

**The validity of automatic termination clauses in  
employment contracts**

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## **Abstract**

This study aims to establish the validity of automatic termination clauses in employment contracts. An automatic termination clause in an employment contract is a mechanism that has the effect that the expiry of an employment contract cannot constitute a dismissal.

In terms of the common law a fixed term contract of employment is terminated automatically as soon as the agreed terms have been reached and it therefore does not constitute a dismissal. The common law therefore created a gap for the exploitation of employees in that the employer can keep the employee on a series of fixed term contracts, which is not in line with the aims of the LRA to create job security.

Section 186(1) of the LRA defines a dismissal as an employer who terminated an employment contract with or without notice and an employee who reasonably expected the employer to renew a fixed term contract of employment on equal or comparable terms, and the employer renewed the contract on less favourable terms, or did not renew the contract at all. In terms of section 185 of the LRA every employee has the right not to be unfairly dismissed. Section 23 of the Constitution affords everyone the fundamental right to fair labour practices. The question that arises in respect of these matters is whether automatic termination clauses fall foul of the Constitution and the LRA and whether they are invalid in terms of the LRA and Constitution.

In *Mahlamu v CCMA and Others* the validity of the automatic termination in an employment contract was challenged. The court noted that when an employee signs a contract with an automatic termination clause, the employee waives his right not to be unfairly dismissed in terms of the Constitution and the LRA. The court found that the rights conferred on the employee in terms of the LRA and Constitution are a matter of public interest and cannot be waived by the individual. Employment contracts with automatic termination clauses fall foul of the LRA and the Constitution, are against public policy and thus invalid. The Labour Court stated that a contractual

device that renders the termination of a contract something other than a dismissal is exactly the exploitation the LRA prohibits

This study aims to establish the validity of different automatic termination clauses in employment contracts, to discuss the interpretation of the LRA and the Constitution regarding automatic termination clauses and to establish to what extent employees are protected against exploitation with regards to employment security in terms of the above-mentioned provisions in employment contracts. The investigation sought to establish whether employees can 'contract out' their right not to be unfairly dismissed, and whether these provisions fall within the ambit of the LRA, and more specifically the Constitution. The constitutionality of the current effect of the LRA on employment contracts with automatic termination clauses will be scrutinised. In conclusion the study will discuss the proposed amendments to the LRA and the possible effects should these amendments be enacted.

The Amendment Bill, if enacted, will prove the contract of employment with the automatic termination clause to be invalid where the employer cannot justify the reason for the temporary employment. The Amendment Bill will furthermore provide for the extensive protection of the rights of the temporary and fixed-term employees. It is clear that the automatic termination clause in an employment contract which is not based on operational reasons falls foul of the Constitution and LRA.

## OPSOMMING

Die studie het ten doel om die geldigheid van outomatiese opseggingsklousules in indiensnemingskontrakte te ondersoek. 'n Outomatiese opseggingsklousule in 'n indiensnemingskontrak is 'n meganisme wat veroorsaak dat die verstrykingsdatum van 'n kontrak nie as ontslag gereken kan word nie.

Volgens gemene reg verstryk 'n vaste termyn indiensnemingskontrak outomaties sodra die onderhandelde voorwaardes bereik is en dit kan daarom nie beskou word as ontslag nie. Die gemene reg het dus daarmee 'n skuiwergat geskep vir die uitbuiting van werknemers omdat dit die werkgever in staat stel om die werknemer aan te hou met 'n reeks vaste termyn indiensnemingskontrakte. Dit is nie in lyn met die oorspronklike bedoeling van die Arbeidsverhoudingewet 66 van 1995 om werksekerheid te bevorder nie.

Deel 186(1) van die Arbeidsverhoudingewet 66 van 1995 definieer ontslag as 'n werkgever wat 'n dienskontrak termineer, met of sonder kennisgewing, of 'n werknemer wat redelikerwys verwag het dat die werkgever die vaste termyn indiensnemingskontrak op gelyke voorwaardes sou hernu, en die werkgever hernu die kontrak op minder gunstige voorwaardes, of hernu dit glad nie. Volgens gedeelte 185 van die Arbeidsverhoudingewet het elke werknemer die reg om nie onregmatige ontslaan te word nie. Gedeelte 23 van die Grondwet gee aan almal die fundamentele reg tot regverdige dienspraktyke. Die vraag wat hieruit voortspruit is of outomatiese opseggingsklousules buite die Grondwet en die Arbeidsverhoudingewet val, en of dit ongeldig is in terme van die Arbeidsverhoudingewet en die Grondwet.

