrongfully affected employees.

1.3. RESEARCH QUESTION (S)

The question to be addressed by this research is the legality of automatic termination of employment contract when weighed against the Constitution and other legislations regarding fair labour practices and job security as provided for in the LRA, as well as if the interpretation of contractual clauses and provisions in the legislation are there for the purposes of fair labour practices or to be used by employers to make unfair dismissals of employees to be fair, and if there is a need to include clauses of automatic re-employment provision and clauses when employees have been unfairly affected by the automatic termination clauses.

The secondary question to be addressed is if the countries that influenced South African labour system deals with automatic termination in the same South Africa does, to consider the adoption of best practices into the South African labour system.

1.4. LITERATURE REVIEW

This study will be investigating the concept of automatic termination of employment contract through the analysis of provisions in the LRA, the Code of Good Practice: Dismissal in general, journal articles, case laws, and the Constitution of the Republic in order to scrutinize the amount of protection afforded to employees against exploitations.

Public Services Act states that the employees who do not register their presence at work for a period exceeding a month without the permission from head of department, such employees shall be deemed to have been discharged from their duties based on misconduct with effect from the day of last attendance at work.[22]

[22] Act 103 of 1994, Section 17(3)(a)(i).

This section allows for an employee to be discharged by operation of law without a hearing or notice. The Act further states that such an employee who have been deemed to be discharged, should they return to work after the expiry of the period referred to in section 17(3)(a)(i), they may be reinstated based on the Commission recommendation.[23]

The study does agree with this section based on the fact employees should be given a chance to advance their reasons as to why they have not been at work. Also due to the fact that the Act promotes employees to be re-employed on the mercy of the Commission or the employer.

In the case of *Grootboom v National Prosecuting Authority*,[24] 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 the employee of NPA (Prosecutor) and he was suspended for the allegations of misconduct. He was then taken for disciplinary hearing and then later dismissed.[25] He was shortlisted to study at United Kingdom (UK) while on suspension and wrote to NPA requesting study leave and NPA's response was that the leave would be without pay.[26]

NPA then later wrote to him and informing him that in terms of section 17(3)(a)(i) of PSA he was deemed to have been discharged from his duties by operation of law.[27] This meant by him going to UK. He appealed to launch an attack on the application of section 17(3)(a)(i) of PSA.[28] The applicant advanced that the respondents failed to prove that by him going to UK absented himself from his official duties, as he was already on suspension and that made it impossible to be absent in terms of section 17(3)(a)(i) of PSA.[29] The Constitutional Court overturned the decisions of the Labour Court and the Labour Appeal Court and upheld the appeal.[30]

The study agrees with the position of the constitutional court. The position

---

[23] Section 17(3)(b).
[24] (CCT 08/13) [2013] ZACC 37 paras 19.
[25] *Grootboom v National Prosecuting Authority* paras 4.
[26] *Grootboom v National Prosecuting Authority* paras 6.
[27] *Grootboom v National Prosecuting Authority* paras 10.
[28] *Public Service Act 103 of 1994; Grootboom v National Prosecuting Authority* paras 40.
[29] *Ibid.*
[30] *Grootboom v National Prosecuting Authority* paras 45-46.

undertaken by the Labour Court and Labour Appeal Court was misdirection and miscarriage of the applicability of the principle contained in section 17(3)(a)(i) of the PSA.[31]

In the case of *Maswanganyi v Minister of Defence and military veterans and Others*[32], the question was whether the applicant who was charged with rape and subsequently sentenced by the trial court, his services with the SANDF has been terminated *ex lege* when he was sentenced irrespective of his appeal against the sentence and conviction, and if ever section 59(1)(d) of the Defence Act was properly interpreted.[33] The court held that section 59(1)(d) wording of the words "conviction" and "sentence" of the Defence Act in cases where an appeal is lodged, they must be interpreted to refer to the convictions and sentences which are valid and final.[34] 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 section 59(1)(d) of the Defence Act are no longer applicable.[35] As the member [SANDF employee] will no longer have the criminal record, there is no purpose served by continued application of the penal provisions of the section on the member.[36] The court further held that applicant's success on appeal defeated the connection between section 59(1)(d) purpose and the applicability of the provision on him.[37] When factors in section 59(1)(d) can no longer be applied, the applicant's termination of employment was reversed by *ex lege*.[38]

The court's conclusion in *Maswanganyi v Minister of Defence and military veterans and Others*[39] 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 the employees.

In the case of *Sindane vs Prestige Cleaning Services*,[40] where the applicant was

---

[31] *Act 103 of 1994,*
[32] (CCT170/19) [2020] ZACC 4.
[33] *Maswanganyi v Minister of Defence and military veterans and others* (CCT170/19) [2020] ZACC 4; (2020) 41 ILJ 1287 (CC) paras 21; 42 of 2002.
[34] *Maswanganyi v Minister of Defence and military veterans and others* (CCT170/19) [2020] ZACC 4; (2020) 41 ILJ 1287 (CC) paras 41.
[35] *Ibid.*
[36] *Ibid.*
[37] Paras 45.
[38] *Ibid.*
[39] (CCT170/19) [2020] ZACC 4.
[40] (JS594/07) [2009] ZALC 156 paras 4.

hired in terms of Fixed Term Eventuality Contract of Employment.[41] The applicant was employed for a definite period which will terminate when the contract between the respondent and their client terminate.[42] When the contract between the respondent and the client was reduced, the applicant was informed 30 (thirty) days before the date of termination.[43] The question was whether or not there was a dismissal.[44] The court referred to section 186(1) of the LRA which defined dismissal.[45] It outlined number of ways employment can be terminated without constituting dismissal, one relates to fixed term contracts.[46] Due to the contract being for a definite time and the applicant having being informed of the scaling down of the contract, the court held that the applicant was not dismissed.[47] This affirms the contract to have been automatically terminated.

In the case of *Enforce Security Group v Fikile & Others*,[48] the court resolute two scenarios which must be considered when assessing automatic termination clauses. Firstly, where automatic termination clauses are triggered by the third party, court deems them to be permissible and thus ensure that no grounds for termination by dismissal arise under the LRA, a good example will be this case and the case of *Sidane* discussed above.[49] The second one 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.[50] In such circumstances, the termination of the contract of employment would give rise to an unfair dismissal, as it happened in the case of *South African Post Office v Mampeule*.[51]

The test as outlined in the case of *Enforce Security Group v Fikile & Others*[52] is paramount in that, it seeks to curtail unwarranted application of this principle by the employers.

---

[41] *Ibid*.
[42] *Ibid*.
[43] Paras 8.
[44] Paras 9.
[45] *Ibid.*
[46] Paras 16.
[47] Paras 18.
[48] (DA24/15) [2017] ZALCD 2.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid*; *South African Post Office v Mampeule* (2010) 31 *ILJ* 2051 (LAC).
[52] (DA24/15) [2017] ZALCD 2.

Danielle Ivy Nel study of "*The validity of automatic termination clauses in employment contracts*" hold the view that the use of any provision or clauses that terminates the employment contracts automatically results with the evasion of the protection afforded to employees in terms of the LRA.[53] He hold 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.[54] He further state that they should be applied with caution.[55] This study based on the case of *Enforce Security Group v Fikile & Others*[56] and the case of *Sindane vs Prestige Cleaning Services,*[57] hold the opposing view and cannot agree to Danielle Ivy Nel's opinion.

Krian Rathinam is of the view that automatic termination clauses put the courts on the precarious position, where the court have to balance between the employees' rights to fair labour practices as contained in the LRA and upholding the contractual law.[58] 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.[59] Employers ought to evaluate the aim of the fixed-term contract, as to whether it is used legitimately or to circumvent protection employees have under the LRA.[60] Justifiability of using fixed-term contracts in accordance with section 198B of the LRA must be considered.[61]

Kutala Ndzendze's study had the problem application of automatic termination clauses as in most cases they are applied unfairly, without employees given a chance to present their cases.[62] Ndzendze further held that the termination of employment contract automatically means that the contract of employment does

---

[53] Nel, DI 'The validity of automatic termination clauses in employment contracts", (2015) *UP* p54.
[54] *Ibid.*
[55] *Ibid.*
[56] (DA24/15) [2017] ZALAC 9.
[57] (JS594/07) [2009] ZALC 156.
[58] Rathinam, K, 'Automatic termination clauses in a fixed-term contract – What employers should consider prior to relying on automatic termination clauses' (2020) *Consolidated Employers Organisation.* < *Automatic termination clauses in a fixed-term contract - What employers should consider prior to relying on automatic termination clauses - Consolidated Employers Organisation (ceosa.org.za)* > accessed 18 May 2023.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] Ndezendze, K, 'Automatic termination clauses in employment contracts', (2019) *NMU* p50.

not terminates by the employer's act but terminates by operation of law.[63] This means employers should not be the ones 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* has been given effect.[64]

CCMA and BUSA outlined ways in which employment contract may terminate automatically without constituting dismissal in terms of common law. That is when contract is terminated by mutual agreement; when a certain task is complete or upon 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.[65] These circumstances for as long as they are applied for a fair reason, they do not infringe on the employees right not to be unfairly dismissed.

Cohen affirmed the view of CCMA and BUSA by stating that the employment contract may be terminated automatically when it is permanently not possible for the employee to carry out their duties without the employee or employer's fault.[66] Such automatic termination will not constitute dismissal as it has become impossible for the employee to perform.[67]

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.[68] 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).[69] However, the impossibility should be absolute and at no fault of either party.[70]

---

[63] Ndezendze, K, 'Automatic termination clauses in employment contracts', (2019) *NMU* p51.
[64] Ndezendze, K, 'Automatic termination clauses in employment contracts', (2019) *NMU* p55.
[65] CCMA & BUSA, 'Ending employment by common law (Part 1)' (2028) < Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 20 May 2023.
[66] Cohen, T, 'Termination of Employment Contracts by Operation of Law – Bypassing the Unfair Dismissal Provisions of the Labour Relations Act 2006 (17) *Stell LR* 91; Cohen, T, 'The legality of the automatic termination of contracts of employment: Notes' (2011) *Obiter* 670.
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*

1.5. AIMS AND OBJECTIVES

This study aims at pointing out wrongful use and misinterpretation of automatic termination of employment contract provisions in the legislations and contractual clauses. The study further seeks to check the possibility of including 'automatic re -employment' clause or provisions in the employment contracts, so that employees who have been wrongfully affected may have available remedy of being reinstated instead of relying on the employer to enforce their reinstatement. This study will further scrutinize the effects of automatic termination on the employees to check if this concept is a tool used by employees to escape the liability of unfair labour practices or gives effect to the purpose of labour law.

1.6. SIGNIFICANCE OF THE STUDY

To provide an understanding on the circumstances under which an employment contract can be automatically terminated and give guidance to employers to ensure compliance with labour laws and regulations. This study will help employers to avoid legal disputes and potential penalties. The study will give an overview of automatic termination provisions which will allow a comprehensive understanding of employees' rights and protections.

It helps to ensure that automatic terminations of employment contracts are fair, justified, and does not infringe upon employees' legal entitlements, such as notice periods and rights not to be unfairly dismissed. Automatic termination provisions can provide employers with a mechanism to end employment contracts automatically swiftly and efficiently in certain situations without infringing employees' rights.

At the end of the study recommendations will be given out to close the gaps of automatic terminations of employment contracts in our law. Recommendations of how to carry our automatic termination of employment contract will also be given. The study will also assist students studying Labour Law, Advanced Labour Law and Postgraduate studies in Labour Law. It will assist the Department of Labour and Employment, CCMA, Bargaining Councils, Labour Court and Labour Appeal Court. Further, it will assist emerging researchers who are conducting research in

Labour Law to provide insight in their research projects.

1.7. RESEARCH METHODOLOGY

The research of this mini-dissertation will be conducted using the method of quantitative method. This method will involve the use and analysis of journal articles, legislations, textbooks, international instruments and conventions, policy documents, the South African Constitution and legislation relevant to the research title which are primary and secondary sources. Such sources will be discussed to identify the gaps in the South African labour law when it comes to the protection of employees against unfair labour practices and dismissals. Case laws will form a major part of the research as they shed light and provide more clarity on this topic.

Comparative method will be used in chapter four (4) with a view of identifying how countries that influenced South African labour laws deal with automatic termination of employment contract.

1.8. SCOPE AND LIMITATION OF THE STUDY

The mini-dissertation consist of five interrelated chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two deals with the legislative and policy framework. Chapter three deals with the validity of automatic termination clauses and their effect by operation of law. Chapter four deals with the Comparative Studies (United Kingdom and South Africa). The last chapter, chapter five, will be conclusions drawn from the whole study and make recommendations.

CHAPTER TWO: LEGISLATIVE AND POLICY FRAMEWORK

2.1. INTRODUCTION

The most proximate basic sources responsible for regulation of labour law in South Africa are the Constitution of the Republic, legislations, common law principles, and international law principles.[71]

Labour law can play a role in promoting economic growth by promoting decent work, increasing productivity, and reducing labour market insecurity.[72] Labour law sets out the legal framework that governs the relationship between employers and employees.[73] This includes matters such as contracts of employment, working conditions, and collective bargaining. By regulating the employment relationship, labour law can help to ensure that workers are treated fairly and equitably.[74]

Labour law is designed to protect the rights of workers, including the right to fair wages, safe working conditions, and freedom of association.[75] By providing workers with legal protections and remedies, labour law can help to prevent exploitation and ensure that workers are able to exercise their rights in the workplace.[76] Labour law can also play a vital role in reducing inequality and promoting social justice by ensuring that all workers are treated fairly and equally, regardless of their race, gender, or other characteristics.[77] Which is also provided for in our Constitution. By addressing discrimination and promoting diversity, labour law can help to create a more inclusive and just society.

Labour law aims to ensure compliance with legal obligations and standards by employers, and to provide effective remedies for workers in cases of non-compliance.[78] Labour law aims to regulate the employment relationship in a manner that promotes cooperation, stability, and fairness between employers and

---

[71] Act 106 of 1996; Du Toit, D, *et al Labour Relations Law: A Comprehensive Guide* (6th ed, LexisNexis 2015) 73.
[72] Heintz, J "The Purpose of Labour Law: Economic Growth and Social Justice", (2015) *International Labour Rights Forum*, < https://laborrights.org/sites/default/files/publications-and-resources/ILRF_Labor_Law_Report_Web.pdf > accessed 29 April 2023.
[73] *Ibid.*
[74] *Ibid.*
[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.*
[78] Benjamin, P "The Purpose and Function of Labour Law", (2001) 25 *South African Journal of Labour Relations*, pp. 5-22.

employees.[79] The purposes of enacting labour legislations is to give effect to the right of fair labour practice which is guaranteed by the Constitution.[80]

The Constitution is the supreme law of the country and supersedes all other laws.[81] Legislations must be interpreted in order to give effects to fundamental rights (inclusive of labour rights) and international law standards.[82] Where legislation cannot regulate employment relationship effectively, the common law principles should be applied to fill such a gap.[83]

As a starting point, the study will touch on the general principles regulating termination of employment contract. Such regulations will assist us in determining validity of automatic termination of employment contract. At a later stage then move to the effects of automatic termination of employment contract.

2.2. THE CONSTITUTION OF THE REPUBLIC SOUTH AFRICA

As the Constitution of the Republic is the supreme law and reigns above all other laws, it is not possible to consider any rights afforded by other laws in isolation from the Constitution. Its supremacy makes any other law that is tested against it and found to be inconsistent with it invalid.[84]

The constitution provides for the obligation of every person, including the State and its organs, to respect, protect, promote, and fulfil the rights contained in the Bill of Rights as they are democracy's cornerstone.[85] These rights apply to everyone without any form of exclusivity. Every person, including juristic persons, is bound by the Constitution and must obey it.[86] This means that all individuals and entities within South Africa, including the government and its institutions, are required to abide by the principles and provisions set forth in the Constitution. These rights do not only bind the three spheres of government which are the legislature, the executive, and the judiciary. The courts must apply common law and where necessary develop it to give effect to the Bill of rights, for as long as the legislation does not give effect to such particular right when applying it to the

[79] *Ibid.*
[80] Section 23 of the Constitution (1996).
[81] Section 2 of the Constitution (1996).
[82] Section 1 and 3 of the Labour Relations Act 66 of 1995.
[83] Section 8(3) of the constitution (1996).
[84] Section 2 of the Constitution (1996).
[85] Section 7 of the Constitution (1996).
[86] Section 7 (3) of the Constitution (1996).

juristic person.[87] Same must apply when developing common law rules as to limit a particular right in terms of section 36(1).[88] The power of the courts to develop the common law when there is a need is conferred by the Constitution.[89]

When considering and dealing with the concept of labour law within the framework of the Constitution, it goes without saying that evaluation of labour law effectiveness should be measured within the scope of ensuring fair labour practices which is enshrined in the Constitution.[90] This enlightens that should any labour law be tested against the Constitution and prove to be inconsistent with it will be considered as being invalid and unenforceable.[91] To ensure the implementation of the Bill of Rights, it may be necessary to modify or restrict common law principles related to labour relations.[92]

It is required by the Constitution that the tenets established by the Constitution play a role when exercising all legal interpretations.[93] It holds that the spirit, purport and objectives of the Bill of Rights must be promoted by the court, tribunal or forum when interpreting legislations, and developing common law or customary law.[94] Fundamental rights in relation to labour law conferred by the Constitution are contained in section 23.[95] Such a right provides that everyone has the right to fair labour practices.[96]

The primary objective of the LRA,[97] BCEA,[98] and Employment Equity Act[99] (EEA) is to enforce the labour law rights outlined in section 23 of the Constitution. Although the EEA was not initially intended to govern labour relations, it must be considered in conjunction with the constitutional provisions, it cannot be read in isolation from the constitutional provisions.[100]

The Constitution serves as the guiding principle for the interpretation and

[87] Section 8(3)(a) of the Constitution (1996).
[88] Section 8(3)(b) of the Constitution (1996).
[89] Section 173 of the constitution (1996).
[90] Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 38.
[91] Section 8(2) of the constitution (1996).
[92] Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 38.
[93] Section 39(2).
[94] *Ibid.*
[95] The Constitution of the Republic of South Africa, 108 1996.
[96] *Ibid.*
[97] Act 66 of 1995.
[98] Act 75 of 1997.
[99] Act 55 of 1998.
[100] Du Toit, D, *et al Labour Relations Law: A Comprehensive Guide* (6th ed, LexisNexis 2015) 73.

application of the LRA, BCEA, and EEA. section 23 of the Constitution forms the basis for understanding and implementing labour laws. It is crucial to subject labour laws to constitutional scrutiny in order to safeguard the rights of employees.

2.2. THE INTERNATIONAL LABOUR ORGANISATION (ILO).

In 1919, the establishment of the ILO took place as a result of the Peace treaty of Versailles.[101] The essentiality of social justice in securing harmony against the history of exploitation of workers was recognized by the ILO founders.[102] The primary objective behind the establishment of the ILO was to create an organization that could establish global labour standards for the regulation of labour relations.[103] The attainment of decent and productive labour for both genders, men and women, in circumstances of liberty, fairness, human dignity and security, is the main goal of the ILO.[104]

The International Labour Conference adopted the Philadelphia Declaration in 1994 to highlight the priorities and objectives of ILO. This declaration was based on the principles of respect for human rights, freedom from want, freedom of fear, and the eradication of poverty.[105] The Philadelphia Declaration also recognized the need for international cooperation to achieve these goals, and it called for the establishment of an international system of social security to safeguard employees and their loved ones from financial and societal vulnerability, it is crucial to provide adequate protection measures.[106]

South Africa, being a founding member of ILO, withdrew its membership in 1964 due to apartheid policies, however, it revived its ILO membership in 1994 and ratified all the ILO core conventions.[107] South Africa is currently participating actively in the affairs of ILO and plays a major role.[108]

---

[101] International Labour Organisation, 'History of the ILO' < https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm > accessed 30 April 2023.
[102] *Ibid.*
[103] Servais, J *International Labour Law* (Kluwer Law International 2009) 21.
[104] Cohen, T, Moodley, T 'Achieving "Decent Work" in South Africa?', (2012) 25 (2) *PELJ* 320.
[105] Servais, J *International Labour Law* (Kluwer Law International 2009) 28.
[106] *Ibid.*
[107] Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 22; The ILO core conventions are found on: Fundamental Conventions, www.ilo.org.
[108] *Ibid.*