In *Mahlamu v CCMA en Andere* word die geldigheid van outomatiese opsegging van 'n dienskontrak aangeveg. Die hof het opgemerk dat wanneer 'n werknemer 'n kontrak met 'n outomatiese diensopseggingsklousule onderteken, die werknemer afstand doen van sy reg om nie onregmatig ontslaan te word nie soos bepaal deur die Grondwet en die Arbeidsverhoudingewet. Die hof het bevind dat die regte wat aan die werknemer toegeken word volgens die Arbeidsverhoudingewet en die Grondwet 'n kwessie van openbare belang is en nie deur 'n individu vervreem kan word nie. Indiensnemingskontrakte met outomatiese opseggingsklousules val buite

die Arbeidsverhoudingewet en die Grondwet, druis in teen openbare belang en is daarom ongeldig. Die Arbeidshof het gestel dat 'n kontraktuele instrument wat die opsegging van 'n kontrak anders maak as 'n ontslag is presies die soort uitbuiting wat die Arbeidsverhoudingewet probeer verhoed.

Die studie poog om die geldigheid van verskillende outomatiese opseggingsklousules in indiensenemingskontrakte te ondersoek, om die interpretasie van die Arbeidsverhoudingewet en die Grondwet rakende outomatiese opseggingsklousules te bespreek en om vas te stel tot watter mate werknemers beskerm is teen uitbuiting met betrekking tot die bogenoemde bepalings in indiensenemingskontrakte. Die ondersoek het ten doel om vas te stel of werknemers hulle reg om nie onregmatig ontslaan te word nie kan 'uitkontrakkeer', en of hierdie bepalings buite die rykwydte van die Arbeidsverhoudingewet en die Grondwet val. Die grondwetlikheid van die huidige effek van die Arbeidsverhoudingewet op indiensenemingskontrakte met outomatiese opseggingsklousules word onder die loep geneem. Ten slotte bespreek die studie die voorgestelde veranderinge aan die Arbeidsverhoudingewet en die moontlike gevolge wat hierdie veranderinge kan hê indien dit aanvaar word.

Die Wysigingswet, indien aanvaar, sal die indiensenemingskontrak met 'n outomatiese opseggingsklousule ongeldig maak. Die wet sal verder voorsiening maak vir uitgebreide beskerming van die regte van die tydelike en vaste termyn werknemers. Dit is duidelik dat die outomatiese opseggingsklousule in indiensenemingskontrakte buite die bestek van die Grondwet en die Arbeidsverhoudingewet val.

## List of abbreviations

Amendment Bill	<i>Labour Relations Amendment Bill, 2012</i>
BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CCMA	Commission for Conciliation, Mediation and Arbitration
Constitution	<i>Constitution of the Republic of South Africa, 1996</i>
EEA	<i>Employment Equity Act 55 of 1998</i>
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	<i>Labour Relations Act 66 of 1995</i>
Public Service Act	<i>Public Service Act 103 of 1994</i>
SCA	Supreme Court of Appeal

## 1 Introduction and problem statement

An automatic termination clause in an employment contract is a termination mechanism similar to that of for example a fixed term contract. These are for instance used in cases of project contracts of labour brokers that specify that if the client terminates the services, the contract terminates; contractors on mines that limit the duration of the employment contract to the duration of their contract with the mine; certain clauses in the public sector e.g. if the employee is absent for longer than 5 days the contract terminates.<sup>1</sup> The automatic termination clause, it seems, can be applied in circumstances where a client no longer needs the services of a specific employer's employees, as is the case with labour brokers. Fixed term contracts can be applied, *inter alia*, to a specified period or until the occurrence of a future event or until the end of a specified assignment.<sup>2</sup> When one of the above-mentioned events occurs, the contract is automatically terminated.<sup>3</sup> The employee can also be employed on a maximum duration<sup>4</sup> contract, which is also automatically terminated.<sup>5</sup>

In terms of the common law a fixed term contract of employment is terminated automatically as soon as the agreed terms have been reached.<sup>6</sup> When a fixed term contract of employment terminates, it does not constitute a dismissal.<sup>7</sup> A common law fixed-term contract cannot be terminated before its termination date.<sup>8</sup> In terms of the common law fixed term contracts of employment do not provide for the protection of employees, consequently placing them in a compromising position. The common law therefore created a gap for the exploitation of employees in that the employer can keep the employee on a series of fixed term contracts.

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1 *Public Service Act* 103 of 1994, section 17(5)(a) states that an officer, other than a member of the services or an educator or a member of the Agency or the Service, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

2 *Grogan Workplace Law* 41.

3 *Grogan Workplace Law* 149.

4 A maximum duration contract can be defined as a fixed-term contract that may be terminated before the agreed termination date.

5 *Grogan Workplace Law* 41.

6 *Grogan Workplace Law* 149.

7 *Grogan Workplace Law* 150.

8 *Grogan Workplace Law* 149-150.

This is not in line with the aims of The *Labour Relations Act* 66 of 1995 (herein after referred to as the LRA)<sup>9</sup> and the *Constitution of the Republic of South Africa*, 1996 (herein after referred to as the Constitution)<sup>10</sup> aims to fill this gap by creating job security.<sup>11</sup> The LRA does not provide for the extensive protection of the employee either, as the labour broker and employers who make use of fixed term contracts can easily circumvent the LRA in terms of temporary employment contracts, relying on automatic termination provisions. The circumvention is found in the fact that the employee does not have job security, and in most circumstances do not receive the same benefits as a permanent employee.