The ILO Convention C158 was adopted on the 22nd of June 1982 and came into force on 23 November 1985, which is regulating the employment termination on the account of the employer.[109] As per the provisions stated in Article 4 of Convention C158, the termination of a worker's employment is only permissible if there exists a valid and justifiable reason for such termination to be carried out due to the incapacity of the worker or due to operational requirement.[110]

According to Article 7 of the Convention, it is stated that the termination of a worker's employment cannot be justified based on their conduct or work performance without providing them with a chance to defend themselves against the accusations made against them, apart from if it is unreasonable to expect the employer to offer such opportunity.[111] Article 8 afford employees who deems their employment to have been terminated unjustifiably an entitlement to approach impartial bodies to appeal such a decision.[112]

This Convention provisions put emphasis on the essentiality of acting fairly when terminating employment contracts.[113] These principles set labour law standards and ought to serve as a yardstick for measuring adherence to global labour norms.[114] This Convention can have an impact on South Africa and can be incorporated into our legal system, even though it has not been ratified.[115]

Unfair dismissal laws of South Africa clearly give effect to the abovementioned articles of Convention C158 subscribed to the ILO.[116] This is evident due to the rights afforded to employees by the LRA. In terms of the LRA, all employees are entitled to the protection of not being unfairly terminated from their employment.[117] Any form of dismissal which is of unfair motive and have not been carried out in compliance with procedure that are just, will be seen and be treated as being unfair.[118]

---

[109] International Labour Organisation (2010), www.ilo.org.
[110] C158 – Termination of Employment Convention, 1982 (No.158).
[111] *Ibid.*
[112] *Ibid.*
[113] Nel, DI 'The Validity of automatic Termination Clauses in Employment Contracts' (2015) *UP* 15.
[114] *Ibid.*
[115] Smit, P, Van Eck, BPS 'International Perspective on South Africa's Unfair Labour Law' (2010) 43 (1) *CILSA* 66.
[116] *Ibid.*
[117] Section 186 of the LRA.
[118] Section 188 of the LRA.

On 29th of September 2010, South Africa, in collaboration with the ILO and other stakeholders, initiated the Decent Work Country Programme (DWCP).[119] This program has assisted the government in achieving its goals of establishing satisfactory employment conditions in South Africa.[120] We possess the subsequent foundations of fair employment: "promotion of fundamental principles and rights at work; promotion of employments and income opportunities; expansion and improvement of social protection coverage; and promotion of social dialogue and tripartism".[121]

South Africa subscribes to global employment values and uses them in order to achieve fair labour practices.

2.3. INTERNATIONAL LAW

The Constitution's mandates that the court, tribunal or forum must consider international law in their interpretation of the Bill of Rights.[122] This means when dealing with labour issues, international law must also be taken into consideration by the courts or tribunals.[123] International law in most cases, fills and close the gaps where municipal or domestic law is lacking. The Constitution further states that each court is obligated to prioritize any interpretation of legislation that is reasonable and in line with international law, rather than opting for an alternative interpretation that does not align with international legal principles.[124]

According to the LRA, a key objective is to ensure that South Africa, as a member state of the ILO, fulfils its obligations.[125] The LRA further state that any person purporting to apply its provisions, must apply interpretation of its provisions in a way that aligns with the obligations of the international law.[126]

The abovementioned will also be to the effect that when interpreting the

[119] RSA Decent Work Country Programme 2010 to 2014 < South Africa Decent Work Country Programme (ilo.org) > accessed 01 May 2023.
[120] *Ibid*.
[121] Cohen, T, Moodley, T 'Achieving "Decent Work" in South Africa?', (2012) 25 (2) *PELJ* 319-344.
[122] Section 39(1)(b) of the Constitution of South Africa, 106 of 1996.
[123] Section 39(1) of the Constitution. This section further provides that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
[124] Section 233 and 39(1) of the Constitution.
[125] Section 1(b) of the LRA; *Sidumo and Another v Rusternburg Platinum Mines Ltd and* others [2007] 12 BLLR 1097 (CC) paras 61.
[126] Section 3(c).

domestic laws, the courts and tribunals will also be open to interpreting such domestic laws in the manner that complies with the regional instruments.

2.4. THE LRA AND OTHER LEGISLATION (S)

2.4.1. The LRA

The LRA's objectives is to promote economic growth, ensure social justice, maintain labour harmony, and democratise the workplace by fulfilling the main objectives of the Act.[127] Enhancement of job security is one of the essential LRA's objectives. The Act achieves such by making available requirements and procedures for the dismissing the employees.[128] It also put in place circumstances which would render the dismissal unfair.[129]

The LRA grants every employee the privilege of being protected against unjust termination of employment and shields them from unfair labour practices.[130] This means that the LRA pride itself with ensuring that workers are exposed to fair labour practices and not dismissed unreasonably.

When dealing with cases that involves termination of employment contract, there is a need to verify as a starting point if ever a dismissal has occurred before relying on the unfair dismissal provisions.[131] It is essential to explore the LRA to check what is a dismissal.

The LRA provides the definition of dismissal in section 186. The LRA defines dismissal as the act or conduct of the employer ending employment with or without prior notification.[132] From the Act it can be deduced that dismissal is customarily caused by the employer, employees cannot dismiss themselves. The decisions and actions which are taken by the employer would then result in dismissal.

2.4.2. Defence Act and Military Disciplinary Supplementary Measures Act (MDSMA)[133]

[127] Section 1 (a) – (d).
[128] Grogan, J *Workplace law* (13th ed, JUTA 2020) 51.
[129] *Ibid*.
[130] Section 185 (a) and (b).
[131] Grogan, J *Workplace law* (13th ed, JUTA 2020) 165.
[132] Section 186(1)(a).
[133] 42 of 2002; 16 of 1999.

The regulation of SANDF is excluded in accordance with the regulations outlined in the PSA,[134] therefore, the study will look into the provisions of these legislations dealing with employment termination.

The Defence Act governs the procedures for handling the termination of employment contracts and the release of Regular Force personnel from the SANDF.[135] The Defence Act further outlines various instances under which termination of employment contract of the Regular Force members and other ranks maybe launched.[136]

The Defence Act states that termination may occur upon the effluxion of time of the contract of employment.[137] In terms of the Act, the employment contract can be terminated if the employee has received a sentence or imprisonment without the option of a fine.[138] In the event that a member of the Regular Force is absent from official duty for a period exceeding 30 days without obtaining prior permission from their commanding officer, they shall be deemed dismissed (in the case of an officer) or discharged (in the case of a member of another rank) on grounds of misconduct.[139] The dismissal or discharge turns out to be effective starting from the day immediately following their final day of presence at their workplace or the last day of authorized leave.[140] However, the Defence Force chief has the authority to reinstate the member under certain conditions upon showing good cause.[141]

MDSMA deals with suspension and disciplinary matters of the SANDF. The Act warrants that the employee can be barred from carrying out his or her duties if they are appearing in the court of law and standing as the accused person.[142] The employee may also be barred from carrying out official duties if they have been sentenced by a court of law and they have intentions of appealing against such a

[134] Section 17 of the PSA Regulations.
[135] Section 59 of the Defence Act 42 of 2002.
[136] Section 59 of the Defence Act 42 of 2002 for all the circumstances under which termination may take place.
[137] Section 59(1)(b) of the Defence Act 42 of 2002.
[138] Section 59(1)(d) of the Defence Act 42 of 2002.
[139] Section 59(3) of the Defence Act 42 of 2002.
[140] *Ibid.*
[141] *Ibid.*
[142] Section 42(1)(a) of Military Discipline Supplementary Measures Act 16 of 1999.

decision or taking it on a review.[143]

It can be alluded in contrast of the above legislations that when the employee or the SANDF member is sentenced or imprisoned, they may be deemed to have been automatically dismissed. However, on appeal or review, the provision of section 49(1)(d) of the Defence Act[144] falls away and employee may not lose his or her employment. This would also apply in the instances where an employee has lost the employment through either of the mentioned provisions but takes it upon themselves to challenge such automated termination of employment contract. When an employee launches an appeal or review, they should be reinstated back to work, as such action temporarily abolish the taken decision awaiting the final decision.

PSA outlined automatic termination provision governing workers offering their services to the public in Section 17(3)(a)(i).[145] The PSA held that employees who are absent from the place of employment without the permission of the HOD or any relevant office for any duration exceeding 30 days shall be considered as having been released from the official duties of their employment.[146] It further outlines that the employee who returns to the place of employment after such duration of time may be reinstated on the recommendation of the commissioner.[147] PSA and the Defence Act are analogous in terms of the provision regulating automatic termination of employment contracts.[148]

2.6. COMMON LAW

There are multiple methods by which an employment contract can come to an end under common law. Employment contract can be terminated by mutual agreement between the employee and the employer, and if the agreement is genuine, it will not render the termination as dismissal.[149]

---

[143] Section 42(1)(b) of Military Discipline Supplementary Measures Act 16 of 1999.
[144] Act 42 of 2002.
[145] Act 103 of 1994.
[146] Section 17(3)(a)(i).
[147] Section 17(3)(a)(iii).
[148] See section 17 of the Public Service Act 103 of 1994 and section 59 of the Defence Act 42 of 2002.
[149] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) < https://smelaboursupport.org.za/download/ending-employment-in-terms-of-the-common-law-part-1/ > accessed 4 May 2023

An employment agreement can terminate due to the fulfilment of a particular project or the conclusion of a predetermined duration.[150] For example, if an employee signs a three-year contract with the employer, the agreement expires after the three years have passed, or when the task agreed upon is complete, the contract terminates automatically.[151] In the case of *Magopeni v Acacia mining (SA) (Pty) Limited and Others*,[152] the court held that according to common law, fixed term employment or service agreements cannot be dissolved early unless there has been a serious violation or one of the parties repudiating the contract.[153] In a different manner, unless the contract expressly permits it, the agreement cannot be cancelled, even with prior notice, unless there is a significant breach or repudiation of the contract.[154]

According to common law contract principles, a contract immediately expires when it is irreparably impractical for one of the parties to execute the terms outlined in the contract, irrespective of no fault being found.[155] Impossibility of performance in the light of an employment contract will culminate in the contract's automatic termination and will not be considered a dismissal.[156] The other party may terminate the contract on the basis of supervening impossibility of performance if something external of the work connection prohibits a party from carrying out its obligations for an excessive amount of time.[157] For example, the employee being sentenced to prison for a long time.

Where an employment agreement has been concluded for an unfixed duration, it may be ended by either the parties to the employment contract, or when the employee attains the retirement age.[158] Where summary dismissal is justified, the employer may in terms of the common law end the employment contract by

---

[150] *Ibid.*
[151] *Ibid*; Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 95.
[152] (16878/18) [2020] ZAGPPHC 300 (30 March 2020).
[153] *Magopeni v Acacia mining (SA) (Pty) Limited and Others* (16878/18) [2020] ZAGPPHC 300 (30 March 2020) paras 38.
[154] *Ibid.*
[155] Cohen, T 'The legality of the automatic termination of contracts of employment', (2011) *UKZN* 5.
[156] *Ibid.*
[157] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) < https://smelaboursupport.org.za/download/ending-employment-in-terms-of-the-common-law-part-1/ > accessed 4 May 2023
[158] Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 95.

giving required prior notice or without notice.[159] However the LRA requires that there should be a notice in line with the fair procedures and for a fair reason.[160]

2.7. CONDLUDING REMARKS

From the discussion above, automatic termination of employment contract when done in line with the Constitution of the Republic and other legislative framework will not be deemed as dismissal. The employees will then have no recourse to challenge such termination of employment based on the unfair dismissal. The legitimacy of automatic termination of employment agreement will then be questioned from case to case and not in totality. The question that may arise is if the employers will not abuse the use of termination clauses by operation of law or contractual clauses to escape liability of practicing unfair labour practices or unfair dismissals.

[159] *Ibid.*
[160] Section 188 of the LRA.

CHAPTER THREE: VALIDITY OF AUTOMATIC TERMINATION CLAUSES

3.1 INTRODUCTION

This chapter, as a point of departure, will demonstrate and discuss general requirements that makes employment contracts valid. Before the employment relationship can exist, there should be a contract regulating how the employment relationship and termination of employment between the employer and employee will be carried out. Secondly, the chapter will name and discuss the types of employees who gets affected by the presumed termination of employment contract. Each type of employees is differently affected by the termination, and such will be discussed below. Lastly, this chapter will give demonstration of how automatic terminations are carried out or ought to be carried out by the employers and the extent of their legality.

3.2 GENERAL REQUIREMENTS FOR VALIDITY OF EMPLOYMENT CONTRACT

Before there could be any termination of any form of employment contract, there should first be an existence of an employment relationship, which will be established through existence of employment contract.[161] *Locatio conductio operarum* gave birth to the contract of employment.[162] *Locatio conductio operarum* represents a legal relationship where an individual agrees to perform work or provide services for another party in exchange for payment or other benefits.[163]

There must be a clear offer of employment made by the employer and a definite acceptance of the offer by the employee.[164] Both parties should be in agreement on the employment terms and conditions.[165] The parties entering into the employment contract must have the legal capacity to do so.[166] 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 hire.[167] In terms of the BCEA it remains a criminal offence to make use or

[161] LEAD, *Labour dispute resolution* (LSSA 2023) 5.
[162] LEAD, *Labour dispute resolution* (LSSA 2023) 4.
[163] LEAD, *Labour dispute resolution* (LSSA 2023) 5.
[164] Grogan, J *Employment Rights* (3rd ed, JUTA 2019) 59.
[165] *Ibid.*
[166] *Ibid.*
[167] *Ibid.*

exercise child labour.[168]

Both the employer and the employee must have the liberty and voluntarily enter into the contract without any form of coercion or duress.[169] Consent must be genuine, and neither party should be forced into the agreement against their will.[170] 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.[171]

The employment contract must have a legal purpose and cannot involve any illegal activities.[172] 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 and others*,[173] an employee hired to carryout illegal activities can still be able to claim unfair dismissal provided the employer is not ordered to do anything illegal.[174] This means the parties to the employment contract must intend to create legal relations, indicating that the agreement is legally binding.[175] This means that the contract is enforceable by law, and both parties have certain rights and obligations under the contract.[176]

The employment agreement's terms and conditions should be clearly stated and specific enough to avoid ambiguity or misunderstanding.[177] This includes details such as employment position, tasks and obligations, working schedule, salary, incentives, termination clauses, and any other relevant provisions.[178]

In the case of *Old Mutual Life Assurance Co SA v Gumbi*,[179] it was determined that a hearing prior to termination of employment is a component of our common law

---

[168] *Ibid.*
[169] Grogan, J *Employment Rights* (3rd ed, JUTA 2019) 60.
[170] *Ibid.*
[171] Grogan, J *Employment Rights* (3rd ed, JUTA 2019) 61.
[172] *Ibid.*
[173] 2010 4 SA 383 (LAC).
[174] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); Grogan, J *Employment Rights* (3rd ed, JUTA 2019) 61.
[175] Grogan, J *Employment Rights* (3rd ed, JUTA 2019) 61.
[176] *Ibid.*
[177] Grogan, J *Employment Rights* (3rd ed, JUTA 2014) 67.
[178] *Ibid.*
[179] 2007 4 All SA 866 (SCA).

in relation to employment contracts, it is enforceable in civil courts.[180] Hearing will therefore be a pre-requisite before terminations.

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 legal requirements.

3.3 TYPES OF EMPLOYEES WHICH CAN BE AFFECTED BY AUTOMATIC TERMINATIONS

3.3.1 Temporary Employment Services (TES) Employee

Temporary or contract workers are typically engaged for a specific duration or to fulfil a particular purpose with no expectation of becoming permanent.[181] It is contained in the contract that the employment will cease to exist upon elapsing of a particular time.[182] Employees are normally hired to assist with a specific project.[183] Once the agreed-upon period or task is completed, the employment contract may automatically terminate without requiring further action.

In many occasions the TES clients hire permanent employees through labour brokers, in such circumstances, TES can be deemed to have been used as a contempt to bypass the safeguards provided to full-time employees under the LRA and labour law.[184] If the services of 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.[185]

The Constitutional Court in the case of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa*[186] ruled that the section 198A meaning should be understood in relation to the right to fair labour practices outlined in section 23 of the Constitution and the overall purpose of the Labour Relations Act

---

[180] *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA); LEAD, *Labour dispute resolution* (LSSA 2023) 6.
[181] LEAD, *Labour dispute resolution* (LSSA 2023) 11.
[182] *Ibid*.
[183] *Ibid*.
[184] *Ibid*.
[185] LEAD, *Labour dispute resolution* (LSSA 2023) 16.
[186] [2018] 9 BLLR 837 (CC).

(LRA).[187] The majority of the court determined that, based on the interpretation of sections 198(2) and 198A(3)(b), the temporary employment service (TES) is considered the employer for the initial three months, after which the client becomes the exclusive employer.[188] The majority 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.[189]

3.3.2 Fixed-Term Contract Employees

Fixed-term contracts terminates automatically upon the completion of a specified period or project, other than traditional retirement date.[190] Once the predetermined date is reached, the employment contract ends without the need for further action or notice. Employees with fixed-term contracts exceeding three (3) months must be treated equally with permanent employees performing the same work.[191]

LRA created an exception or rather an instance where automatic termination will not suffice, and if relied 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.[192] However, the employer presented two options: either renewing the contract with less favourable terms or opting not to renew it altogether.[193] This similarly applicable where the employee possessed a justifiable anticipation that the employer would maintain their employment on an ongoing basis, with terms similar to their previous fixed-duration employment contract.[194] However, the employer either offered to retain the employee with inferior conditions or the employee was not presented with a retention offer at all.[195]

In the case of *MEC for the Department of Finance v De Milander*[196] it was held

---

[187] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* [2018] 9 BLLR 837 (CC).
[188] *Ibid.*
[189] *Ibid.*
[190] LEAD, *Labour dispute resolution* (LSSA 2023) 16.
[191] *Ibid.*
[192] Section186(1)(b)(i).
[193] *Ibid.*
[194] section 186(1)(b)(ii).
[195] *Ibid.*
[196] *MEC for the Department of Finance, Eastern Cape v De Milander & others* [2011] 9 BLLR 893.

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.

If an employee is employed on a fixed-term agreement that extends beyond than 24 months for a valid reason, they are entitled to receive severance pay when the contract expires.[197]

3.3.3 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.[198] The employer utilizes the probationary period to evaluate the employee's performance before making a final decision on their employment.[199] It is significant to note that the utilization 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.[200] For example, it is considered an unfair labour practice to dismiss employees who have completed their probationary periods and replace them with new employees.[201]

During the probationary period, the employer should assess the employee's performance.[202] The employer should provide reasonable evaluations, instructions, training, guidance, or counselling to enable the employee to provide satisfactory service.[203]

At the conclusion of the probation period, it is not appropriate for an employer to

[197] LEAD, *Labour dispute resolution* (LSSA 2023) 17.
[198] Schedule 8 of Labour Relations Act Code of Good Practice: Dismissal.
[199] *Ibid.*
[200] *Ibid.*
[201] *Ibid.*
[202] *Ibid.*
[203] *Ibid.*

terminate an employee based on unsatisfactory performance unless they have provided the employee with suitable evaluation, instruction, training, guidance, or counselling; and if the employee has been given a reasonable amount of time to improve their performance but continues to perform inadequately.[204]

In such circumstances then 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*[205] 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 they are unsuitable for the position.

3.3.4 Public Services Employees

The employment contracts of public services employees may be terminated automatically under certain circumstances outlined in the legislations governing their employment.