Where an employee alleges that a dismissal took place, the burden<sup>12</sup> is on the employee to prove the existence of a dismissal in terms of section 192(1) of the LRA.<sup>13</sup> Only when the employee has proven the existence of a dismissal, the employer will have to prove that the dismissal was fair.<sup>14</sup> Section 186(1) of the LRA defines a dismissal as an employer who terminated an employment contract with or without notice<sup>15</sup> and an employee who reasonably expected the employer to renew a fixed term contract of employment on equal or comparable terms, and the employer renewed the contract on less favourable terms, or did not renew the contract at all.<sup>16</sup> In terms of the LRA every employee has the right not to be unfairly dismissed.<sup>17</sup> The LRA aims to prevent employers from exploiting employees by keeping them on fixed-term contracts indeterminately and terminating the contract without substantive reasons or without following fair procedures once they decide not to continue the relationship.<sup>18</sup> It should be noted that the LRA has not been completely unsuccessful in this regard. The fixed-term contract cannot be terminated before the termination date without showing good cause.<sup>19</sup>

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9 S 185 of the LRA ensures every employee the right not to be unfairly dismissed.

10 S 23 of the Constitution provides that everyone is entitled to fair labour practices.

11 Grogan *Workplace Law* 149-150.

12 Grogan *Workplace Law* 150.

13 S 192 of the LRA states that the burden of proving that the termination of employment constitutes a dismissal is on the employee and that if the existence of a dismissal is proven, the burden shifts to the employer to prove that the dismissal was fair.

14 S 192(1) of the LRA.

15 S 186(1)(a) of the LRA.

16 S 186(1)(b) of the LRA.

17 S 185 of the LRA.

18 Grogan *Workplace Law* 149-150.

19 Grogan *Workplace Law* 41.

Labour brokers also play a significant role in the debate on automatic termination contracts.<sup>20</sup> In terms of automatic termination contracts, employees "contract out" their rights in terms of the Constitution and the LRA, i.e. the right to fair labour practices and the right not to be unfairly dismissed. It should be determined whether the above-mentioned rights are placed on the individual or the public as a whole. Should these rights belong to the public as a whole, would the contracting out of the above-mentioned right be against public policy?

In *Mahlamu v CCMA and Others*<sup>21</sup> the Labour Court approached the validity of automatic termination clauses contained in employment contracts with reference to the LRA. In the Commission for Conciliation, Arbitration and Mediation (herein after referred to as the CCMA) the Commissioner dismissed the applicant's claim as the applicant did not prove the existence of a dismissal in terms of section 192<sup>22</sup> of the LRA. A dismissal cannot, in most circumstances, exist where an automatic termination clause is present in the employment contract; the contract of employment merely ends by the operation of law. The LRA attempts to fill this gap by affording more protection to employees employed under these conditions.

Section 23 of the Constitution affords everyone the fundamental right to fair labour practices. The question that arises with respect to these matters is whether automatic termination clauses fall foul of the Constitution and the LRA and whether they are invalid in terms of these laws. The Labour Court stated that a contractual device that renders the termination of a contract something other than a dismissal is exactly the exploitation the LRA prohibits.<sup>23</sup> The court referred to *Sindane v Prestige Cleaning Services*<sup>24</sup> where the Labour Court stated that where an employment contract was terminated with no fault to the employer, as is the case of a fixed term contract where a specified event occurred, it could not be deemed a dismissal, as it does not fall within the ambit of section 186 of the LRA. The court also referred to *South African Post Office v Mampeule*<sup>25</sup> where it was found that an automatic

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20 S 198 of the LRA.

21 [2011] 4 BLLR 381 (LC).

22 Where the employee does not prove the existence of a dismissal, the employer does not have to prove that there was substantive reason and fair procedure followed with the termination.

23 *Mahlamu v CCMA and Others* [2011] 4 BLLR 381 (LC).

24 [2009] 12 BLLR 1249 (LC).

25 (2009) 30 ILJ 664 (LC).

termination clause constituted an impermissible contracting out of the protection afforded to employees in terms of the LRA. The proper interpretation the LRA does not permit the contracting out of the right not to be unfairly dismissed.

The above-mentioned legislation and case law clearly illustrates the compromising position of the employee and the uncertainty regarding the rights and the protection of employees employed in terms of automatic termination contracts. There is a clear contradiction of principle in the case law regarding automatic termination clauses as discussed below. This study will attempt to expose the validity of an automatic termination clause in a contract of employment, as well as the validity of the automatic termination of a fixed-term contract.