3.4 AUTOMATIC TERMINATIONS *EX LEGE*

3.4.1 Public Services Employees

The employment of Public Services Employees is governed by PSA. In terms of PSA, the officers to the exception of members of educators, service members, or intelligence service personnel, will be considered as having been dismissed from their job due to misconduct if they are 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.[206] Regardless of whether the specified period has passed or not, if such an officer takes on another job, it will be considered that they have been discharged in the

[204] *Ibid.*
[205] (2017) 38 ILJ 595 (LAC).
[206] Section 17(3)(a)(i) of the Public Services Act 103 of 1994.

same manner as mentioned in section 17(3)(a)(i).[207]

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.[208] The conditions of reinstatement will be determined by the Commission's recommendations.[209] In this case, the duration of time during which the officer was not present for official duty will be considered as unpaid vacation leave or leave under any other conditions recommended by the Commission.[210]

However, in the case of *Dendy v University of Witwatersrand*[211] 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.[212]

In the case of *Motsamai v Department of Public Safety, Security and Liaison*[213] where an employee returned back to work After being away for a period of five months, upon returning and undergoing a disciplinary enquiry, he was notified of my termination in accordance with the PSA.[214] 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).[215] The arbitrator made a founding that the employees employment had been terminated by the employers.[216]

In the case of *PSA obo Van der Walt v Minister of Public Enterprise*[217] in which Francis J determined that the termination of the employee's employment in

---

[207] *Ibid*. Section 17(3)(a)(ii).
[208] *Ibid*. Section 17(3)(b).
[209] *Ibid*.
[210] *Ibid*.
[211] 2005 (5) SA 357 (W) [2005] 2 All SA 490.
[212] *Dendy v University of Witwatersrand* 2005 (5) SA 357 (W) [2005] 2 All SA 490 par 53
[213] (2001) 22 ILJ 487 (LC).
[214] *Motsamai v Department of Public Safety, Security and Liaison* (2001) 22 ILJ 487 (LC).
[215] *Ibid.*
[216] *Ibid.*
[217] 2010 1 BLLR 78 (LC).

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.[218]

Section 14 of the Employment of Educators Act[219] (Educators Act) carries similar wording with the section 17 of PSA.[220] In terms section 14(1)(a) - (d), educators who holds a permanent position and is absent from work for more than 14 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.[221]

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 the employer.[222]

In the case of *PSA v Department of Education,*[223] Ms Raquel Rousseau-Geduld, a teacher, was informed by her Head of Department that she had been dismissed, as she had been absent from work for a period exceeding 14 consecutive days without acquiring the necessary permission.[224] She appealed to the Member of the Executive Council (MEC) for reinstatement, however, despite four years

---

[218] *PSA obo Van der Walt v Minister of Public Enterprise* 2010 1 BLLR 78 (LC); Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 676.
[219] Act 76 of 1998.
[220] Act 103 of 1994.
[221] *Ibid.*
[222] *Ibid.*
[223] (C986/14) [2017] ZALCCT 10 (22 March 2017).
[224] *PSA obo R ROUSSEAU-GEDULD v Head of Department, Department of Education, Northern Cape and Another* (C986/14) [2017] ZALCCT 10 (22 March 2017) paras 2.

passing, the MEC has not provided any response to her appeal.[225]

PSA representing Ms Raquel Rousseau-Geduld has filed an application under section 158(1)(h) of the LRA to seek a review and setting aside of the decision made by the Head of Department, alternatively, they are requesting a review and 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.[226]

Since the MEC did not make any decision nor responded, the court repudiated the MECs verdict not to reinstate Ms Raquel Rousseau-Geduld.[227] 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.[228] 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.[229] However, in this case, the MEC omitted or neglected to exercise this authority, which goes against the intended purpose of achieving effective resolution of disputes.[230]

This legislation (PSA) regulates automatic termination of employment of the employees in the public services. Based on the judgements above, if PSA is not correctly used, it will result in the employer unfairly dismissing employees. The same can be same with regards to the employment of educators.

3.4.2 Desertion

Desertion takes place when an employee is not present at the workplace without any motive of coming back.[231] If there is no motive resulting with absenteeism, then it does not qualify as desertion but rather it constitutes misconduct in the form of unauthorized absence.[232] Desertion represents a violation of a

---

[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*
[228] Act 66 of 1995; *PSA obo R ROUSSEAU-GEDULD v Head of Department, Department of Education, Northern Cape and Another* (C986/14) [2017] ZALCCT 10 (22 March 2017) par 28.
[229] *Ibid.*
[230] *Ibid.*
[231] Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 672.
[232] *Ibid.*

fundamental term within the employment contract, and it is considered that the employee has effectively breached and renounced the contract.[233]

A question has emerged regarding whether the deserting employee effectively terminates the employment relationship and implicitly resigns through their conduct, or if it is the employer who terminates the employment relationship by taking action against the desertion.[234] 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.[235] 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. [236]

In the case of *SA Transport & Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd*,[237] 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.[238] Despite this, they did not report for work, even after a High Court interdict was issued, which mandated their return back to work.[239] The employees defied numerous pleas from the employer urging them to return back to work.[240]

In the latter case, due to adduced evidence, the court determined that the majority of employees were not inclined to resuming work and they effectively deserted their positions.[241] 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.[242]

---

[233] *Ibid.*
[234] *Ibid.*
[235] Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 673.
[236] *Ibid.*
[237] (2011 32 ILJ 428 (LC).
[238] *SA Transport & Allied Workers Union obo Langa v Zebediela Bricks (Pty) Ltd* (2011 32 ILJ 428 (LC); Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 674.
[239] *Ibid.*
[240] *Ibid.*
[241] *Ibid.*
[242] *Ibid.*

This means where the employee cannot be found for the purposes of holding a hearing, he will be deemed to have been automatically dismissed and not unfairly dismissed at the instance of the employer. However, this will be absurd as there is not a manner in place which can be utilised to ensure that employee's hearing attendance is secured.

3.4.3 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 predetermined duration or conclude upon the fulfilment of a specific task.[243] Terminating such a contract on the agreed date or time will not be considered dismissal.[244] The employees will not have recourse or have a ground to allege 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.[245] 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 LRA.[246] 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.[247] In the case of *MEC for the Department of Finance v De Milander*[248] 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.[249] Based on the test in the latter case,

---

[243] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) <Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 20 June 2023.
[244] Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015) 97.
[245] Du Plessis, *et al* 'Practical Guide to Labour Law' (5th ed, 2004) 23.
[246] Section 186(1)(a) LRA 66 of 1995.
[247] Section 186(1)(b) LRA 66 of 1995.
[248] [2011] 9 BLLR 893.
[249] *MEC for the Department of Finance, Eastern Cape v De Milander & others* [2011] 9 BLLR 893.

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.[250] 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.[251] In this case automatic termination will not apply even though the contract naturally expired.

3.4.4. 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 concludes through mutual agreement and is not considered a dismissal.[252] However, if an employee is terminated solely due to their age in an arbitrary manner, it may be classified as an unfair dismissal according to section 187 of the LRA.[253] This could occur if one employee is compelled to retire at a specific age while such requirements do not generally apply to other employees.[254]

In the case of *Evans v Japanese School of Johannesburg*[255] where there was no designated retirement age agreed upon in the employment agreement, the previous practice set a precedent that staff members typically retire at the age of 65 at that school, 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 due to age discrimination.

In the case of *Bedderson v Sparrow Schools Education Trust*[256] where the employee was hired at the age of 64 and dismissed for being above the age of 70 in 2006, the court concurred with the perspective put forth in the latter case and concluded that the termination of the applicant was automatically considered

---

[250] LEAD, *Labour dispute resolution* (LSSA 2023) 32.
[251] *Ibid.*
[252] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) <Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 20 June 2023.
[253] *Ibid.*
[254] *Ibid.*
[255] (2006) 27 *ILJ* 2607 (LC).
[256] (JS 70/07) [2009] ZALC 167.

unjust, as it constituted discriminatory treatment.

For retirement age to constitute automatic termination of employment contract, the employer must have made it clear from the beginning of conclusion of a contract. This should not be applied arbitrarily so.

3.4.5. Termination due to death of the parties

The employment contract ceases to exist in the unfortunate event of an employee's demise.[257] As a general rule, the employment contract endures beyond the employer's death, whereas the passing of the employee does result in termination due to the impracticality of fulfilling the obligations.[258] Employer's demise can terminate the contract if the employee was engaged in the 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.[259]

3.4.6. Termination due to insolvency

Section 38 of the Insolvency Act prior 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.[260]

Section 38 is now amended, post January 2003, it has been declared that the

[257] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) <Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 20 June 2023.
[258] Du Plessis, *et al* 'Practical Guide to Labour Law' (5th ed, 2004) 22.
[259] Brassey "The effect of Supervening Impossibility of Performance on Contract of Employment" 1990 *Acta Juridica* 22 23; Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 670.
[260] Insolvency Act 24 of 1936; CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) <Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 27 June 2023.

employment agreements of employees whose employer is placed under sequestration will be put on suspension from the day the sequestration order is granted.[261] The employment contract remains unaffected by an employee's insolvency, unless there exists a specific clause within the contract indicating otherwise.[262]

The trustee may not cease employment contracts of the employer's employees without consulting relevant individuals as set out in the section 38(5) of the Act.[263] That includes trade unions, workplace forums, employees whose contracts have been temporarily halted by invoking section 38(1).[264]

In the case of *SAAPAWU v HL Hall & Sons (Group Services)*[265] the court had to answer the question whether the automatic termination of employment contracts as stipulated in section 38 of the Insolvency Act conflicted with the LRA and, the court also had to establish whether the termination of employment resulting from the employer's insolvency should be considered as a dismissal or not.[266]

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 LRA and Insolvency Act.[267] Employees who experienced job loss 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 being considered a dismissal.[268]

It can be deduced that whether sequestration is voluntary or the compulsory one, it does not render terminations of employment unfair as they terminate in terms of a statute provisions.

3.4.7. 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,

---

[261] *Ibid*; section 38(1).
[262] Grogan, J *Workplace law* (13th ed, JUTA 2020) 84.
[263] Insolvency Act 24 of 1936.
[264] *Ibid*.
[265] 22 ILJ 2290 (LAC).
[266] *SAAPAWU v HL Hall & Sons (Group Services)* (2001) 22 ILJ 2290 (LAC).
[267] *Ibid*.
[268] *Ibid*.

without either party attributing fault.[269] 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.[270]

It is commonly known that convict employees are unable to render their services as they are locked in 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,*[271] the employer contended that the employee's imprisonment hindered their ability to fulfil the contractual obligations, which they also argued that it amounted to a repudiation of the employment contract.[272] The employer further claimed that accepting this repudiation automatically terminated the contract *ex lege*.[273]

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.[274] However, if the impossibility of performance is permanent or expected to last for a significant duration, the contract terminates automatically by operation of law.[275]

This case enlightens that where an employee is incarcerated for a short period of time, the incapacity is therefore temporary and cannot give rise to automatic termination. Impossibility of performance will then arise when the incarceration is for a prolonged period of time. Although the reasonable period which cannot amount to impossibility of performance have not yet been established.