This study aims to investigate the interpretation of the LRA and the Constitution regarding different automatic termination clauses to establish to what extent employees are protected against exploitation in terms of the above-mentioned provisions in employment contracts. As part of such an endeavour the study will attempt to interpret other labour legislation<sup>26</sup> with reference to the validity of the automatic termination clause in the contract of employment. The investigation seeks to establish whether employees can 'contract out' their right not to be unfairly dismissed, as there is still some uncertainty regarding this matter, and whether these provisions fall within the ambit of the LRA and more specifically the Constitution. Case law with different views regarding automatic termination clauses, as well as case law regarding different circumstances will be discussed. In conclusion the study will discuss the proposed amendments to the LRA and the possible effects should these amendments be enacted.<sup>27</sup>

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26 EEA and BCEA.

27 The *Labour Relations Amendment Bill* (hereinafter the *Amendment Bill*).

## 2 Employment contracts

Grogan J<sup>28</sup> defines the employment contract as;

an agreement between two legal personae (parties) in terms of which one the parties (the employee) undertakes to place his or her personal services at the disposal of the other party (the employer) for an indefinite or determined period in return for a fixed or ascertainable remuneration, and which entitles the employer to define the employee's duties and to control the manner in which the employee discharges them.

It is of vital importance that the employer and employee agree on the nature of the contract to ensure that no disputes arise from any confusion.<sup>29</sup> Among others it is important for an employer and employee to agree whether a contract is a fixed-term contract or a permanent contract.

Indefinite employment contracts, temporary employment contracts and the right to fair dealing will be discussed in this chapter.

### 2.1 *Permanent employment contracts*

Indefinite contracts of employment are the most common type of employment contracts. In terms of an indefinite employment contract the employee engages in an employment relationship with an employer on a permanent basis. There is no termination date determined as in the case of a fixed term contract. There is also no expectation or agreement that the contract will end.<sup>30</sup>

The employment relationship will only end<sup>31</sup> when the employee dies, resigns, retires, is dismissed as a result of operational requirements or dismissed as a result of misconduct, incapacity etc.<sup>32</sup> Employees employed on indefinite contracts are entirely protected in terms of labour legislation and also enjoy the full benefits of being permanently employed, including, if agreed on, pension and medical benefits.

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28 Grogan *Workplace Law* 29.

29 Anon 2012 <http://www.labourguide.co.za/contracts-of-employment/contracts-of-employment-72>.

30 Grogan *Workplace Law* 42.

31 Automatically terminate.

32 Grogan *Workplace Law* 42.

## **2.2 Temporary employment contracts**

It has been argued that temporary employment contracts are used by employers to circumvent the labour legislation in South Africa, as the employee is in most circumstances not entitled to the same benefits as an employee employed on an indefinite contract of employment. The employee also does not have job security as his or her employment contract, in most circumstances, will definitely come to an end in the future. The main characteristic of these contracts are that they are impermanent and for a specific time of service or until the occurrence of a future event. These contracts can be automatic termination contracts, fixed-term contracts and maximum duration contracts.<sup>33</sup>

The main element of these types of contracts is that the employer and employee agree that the contract will end as soon as the services of the employee are no longer needed.<sup>34</sup> The employee should not have the anticipation that the contract will endure after his or her services are no longer required.<sup>35</sup> Automatic termination contracts are typically used by labour brokers. These contracts usually end when the client of the labour broker no longer needs the services of the employee or ends its contract with the labour broker.

A fixed-term contract is temporary contract for a specific period of time or for a specific project and terminates when the agreed date is reached or the specified event occurs, thus the contract terminates automatically.<sup>36</sup>

The LRA provides for when the termination of a fixed term contract will constitute a dismissal as discussed in Chapter 3 below. Employers increasingly use automatic termination provisions in employment contracts to terminate employment without the possible responsibility for an unfair dismissal dispute being referred.<sup>37</sup> The Labour Courts and the legislature are aware of these contractual mechanisms that lead to

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33 Maximum duration contracts are similar to fixed-term contracts, but they may be terminated before the agreed date.

34 Grogan *Dismissal* 30.

35 Grogan *Dismissal* 30.

36 Grogan *Dismissal* 188.

37 Le Roux 2010 *Contemporary Labour Law* 101.

the contracting out of the right not to be unfairly dismissed, as discussed in Chapter 3 below.<sup>38</sup>

In *Numsa obo Majoro and Others v Purple Moss 1309 t/a Kopano Thermal Insulation*<sup>39</sup> the following decision was made:

...it is not right for employment contracts to contain agreements as to the end of the contract, unless the end date is specified in the contract. She argues this reduces the employment security of the employee, who due to the uncertainty as to the end date of employment is unable to manage his/her financial affairs properly, or to know whether to seek other employment or not. The arbitrator deemed the limited duration clauses in the employees' contracts to be invalid.

### **2.3 Development of the common law**

The right to fair dealing can be discussed in terms of the common law, section 23 of the Constitution, the LRA and decisions reached by the courts. The right to fair dealing can be defined as the right of the employee to be treated fairly by the employer and the obligation of the employer to always deal fairly with the employee. It can also include the obligation of the employee to deal fairly with the employer, thus creating a mutual obligation to fair dealing. This notion is derived from the right to fair labour practices in the *Bill of Rights*.

When establishing the validity of automatic termination clauses in employment contracts it is imperative to research the development of the common law by our courts and the Constitution with regards to the right to fair dealing. The right to fair dealing can be derived from the contract of employment. The courts have used the contract of employment to establish whether unfair dealing was present in each case as discussed below. The development of the common law relating to fair dealing was a result of the application of section 39 of the Constitution, which states that when developing the common law, every court must promote the spirit, purport and

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38 S 185 of the LRA and s 23 of the Constitution.  
39 (2008) 4 BALR 342.

objections of the Bill of Rights.<sup>40</sup> The Bill of Rights does not deny the existence of the common law, as far as it is consistent with the Bill of Rights.<sup>41</sup>

In *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA) (hereafter the *Denel*-case) introduces that even the *Interim Constitution* section 27, played a role in developing the common law in terms of employment contracts on the basis of fair procedure. This obliges the employer to act fairly with his employees. In *Mahumani v Member of the Executive Council: Finance, Economic Affairs & Tourism, Limpopo* (2010) 31 ILJ 2009 (LC) (hereafter the *Mahumani*-case) it was emphasised that as a result of the development of the common law, every employee now has the right to claim for breaches of the employment contract. The common law must provide for a right to procedural fairness according to *Old Mutual Life Insurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) (hereafter the *Gumbi* case) and *Boxer Superstores Mathatha & Another v Mbenya* 2007 8 BLLR 693 (SCA) (hereafter the *Boxer*-case.<sup>42</sup>).

The employee has the remedies in the LRA and the remedies on the basis of breach of contract at his disposal.<sup>43</sup> In *Murray v Minister of Defence* 2008 6 BLLR 513 (SCA) (hereafter the *Murray*-case) the court found the right to fair labour practices, section 23 of the Constitution, had to be understood through the development of the common law.<sup>44</sup> The right to fair dealing reflects a balance in the employment relationship, as it is not only the obligation of the employer to ensure fairness. In *Maritime Safety Authority v McKenzie* 2010 5 BLLR 488 (SCA) (hereafter *Maritime*-case) the court found that it was not necessary to develop the common law in order to alter the contractual relationship of employment because the LRA provides for remedies in this regard.<sup>45</sup> I would argue that this is the correct approach since the common law as yet requires that the provisions of a contract of employment should not be *contra boni mori*.

The Constitution provides that courts must apply and develop the common law, as provided in section 3(a). The common law is applicable as far as legislation does not

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40 S 39(2) of the Constitution.

41 S 39(3) of the Constitution.

42 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 35.

43 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 35.

44 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 36.

45 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 37.

regulate a specific problem. The Constitution further provides for everyone's right to fair labour practices.<sup>46</sup> With regard to the right to fair dealing, the common law is still in use and has been developed by the constitutional jurisprudence in South Africa. Benjamin<sup>47</sup> states that:

the SCA has relied on the constitutional protection against unfair labour practices dealing with employees to develop the common law of employment to incorporate obligations of fair treatment into all contracts of employment.

In the *Murray*-case the court highlighted the importance of the impact of the Constitution on the common law; and that the common law obligates the employer to fair dealing at all times.<sup>48</sup> Benjamin<sup>49</sup> continues on the employer's obligation to fair dealing and the right of the employee to dispute the procedures of the employer. Employer's actions should be procedurally and substantively fair.

Du Toit<sup>50</sup> stated that it is not always necessary to develop common law remedies where the LRA provide for remedies, as this can only create confusion. He criticises the courts in developing the common law in the *Gumbi*, *Boxer* and *Murray* cases, as this led to the confusion.

In the *Boxer*-case the appellant referred the case to the Supreme Court of Appeal to appeal the decision of the High Court dismissing the objection to the court's jurisdiction. The respondent referred her dispute to the High Court, outside the time limit, to set aside her alleged unfair dismissal under the LRA. The respondent claimed her dismissal was unlawful. She wanted the dismissal to be set aside, back-pay and costs. The appellant stated that the court did not have jurisdiction over this dispute. In the respondent's affidavit she stated that her dismissal was substantially and procedurally unfair; and that her dismissal was thus unlawful. The respondent also referred to section 9(1)<sup>51</sup> and section 84<sup>52</sup> of the Constitution. The respondent claimed that her pre-dismissal hearing was unlawful. It had to be determined whether

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46 S 23(1) of the Constitution.