---

[269] Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 670.
[270] *Ibid.*
[271] 2009 8 BLLR 777 (LC).
[272] *NUM v CCMA* 2009 8 BLLR 777 (LC).
[273] *Ibid.*
[274] *Ibid.*
[275] *Ibid.*

In the case of *Maswanganyi v Minister of Defence and military veterans and others*[276] the question was whether the applicant who was charged with rape and subsequently sentenced by the trial court, his services with the SANDF has been terminated *ex lege* when he was sentenced irrespective of his appeal against the sentence and conviction, and if ever section 59(1)(d) of the Defence Act was properly interpreted.[277] The court held that section 59(1)(d) wording of the words "conviction" and "sentence" of the Defence Act in cases where an appeal is lodged, they must be interpreted to refer to the convictions and sentences which are valid and final.[278] 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 section 59(1)(d) of the Defence Act are no longer applicable.[279] As the member [SANDF employee] will no longer have the criminal record, there is no purpose served by continued application of the penal provisions of the section on the member.[280] The court held further held that applicant's appeal success defeated the connection between section 59(1)(d) purpose and the provision application on him.[281] When factors in section 59(1)(d) can no longer be applied, the applicant's termination of employment was reversed by *ex lege*.[282]

In the aforementioned case, the court determined that the employer should have invoked section 42(1) of the Military Discipline Supplementary Measures Act[283] (MDSMA) rather than relying on section 59(1)(d), this particular section allows for the suspension of a convicted individual from their duties until the appeal or review process reaches its conclusion.[284] Furthermore, the court determined that the employer had the option to utilize section 59(3) of the Defence Act as an alternative or substitution of MDSMA.[285]

Incarcerations and convictions in relation to members of South African Police

---

[276] (CCT170/19) [2020] ZACC 4.
[277] *Maswanganyi v Minister of Defence and military veterans and others* (CCT170/19) [2020] ZACC 4; (2020) 41 ILJ 1287 (CC) paras 21; 42 of 2002.
[278] *Maswanganyi v Minister of Defence and military veterans and others* (CCT170/19) [2020] ZACC 4; (2020) 41 ILJ 1287 (CC) paras 41.
[279] *Ibid.*
[280] *Ibid.*
[281] Paras 45.
[282] *Ibid.*
[283] Act 16 of 1999.
[284] *Maswanganyi v Minister of Defence and military veterans and others* (CCT170/19) [2020] ZACC 4; (2020) 41 ILJ 1287 (CC)
[285] *Ibid.*

Services (SAPS), are regulated by South African Police Services Act.[286] 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."[287]

However, the 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.[288] Such a request for reinstatement should be submitted within 30 days after the reversal of their conviction.[289]

Form the case *of Maswanganyi v Minister of defence*,[290] 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 the appeal or review being lodged. The view of the latter case is analogous to 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 review or appeal setting aside the previous conviction.[291] If the imprisonment is not absolute, employees are not deemed to be dismissed.

3.4.8. 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.

---

[286] Act 68 of 1995.
[287] Section 36(1) of South African Police Services Act 68 of 1995.
[288] Section 36(2) of South African Police Services Act 68 of 1995.
[289] *Ibid*.
[290] (CCT170/19) [2020] ZACC 4.
[291] Act 68 of 1995.

According to the principles of contract under common law, a contract is deemed terminated automatically if it becomes impossible to fulfil its terms permanently, without any fault on either party's part.[292] 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 employees contract due to the occurrence of an unforeseen circumstance that makes it impossible to fulfil the obligations.[293] Examples of situations that can arise as supervening impossibility are strikes, natural disasters, and/or actions taken by the government.[294]

The fulfilment of the obligation is hindered by an unforeseeable and unavoidable force that could not have been reasonably anticipated or prevented.[295] The impossibility of performance must be total and absolute, not just limited to one party's circumstances.[296] Furthermore, the impossibility should not be caused by the fault or negligence of either party involved.[297] 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.[298] 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,*[299] 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

[292] Cohen, T 'The legality of the automatic termination of contracts of employment' *OBITER* (2011) 670.
[293] CCMA & BUSA, 'Ending employment in terms of the common law (Part 1)' (2018) <Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 27 June 2023.
[294] *Ibid.*
[295] Brassey, "The Effect of Supervening Impossibility of Performance on Contract of Employment" (1990) 22 *Acta Juridica* 23.
[296] *Ibid 25.*
[297] *Ibid 26.*
[298] *Ibid 28.*
[299] (2003) 2 BALR 140 (CCMA).

on the part of either party.[300]

The latter case is analogous to the case of *Themba v Springbok Patrols*[301] where the employment contract of the employee, who worked as a security guard, was considered to have automatically ended due to his failure to meet the requirements set forth by the Security Officers Act.

Supervening impossibility therefore terminates 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 not occur on either of the parties.

3.5 CONCLUDING REMARKS

Automatic termination is applicable and valid in our law. 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. 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 legislations does not provide clear guideline in applications 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 section of the PSA.[302] That is so because the section does not have internal limitations of circumstances under which the section may not apply. The employer is given a discretion which they must exercise in deciding whether they re-employ the employee.

[300] *FAWU obo Meyer v Rainbow Chicken* (2003) 2 BALR 140 (CCMA).
[301] *Themba v Springbok Patrols* (1997) 18 ILJ 1465 (CCMA).
[302] Section 17(3)(a).

CHAPTER FOUR: COMPARATIVE STUDIES (SOUTH AFRICA and UNITED KINGDOM)

4.1. INTRODUCTION

South African Constitution allows for interpretation of international law and preference of the meaning that is in line with international legislations and laws.[303] UK will be used as for the purposes of comparative studies since its legal system influenced South African legal system. The Employment Rights Act of UK can be said to have inspired the LRA, due to the similarities in protection of employees.[304]

Employment law in the United Kingdom (UK) is a complex and extensive area of legislation that provides rights and protections for employees and sets out obligations which employers must abide by.[305] The cessation of employment contracts in the UK is regulated by various laws and regulations. The Employment Rights Act[306] is the main legislation regulating employment, and relationships between the employers and employees in UK. The UK does not have a legislation governing public sector employment solely, it has legislation regulating automatic termination of general contracts. The term used is frustration of contracts through the use of Law Reform (Frustrated Contracts).[307] For labour law purpose it will be frustration of employment contracts.

This chapter's main focus is what amounts to a dismissal in UK, how the employment relationships terminate automatically in UK by frustrating the employment contract, analysis of similarities and differences of both UK and South Africa in automatically discharging employees. This will be done through analysis of various statutes, case laws and UK employment laws in general. The UK law will be outlined, and comparison and similarities will be outlined in closing remarks. What each country will learn from the other will also be touched on.

4.2. LEGISLATION (S) REGULATING TERMINATION OF EMPLOYMENT

4.2.1. The Employment Rights Act 1996 (ERA)

[303] Section 233 of the Constitution of South Africa.
[304] Act of 1996; Act 66 of 1995.
[305] Buswell, G 'Employment law in the UK' (2023) *Epatica* < Labor and employment laws in the UK | Expatica > accessed 13 July 2023.
[306] Act of 1996.
[307] Act of 1943.

The Act protects the employees against unfair dismissals.[308] In terms of section 86, the employer who wishes to cease the employee's employment, he may do so by means of giving notice.[309] The employer must provide a minimum notice period when terminating the employment contract of an employee who has been continuously employed for at least one month.[310] The notice period is as follows: If the employee's continuous employment is less than two years, the notice must be at least one week; If the employee's continuous employment is between two and twelve years, the notice must be one week for each year of continuous employment; If the employee's continuous employment is twelve years or more, the notice must be three months.[311]

The Act obliges the employer to provide the employee with a written statement that explains the reasons for the employee's dismissal in the following circumstances: If the employer gives the employee notice of contract termination; If the employer terminates the employee's contract without providing any notice; If the employee is employed under a limited-term contract, and the contract comes to an end due to the specified event without being renewed under the same contract.[312] However, such reasons are only provided based on the employees request.[313]

The ERA outlines situations under which the employee is deemed to be dismissed. They are as follows:

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
> (c) the employee terminates the contract under which he is employed (with

[308] Section 91(1) of The Employment Rights Act 1996.
[309] *Ibid* Section 86(1)
[310] *Ibid.*
[311] *Ibid* Section 86(1)(a)-(c).
[312] *Ibid* Section 92(1)(a)-(c).
[313] *Ibid* Section 92(2).

or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."[314]

Under the above outline provisions the employee is regarded as having been dismissed by the employer's act other that being terminated automatically by operation of law. That is due to termination provisions having been invoked by the employer.

The Act states the orders the tribunal can make in the event where the employee was unfairly dismissed.[315] The tribunal may order the reinstatement of the employee in which the employer is required to treat the complainant in every way as if they had not been unfairly terminated.[316] If the complainant would have experienced better terms and conditions of employment had they not been dismissed, an order for reinstatement will necessitate treating them as if they had received those improved terms from the date which they would have received them if not for the dismissal.[317] The employees' rights and benefits which must be restored might be specified by the tribunal.[318]

UK does not have legislations governing automatic termination of employment solely. However, there are various cases in which dealt with automatic termination of employment in UK, for example, termination due to imprisonment which will be discussed below under 4.2.2. UK uses a term called a frustration of a contract to relieve parties from a contract governed by Law Reform (Frustrated Contracts)

[314] Section 95(1) - (2).
[315] Section 114.
[316] *Ibid.*
[317] Section 114(3).
[318] Section 114(2)(c).

Act.[319]

4.2.2 Frustration of a contract and its application

Frustration of contract is a legal principle that allows parties to be released from their contractual obligations when it becomes impossible to fulfil them.[320] It applies when a certain event occurs that fundamentally changes the circumstances under which the contract was meant to be performed, rendering performance no longer necessary.[321] This event, known as a supervening event, leads to the automatic termination of the contract.[322]

Frustration of contract is not specific to employment law but applies to contract law in general. Frustration causes a contract to terminate automatically and instantly. Where the parties have a choice, frustration will not have an effect. If the occurrence of a supervening event does not result in the frustration of the contract, the party who is obligated to perform but fails to do so is considered to be in breach of the contract.[323]

Events which can lead the contract to be frustrated are among other things: Death of either party; incapacity (ill-health or physical) of the employee; war (rioting and civil unrest); convictions; Acts of God/nature; Change of laws regulating trades; and workplace destructions.[324] Employers frequently cite frustration as a ground for termination in cases of extended employee illness or imprisonment.[325]

In the case of *Maritime National Fish Ltd. v. Ocean Trawlers Ltd*[326] the claimant was the owner of five fishing vessels, one of which was leased to the defendants.

---

[319] Act of 1943.
[320] Ellis, L 'Frustration of Contracts in law: Getting out of Contract Obligations (Termination of Contracts)' (2020) *Hall Ellis Solicitors* < Frustration of Contract: Law, Discharge & Consequences | Solicitors London (hallellis.co.uk) > accessed 13 July 2023.
[321] *Ibid.*
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*
[325] McMullen, J "Frustration of the Contract of Employment and Statutory Labour Law." (1986) 49 *The Modern Law Review* 6, pp 785–90.
[326] *Maritime National Fish Ltd. v. Ocean Trawlers Ltd* [1935] UKPC 20.

All the vessels were equipped with otter trawler nets. However, new legislation was implemented that required licenses for the use of otter trawl nets. The claimant applied for licenses for all five vessels but was only granted three. When specifying the vessels for which the licenses would be used, the claimant excluded the vessel leased to the defendant. As a result, the defendant could not utilize the vessel for fishing purposes.

In the latter case, in response to a lawsuit filed by the claimant seeking payment for the lease, the defendant argued in their defence that they were not obligated to pay for the cost of hire due to the claimant's failure to provide a license. The claimant contended that there was no breach on their part, as the failure to provide a license was a frustrating event beyond their control, as the decision to grant licenses rested with the Secretary of State.

The court determined that the contract was not frustrated because the claimant had made a deliberate choice to retain the three licenses granted for their own use, instead of using one to fulfil their contractual obligation. By doing so, the claimant had intentionally caused the frustrating event and consequently was in breach of the contract.

This shows that should the defendant not had a choice to choose how to use the licenses, the contract would be frustrated and instantly terminated. The contract was not frustrated as he could have used a vessel which is licensed. For frustration to be carried out, the occurrence of the frustrating event must not have been reasonably foreseeable by the parties involved.[327] It should be an external event or a significant change in circumstances that is beyond the control of the parties.[328]

In the case of *Kingston v British Railways Board,*[329] the tribunal established that both the nature of the offense and the length of the sentence are important factors in determining the fairness of a dismissal. The Employment Appeal Tribunal (EAT) supported the Employment Tribunal's decision that it was fair to summarily dismiss an individual who received a three-month custodial sentence

[327] Ellis, L 'Frustration of Contracts in law: Getting out of Contract Obligations (Termination of Contracts)' (2020) *Hall Ellis Solicitors* < Frustration of Contract: Law, Discharge & Consequences | Solicitors London (hallellis.co.uk) > accessed 13 July 2023.
[328] *Ibid.*
[329] *Kingston v British Railways* 1984 IRLR 146.

for assaulting the police at their workplace.[330] Despite the lack of ordinary disciplinary procedures being followed, the dismissal was not deemed unfair.[331] The discharge was justified because the custodial sentence prevented the employee from attending work.[332]

This case shows that where it is impossible for the employee to perform their duties, the said employee would be dismissed automatically, and such dismissal would not be rendered unfair. The need not to follow normal dismissal procedures is upheld by the tribunal in *Bailey v BP Oil (Kent Refinery) Limited*[333] where it was held that, that while disciplinary procedures should be considered by employment tribunals and employers, their application in a specific case depends on the circumstances. This is the case where an employee was dismissed due to his conviction and the tribunal held that the ordinary disciplinary procedures could not be followed as the appellant was in prison.[334]

Under the principle of frustration, if an event occurs that is beyond the control of the parties and makes it impossible to fulfil the contract's obligations, the contract may be considered frustrated and automatically terminated. This occurs in exceptional circumstances where it becomes impossible for the employee or the employer to carry out their duties. The employer can dismiss the employee if it is impossible for the employees to carry out their duties, for example, if the employee loses a driving license while employed as a taxi driver.[335]

Not every unforeseen event can lead to contract frustration. The alteration in circumstances must be so significant that the parties did not anticipate such changes at the time of forming the contract.[336] The purpose of frustration is to achieve fairness and reasonableness between the parties by acknowledging that certain events can disrupt contract performance.[337] It serves as a remedy to avoid injustice that may arise from enforcing a contract literally after a substantial

[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*
[333] *Bailey v BP Oil (Kent Refinery) Limited* [1980] EWCA Civ J0520-1.
[334] *Ibid.*
[335] Buswell, G 'Employment law in the UK' (2023) *Epatica* < Labor and employment laws in the UK | Expatica > accessed 13 July 2023.
[336] Ellis, L 'Frustration of Contracts in law: Getting out of Contract Obligations (Termination of Contracts)' (2020) *Hall Ellis Solicitors* < Frustration of Contract: Law, Discharge & Consequences | Solicitors London (hallellis.co.uk) > accessed 13 July 2023.
[337] *Ibid.*

change in circumstances.[338]

4.3. SIMILARITIES OF UK AND SOUTH AFRICAN LABOUR LAW ON TERMINATION OF EMPLOYMENT CONTRACT

These countries each have primary legislations regulating employment relationships, in South Africa it is LRA and in UK it is Employments Rights Act.

Both countries protect employees against unfair labour practices.[339] Both South African and UK labour laws generally require employers and employees to give notice before terminating an employment contract. In South Africa the notice period is 30 days, in UK the notice periods may vary based on factors such as the length of service and the terms of the contract. These countries provide protections against unfair dismissal. Employers must have valid reasons for terminating an employee's contract, and dismissals must follow fair procedures in both jurisdictions.

Both countries have legislation that prohibits discriminatory termination of employment based on factors such as race, gender, religion, disability, or other protected characteristics.[340] Both legal systems recognize constructive dismissal, which occurs when an employee resigns due to the employer's actions or breach of contract, making continued employment untenable.

These countries regulate fixed-term contracts, ensuring that employers cannot misuse them to avoid providing job security to their employees. They both recognize that where an employment contract has been renewed more often, the employee will be considered to have been unfairly dismissed if the employer fails to renew the contract without a just reason. However, both legal systems allow for termination of employment for just cause, such as misconduct or poor performance, provided proper procedures are followed.

Both jurisdictions recognize the legal principle of termination of employment contract *ex lege*, which can apply to employment contracts under certain circumstances. Frustration or automatic termination in both countries occurs when an unforeseen event outside the control of the parties makes it impossible

[338] *Ibid*.
[339] Section 23(1) of The Constitution of the Republic and the Employment Rights Act of 1996.
[340] Employment Equity Act 55 of 1998; Equality Act of 2010.

or impractical to fulfil the contract's terms. In such cases, the contract may be automatically terminated, relieving both parties of further performance.

The following events can automatically terminate employment contract automatically in both countries: death of either party; incapacity (ill-health or physical) of the employee; war (rioting and civil unrest); convictions/incarcerations; Acts of God/nature; Change of laws regulating trades; and workplace destructions.[341] Both countries also recognize automatic termination due to retirement age, for as long as the employee is not unfairly discriminated based on age.

Incapacity due to ill-health or injury may terminate the contract of employment automatically in both countries, however, only if such incapacity is for a reasonable period of time.

In both these countries where an employee has been automatically discharged from their employment, they have the right to request reasons on their termination and the employer must submit such reasons to the employee within a reasonable time.

4.4. DIFFERENCES OF UK AND SOUTH AFRICAN LABOUR LAW ON TERMINATION OF EMPLOYMENT CONTRACT

South Africa has a legislation solely governing automatic termination of employment contracts. South Africa's automatic discharge of employees from their employment is governed by PSA, and employees like educators who are excused in the PSA are governed by legislations regulating their profession, for example, Educators Act.

UK does not have any legislation which regulates automatic termination of employment contract which only focuses on the employment relationships. They have Law Reform (Frustrated Contracts) Act which regulates general contracts, nevertheless, it is also applicable to the labour law sector.[342] It does not expressly state on which ground will an employee be deemed to have been automatically

[341] *Ellis, L 'Frustration of Contracts in law: Getting out of Contract Obligations (Termination of Contracts)' (2020) Hall Ellis Solicitors < Frustration of Contract: Law, Discharge & Consequences | Solicitors London (hallellis.co.uk) > accessed 17 July 2023; Cohen, T 'The legality of the automatic termination of contracts of employment' OBITER (2011) 670.*

[342] Law Reform (Frustrated Contracts) Act 1943.

terminated, as opposed to the PSA which states that employment will cease if an employee is absent from work for a period exceeding 30 days without permission from the head of department.

In South Africa, the act of imprisonment automatically justifies the termination of an employment contract, without the requirement to assess whether the incarceration incapacitates the employee for a minimum period of time. In this context, the mere fact of imprisonment is considered sufficient grounds for termination, regardless of the duration of the sentence or its impact on the employee's ability to perform their duties.[343]

In contrast, in the UK, the period of imprisonment is taken into careful consideration when dealing with employment termination due to incarceration. If the employee's imprisonment is only for a short period, the employer is expected to assess the circumstances and consider the possibility of reinstating the employee after their release. In cases where the sentence is temporary and does not significantly impede the employee's ability to fulfil their job responsibilities, the employer may decide to retain the employee in their position, provided it is reasonable to do so.