47 Benjamin 2009 *ILJ* 757.

48 Para 5 of *Murray*-case.

49 Benjamin 2009 *ILJ* 759.

50 Du Toit 2010 *ILJ* 41-42.

51 The right to equal protection under the law.

52 The right to have a dispute resolved before a court.

the High Court had jurisdiction to resolve this dispute. In terms of the LRA the labour court has exclusive jurisdiction in all labour related disputes, subject to the Constitution, the Labour Appeal Court's jurisdiction and where the LRA provides otherwise.<sup>53</sup> The High Court's jurisdiction will not be relieved just because the dispute falls within the sphere of employment relations. Where an employee claims that the dismissal was unlawful with any loss other than salary, she can sue the High court for relief. The common law on contract of employment has been developed through the Constitution to include the right to a pre-dismissal hearing.<sup>54</sup> The impact of the above was that every employee had the common law contractual right not to be unfairly dismissed, but also the right to a pre-dismissal hearing. The main complaint of the respondent was that her pre-dismissal hearing procedures were not fair; with reference to this the court referred to the *Old Mutual Life Insurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA) and *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA) cases and stated that it would be irrational that an employee can claim for damages for a breach of the common law, but cannot claim a declarator. The court made its judgement that the appeal should fail; the employee may rely on the remedies in the LRA and claim for damages relating to the contract breach of common law employment. This obliges the employer to act fairly with its employees. In this regard Olivier<sup>55</sup> stated that the employee can rely on the remedies provided in the LRA or the contractual remedies of the common law on employment contracts.

In the *Murray*-case the court upheld the appellant's appeal after a constructive dismissal. With regard to *Murray*, Olivier<sup>56</sup> argues that the right to fair labour practices had to be understood through the development of the common law. There is a duty on both the parties to be fair in the employment relationship.

In the *Gumbi*-case the employee in this dispute was dismissed due to his misconduct. The employee did not refute that the appellant had due cause to dismiss him, but that the dismissal was procedurally unfair. The employee was given notice to attend a pre-dismissal hearing that he failed to attend; the appellant dismissed the employee. The employee then launched a dispute that the dismissal was

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53 S 157(1) of the LRA.

54 *Old Mutual Life Insurance Co SA Ltd v Gumbi* 2007 8 BLLR 699 (SCA).

55 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 35.

56 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 36.

procedurally unfair and that his right to be heard was infringed. He was reinstated. The pre-dismissal hearing was again instituted and the employee failed to return after a short break; a medical certificate was provided. The appellant dismissed the employee. The employee referred the dispute of a procedurally unfair dismissal to the court *a quo*, which found the dismissal to be procedurally unfair. The appeal court overturned the decision of the court *a quo*. The appellant then approached the Supreme Court of Appeal arguing that the employee infringed his right to a fair pre-dismissal hearing. In the common law, when an employee attempts to stop the contractual course of being fulfilled, it would be deemed to have been fulfilled. The court had to determine whether the dismissal was procedurally unfair. The court stated that the employee has a common law right to a pre-dismissal hearing. This common law right applies to the employment relationship between the parties. The procedures of a pre-dismissal hearing should always be fair under the common law. The right to a hearing is to be protected by the common law; to the extent that this does not infringe any right in the Constitution. Thus an employee cannot be dismissed due to his misconduct without the opportunity to refute the claims against him. It is also important to note that these rights are not absolute. While recognising the common law our law develops justice and fairness in labour law. Fairness must benefit both parties of the employment relationship; this includes the balance of conflicting interests of both parties. Where an employee does not use the opportunities given to be heard, the fairness of a dismissal cannot be challenged. Fair procedure should be included in the right to fair dealing to include the right to a hearing in terms of section 39 of the Constitution.<sup>57</sup> The court found that the dismissal of the employee was not procedurally unfair. In this case, the need to develop the common law relating to fair dealing is provided. Oliver<sup>58</sup> states that fair procedure should be implemented in the common law on the contract of employment to include the right to a fair hearing.

*Maritime Safety Authority v McKenzie* overturned these decisions and the effect is discussed below.

### 2.3.1 *Explicit terms and terms incorporated from policies*

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57 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 35.

58 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 35.

In the Denel-case the respondent, the employee, was summarily dismissed by the appellant. The respondent approached the Industrial Court, but abandoned the case. He then approached the Pretoria High Court for damages relating to the breach of contract. On appeal the court ordered that the respondent succeeded on merits for the claim to damages. The respondent did not dispute that the appellant had proper grounds for a summarily dismissal, he disputed the way in which the appellant dismissed him. The appellant introduced a disciplinary code that applied to the respondent. The terms in the employment contract of the disciplinary code were expressly incorporated. The disciplinary code was contractually effective. The disciplinary code expressly stated how disciplinary action had to be taken. It was a two part decision that had to be made. In the disciplinary hearing the respondent's employment was terminated. The steps as set out in the disciplinary code were not followed. The appellant argued that the way in which they handled the disciplinary code could be read in that way, that it was tacit in the disciplinary code. The court found that the disciplinary code could not be construed in that way, as terms were expressly set out. The court found that when a disciplinary code exists, the employee's could expect that a specific course would be followed, and not substituted with another course. Where a disciplinary code is agreed upon, it would be unfair dealing to substitute the course of disciplinary action with another. It would not constitute fair procedure. The court found in favour of the respondent. The Supreme Court of Appeal thus decided on a case relating to expressly incorporated terms found in a disciplinary code, on the basis of breach of contract of employment.<sup>59</sup> The employer did not follow its own disciplinary code.<sup>60</sup>

In *Gobindlal v Minister of Defence and Others* (2010) 31 ILJ 1099 (NGP) the right to be heard in reasonable time as part of the right to fair procedure as incorporated in section 23(1) of the Constitution. The right to be heard in reasonable time is an express term derived from the contract of employment. (See the *Mahumani*-case).

In the *Mahumani*-case the applicant, the employee was charged and acquitted for involvement in the theft of animals from the reserve he worked for. The respondent

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59 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 34.

60 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 53.

notified the applicant of disciplinary hearings on multiple occasions. These disciplinary hearings were moved time after time for a number of reasons because of the fault the respondent and applicant. The applicant sought relief from the court in terms of an interdict for the stay of the disciplinary hearing and his reinstatement. The applicant argued that his right to be tried within reasonable time had been infringed. The court will only intervene in cases where a 'grave injustice' will be the result. The court stated that the applicant had a common law right to a pre-dismissal hearing,<sup>61</sup> which included the right to reasonable time. The disciplinary code of the respondent also included time frames in which the proceedings had to be finalised. The applicant's main complaint was the delay in finalising the disciplinary hearing. The court concluded that the delay was on the part of the applicant and respondent.

### 2.3.2 *Tacit and tacit terms*

Tacit terms are terms that can be derived from the contract of employment between the parties, if it can be deemed that both parties would have agreed to the terms. This is part of fair dealing since the tacit terms can result in a balance between the parties. A balance between the parties is a part of the right to fair procedure. Implied terms are terms that are introduced into the contract by function of law as a characteristic of the contract. The parties are restricted in changing the term.<sup>62</sup>

In *Harper v Morgan Guarantee Trust Company of New York, Johannesburg and Another* 2004 (3) SA 253 (W) the employee approached the High Court on the claim of an unlawful termination of her contract. The employer did give the proper notice before the termination, but the employee argued that there was an infringement of an implied term in the contract of employment. The employee stated that the employment was terminated and infringed the implied term of trust and good faith between the parties. This did not succeed. The court ruled that this did not exclude the tacit term of fairness in the employment contract.<sup>63</sup>

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61 The *Gumbi* case 2.

62 Anon 2010 <http://www.labourman.co.za/articles/2010/08/19/making-law-end-line>.

63 Wanblad "Labour Litigation: A choice of forum & the quantification of damages v compensation" 9 -10.

In the *Maritime*-case the respondent was dismissed by the appellant. He claimed that the dismissal was unfair.<sup>64</sup> The respondent claimed that the employment contract had tacit terms that provided that he could not be unfairly dismissed or dismissed without just cause. The court had to establish whether tacit terms were present in the employment contract. A tacit term is a term incorporated into the employment contract through the common law. It was stated that the alleged tacit terms could be understood through the LRA or the development of the common law.<sup>65</sup> The court noted that it not acceptable that the common law rights can exist where rights derived from the LRA already exists, relating to the right not be unfairly dismissed. This means that there is no need for the development of the common law where the LRA already protects the employee against unfair dismissals. The court also stated that developing the common law where statutory rights already exist, will oust the limits set by the Constitution. Developing the common law in relation to unfair dismissal would give the employee remedies to claim for breach of contract, outside the remedies provided for in the LRA and the BCEA. This does not constitute fairness. The question was raised that what would the use of a statutory framework be if the employee can claim damages through the development of the common law, as well as the remedies provided for in legislation? The statutory limit on claims for unfair dismissal would disappear. The claims for damages with regard to fairness and dismissals should be limited in extent and application. The court stated that,<sup>66</sup>

While the Constitution guarantees to everyone ‘the right to fair labour practices’,<sup>67</sup> and also calls upon courts, when developing the common law, to ‘promote the spirit, purport and objects of the Bill of Rights’,<sup>68</sup> it does not follow that courts are thereby enjoined to develop the common law contract of employment by simply incorporating in it the constitutional guarantee. Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed.

The Constitution states that the common law should be developed as far as legislation does not provide for a situation,<sup>69</sup> thus developing the common law in the employment relationship relating to fair dealing would create a double law. The LRA

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64 Procedurally and substantively unfair.

65 S 39(2) of the Constitution.

66 *Maritime*-case, para 35.

67 Section 23 of the Constitution.

68 Section 39 of the Constitution.

69 S 8(3) of the Constitution.

explicitly provides for the right to fair dealing<sup>70</sup> and the right not to be unfairly dismissed; thus there is no need to develop the common law relating to fair dealing and as a result changing the employment relationship. The court referred to the *Gumbi*-case that stated the source of the right to a pre-dismissal hearing can be found in the development of the common law; this court was of the opinion that this statement did not constitute a new principle in law. The court dismissed the respondent's claim and upheld the appeal. Du Toit<sup>71</sup> confirms the court decision in the *Maritime*-case stating that there is not always a need to develop common law remedies where the LRA provides for remedies, as this causes uncertainty. He criticises the courts in developing the common law in the *Gumbi*, *Boxer* and *Murray* cases, as this led to the confusion.