Where automatic termination of employment contract is invoked, it is always due to legislative provision or contractual clause. In UK, to frustrate the employment contract, most of the time the contract is through application to the tribunal or courts. In South Africa, after the employees have been discharged from their employment, the employee can be reinstated on the discretion of the employer. In UK, recommendations in which the tribunal can make when the employees are unfairly dismissed or wrongfully affected by the frustration of the contract are outlined in the Employment Rights Act.[344]

4.5. LESSONS THAT SOUTH AFRICA CAN LEARN FROM UK IN TERMS OF AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT

South African employees should consider taking into account individual circumstances of employees. The UK takes into account the duration of

[343] *Cohen, T 'The legality of the automatic termination of contracts of employment' OBITER (2011) 670.*
[344] Section 113 -116.

imprisonment and the impact it has on the employee's ability to fulfil their job responsibilities. South Africa could benefit from adopting a similar approach, considering individual circumstances and the actual impact of the event on the employment relationship before automatically terminating a contract. Not every event terminating the employment contract should be carried out in a permanent basis.

South Africa should into account factors such as the length of imprisonment and the possibility of reinstatement, the UK provides a balanced approach that considers the rights of both employers and employees. South Africa could strive to strike a similar balance, ensuring that automatic termination is not always the default response to certain events but is instead guided by fairness and reasonableness. South Africa could benefit from developing clear and transparent procedures to handle automatic termination situations, providing both parties with a clear understanding of their rights and responsibilities. South Africa can adopt the use of tribunals, commissioners or presiding officers to grant orders of reinstating employees instead of employees relying on the mercy of the employer.

4.6. LESSON (S) THAT UK CAN LEARN FROM SOUTH AFRICA IN TERMS OF AUTOMATIC TERMINATION OF EMPLOYMENT CONTRACT

The UK can refine its practices regarding automatic termination of employment contracts and create a more balanced, fair, and equitable environment for both employers and employees in these circumstances. UK can create a legislation that governs public sector employment in which the concept of automatic termination of employment contract may be outlined, instead of relying on the frustration of a contract which governs general contracts. It can cause confusions. Most of the frustrated employment contracts have to be confirmed by the courts before they are carried out, simply because there are no clear guidelines.

4.8. CONCLUDING REMARKS

The two countries were compared as UK influenced and inspired the promulgation of the LRA by its ERA. As much as they do not have similar economic standing, the UK labour system has largely impacted the South African labour system. These countries recognizes that there are instances or events which can lead the employment contract to terminate automatically without

constituting unfair dismissal. Such circumstances are not due to the act of the employer and are unpredicted when concluding the employment contract. The two countries deal differently with automatic termination of employment contract, in the motherland it happens automatically due to the public sector employment governing legislation or the contractual clauses, in UK in most cases, frustration happens automatically but gets to be confirmed by the tribunal or the court.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. CONCLUSION

The LRA confers each and every employee the entitlement to be protected from unfair dismissal and unfair labour practices.[345] The common law remains applicable where the codified labour system fails to govern relationship between the employer and the employee.[346]

It became clear from the judicial precedents in various cases that automatic termination of employment contract is legal and valid, its constitutional validity cannot be in question. The only issue lingering is the fairness in application of automatic termination of employment contract. In other situation such as death, retirement age, uncoerced resignation and supervening impossibility of performance, the fairness is not questionable.

The discretion of employers on whether to reinstate the employees or not, and the concept that employees may be re-employed, however, employee choosing whether in the same position or a different one, can cast aspersions on automatic termination of employment contract. It can make those on the negative side of the employer to question the principle of equality before the law and the right to fair labour practices as embodied in the Constitution.[347]

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.[348]

Automatic termination of employment contract is valid, applicable and constitutional for as long the employer carried it out in an effective manner that does not impede on the right to just administrative action. 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, section 17 of PSA should be invoked

[345] Section 185(a) and Section 185(b) Act 66 of 1995.
[346] Cohen, T "The Legality of the Automatic Termination of Contracts of Employment: Notes" (2011) 32 *Obiter* 677.
[347] Section 9 and 23 of the Constitution.
[348] Ndezendze, K, 'Automatic termination clauses in employment contracts', (2019) *NMU* 54.

in an unbiased manner.[349]

The maxim that says "the law is not an ass" which was affirmed by Mogoeng Mogoeng CJ must be borne in mind when dealing with automatic terminations of employment contract. Mogoeng Mogoeng CJ 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."[350]

5.2. RECOMMENDATIONS

As the TES employees who earn less than the specified threshold outlined in the BCEA are deemed to be the employee of the TES client (the actual employer), their employment fixed-term contracts should be renewed every time the new TES provider is appointed for as long as the new TES provider will provide the same work or services in which the skills of the same employee (s) will be required. Should the new TES provider employ new employees to provide the same services of the old TES provider and not renew the contract old the employees who have been rendering their services, the actual employer should be charged with misconduct due to unfair labour practices and unfair dismissal. TES employees' expectation for their contract to be renewed must be made to exist automatically and when a new TES provider is appointed, the salary should remain the same or be upsized. The reduction of salary should be made equivalent to amounting to constructive dismissal.

The PSA and the Defence Act provides instances under which the employee shall be considered as having been terminated from their official duties, however, they do not have automatic re-employment clauses. The re-employment of employees is places on the discretion or mercy of the employer, the employer can even

[349] Act 76 of 1998; 103 of 1994; Act 101 of 1994.
[350] *Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC) par 40.

choose where to place the employee should they reinstate him or her. The legislations should be amended to include clauses of automatic re-employment, situations in which the section 14 and 17, section 14 of the Employment of Educators Act, and section 59 of the Defence Act will not be applicable. The legislations must also include orders or remedies the commissioner, tribunal or the courts may order in cases where the automatic termination of employment contract disputes are presented before them.

The principle of *Audi Alteram Partem* should be considered in exceptional circumstances, especially where the employee did not dissert into the private sector, to test the fairness of the application of automatic termination. This will assist in ensuring that employees who had just reason to abscond work without the employer's permission are not discharged unfairly, for example, in the cases of serious ill-health.

In the cases of temporary incapacity, for example, incapacity due to ill-health or physical injury, if the incapacity is temporary, instead of the employees having to be terminated due to impossibility of performance, the employees should be replaced with temporary workers until it is possible for them to return back to work, or have their contract being suspended for such a period of time instead of invoking irreversible conduct, automatic termination.

Where the contracts of employment terminate due to supervening impossibility of performance, for example, in the case war or severe riot. Once the employer rises and establishes himself, the employees whose contracts have been terminated due to impossibility of performance should be given first preference and be reinstated in their positions. Their employment contract should be deemed to have been suspended for the duration of such supervening act.

BIBLIOGRAPHY

Books

Du Plessis, Fouché and Van Wyk, 'Practical Guide to Labour Law' (5th ed, 2004).

Du Toit, D, *et al Labour Relations Law: A Comprehensive Guide* (6th ed, LexisNexis 2015).

Grogan, J *Collective Labour Law* (3rd ed, JUTA 2019).

Grogan, J *Employment Rights* (3rd ed, JUTA 2019).

Grogan, J *Workplace law* (13th ed, JUTA 2020).

Landis, H & Grosset, L *Employment and the Law: A Practical Guide for the Workplace* (2nd ed, JUTA 2019).

LEAD, *Labour dispute resolution* (LSSA 2023).

Servais, J *International Labour Law* (Kluwer Law International 2009).

Van Niekerk, A *et al Law@Work* (5th ed, LexisNexis 2015).

Journal articles

Benjamin, P "The Purpose and Function of Labour Law", (2001) 25 *South African Journal of Labour Relations* pp. 5-22.

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

Cohen T, 'The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships' (2014) 35 *ILJ* 2608.

Cohen, T, 'Termination of Employment Contracts by Operation of Law – Bypassing the Unfair Dismissal Provisions of the Labour Relations Act 2006 (17) *Stell LR* 91.

Cohen, T, 'The legality of the automatic termination of contracts of employment: Notes' (2011) *Obiter* 670.

Cohen, T, Moodley, T 'Achieving "Decent Work" in South Africa?', (2012) 25 (2) *PELJ* 319-344.

Gericke SB, '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) 11 *PELJ* 105.

McMullen, J "Frustration of the Contract of Employment and Statutory Labour Law." (1986) 49*The Modern Law Review* 6.

Smit, P, Van Eck, BPS 'International Perspective on South Africa's Unfair Labour Law' (2010) 43 (1) *CILSA* 66.

Tshoose, C & Tsweledi, B 'A critique of protection afforded to non-standard workers in a temporary employment services context in South Africa', (2015) 18 *Law, Democracy and Development.*

Internet Sources

Buswell, G 'Employment law in the UK' (2023) *Epatica* < Labor and employment laws in the UK | Expatica > accessed 13 July 2023.

CCMA & BUSA, 'Ending employment by common law (Part 1)' (2028) < Ending employment in terms of the common law (Part 1) – SME Labour Support by CCMA and Busa > accessed 20 May 2023.

Ellis, L 'Frustration of Contracts in law: Getting out of Contract Obligations (Termination of Contracts)' (2020) *Hall Ellis Solicitors* < Frustration of Contract: Law, Discharge & Consequences | Solicitors London (hallellis.co.uk) > accessed 13 July 2023.

Erasmus, J, 'Deemed dismissals in South African Labour Law' (2022) *Consolidated Employers Organisation.* < https://ceosa.org.za/deemed-dismissals-in-south-african-labour-law/ > accessed 30 March 2023.

Heintz, J "The Purpose of Labour Law: Economic Growth and Social Justice", (2015) *International Labour Rights Forum*, < https://laborrights.org/sites/default/files/publications-and-resources/ILRF_Labor_Law_Report_Web.pdf > accessed 29 April 2023.

Rathinam, K, 'Automatic termination clauses in a fixed-term contract – What employers should consider prior to relying on automatic termination clauses' (2020) *Consolidated Employers Organisation.* < *Automatic termination clauses in a*

fixed-term contract – What employers should consider prior to relying on automatic termination clauses – Consolidated Employers Organisation (ceosa.org.za) > accessed 18 May 2023.

RSA Decent Work Country Programme 2010 to 2014 < South Africa Decent Work Country Programme (ilo.org) > accessed 01 May 2023.

Thesis and Dissertations

Ndezendze, K, 'Automatic termination clauses in employment contracts', (2019) *NMU.*

Nel, DI 'The validity of automatic termination clauses in employment contracts", (2015) *UP.*