In *De Lange v ABSA Makelaars (Endms) Bpk* (2010) 31 ILJ 885 (SCA) the employee relied on the existence of a tacit term in his contract of employment. The respondent argued that the appellant gave incorrect or incomplete advice to clients, which he did intentionally or negligently. In two separate cases, the appellant gave advice to clients that caused severe loss for both the clients. The respondent investigated the claims of the appellant's clients. The respondent never questioned the appellant, and he was not given the opportunity to state his case. After the investigations, it was concluded that the respondent was legally liable for the loss of the clients. The appellant was found guilty by the respondent. The court of first instance decided that the respondent was correct in concluding that it was not necessary to hear the appellant. The Supreme Court of Appeal stated that this was inaccurate. Olivier<sup>72</sup> refers to the right of the employee to a hearing before he was found liable to pay damages, in this specific case, as the result of a tacit term. The court had to decide whether a tacit term existed in the appellant's contract of employment, which entitled him to a hearing before the employer made decisions rendering the employee liable for damages the employer suffered. The court stated that the contract of employment had a tacit term that gave the appellant the right to be heard. The 'bystander test' had to be used. The court referred to *City of Cape Town (CMC Administration) v Bourbon-Leftley & another NNO* 2006 (3) SA 488 (SCA):

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70 S 23 of the Constitution.

71 Du Toit 2010 ILJ 41-42.

72 Olivier *Impact of the Constitution on Labour Law and Labour Relations* 37.

tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so<sup>73</sup>

The tacit term can only be imported into the contract, when it is evident that both parties would have agreed to it. When deciding whether the tacit term should be incorporated by the court, the express terms and circumstances play a role. The conduct of the parties can also be a deciding factor. The court decided that the tacit term had to be imported into the contract. The appeal succeeded.

## **2.4 Conclusion**

The right to fair dealing can be described as the right of the employee to be treated fairly by the employer. The right to fair dealing also includes the obligation of the employee to ensure fair dealing when working with the employer. The right to fair dealing creates a mutual obligation in the contract of employment. The right to fair dealing can be derived from the contract of employment, common law, the Constitution and in case law. The courts established the right to fair dealing through explicit, tacit and implied terms. Automatic termination clauses in employment contracts infringe the right to fair dealing, as the employee waives his rights in terms of the LRA and Constitution. The employee's rights are infringed as he cannot claim remedies as provided above in all circumstances.

Van Eck<sup>74</sup> states that:

Subsequent to the enactment of the Constitution, the Supreme Court of Appeal confirmed in a cluster of cases, starting with *Fedlife Insurance v Wolfaardt*,<sup>75</sup> and culminating in the *Gumbi*<sup>76</sup> and *Boxer Superstores*<sup>77</sup> cases, that the common law contract of employment was developed to include a right to procedural fairness. This development was deemed necessary due to the

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73 *De Lange v ABSA Makelaars (Endms) Bpk* (2010) 31 ILJ 885 (SCA) 13.

74 Van Eck "Interaction Between Different Areas of the Law and Engagement Between Academic Departments within the Faculty of Law" 7.

75 (2001) 22 ILJ 2407 (SCA).

76 *Old Mutual Life Assurance v Gumbi* [2007] 8 BLLR 699 (SCA).

77 *Boxer Superstores Mthatha v Mbenya* [2007] 8 BLLR 693 (SCA).

influence of the constitutional right to fair labour practices<sup>78</sup> on the common law contract of employment.

Automatic termination clauses in employment contracts are valid in so far they are not used to circumvent the LRA.

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78 S 23(1) of the Constitution provides that '[e]veryone has the right to fair labour practices.'

### **3 The Constitution, labour legislation and the validity of automatic termination clauses**

#### **3.1 The Constitution**

The Constitution provides for the protection of employees employed on employment contracts with automatic termination clauses. Section 2<sup>79</sup> of the Constitution states that:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Section 23 of the Constitution does not define fair labour practices, but it has been contended that it does include the right not to be unfairly dismissed.<sup>80</sup> Employees on fixed-term contracts are entitled to the same protection under the Constitution as employees employed on indefinite contracts of employment.<sup>81</sup> Gericke wrote that:

It is submitted that a positive duty is therefore placed on the employer in the context of the employment relationship to act within the parameters of the protection afforded by section 23(1). The constitutional right to fair labour practices, on the other hand, is as much afforded to the employer as to the employee within the meaning of 'everyone'. The employer is therefore rightfully entitled to conclude fixed-term contracts determined by an 'objective condition' such as the arrival of an agreed date, the completion of a specific task or the happening of a particular event.<sup>82</sup>

Thus in terms of the Constitution there can be no differentiations regarding protection in terms of section 23 between employees employed on automatic termination contracts and employees employed on permanent contracts of employment.

#### **3.2 LRA**

The *Labour Relations Act 27 of 1956* (herein after LRA 1956) made provisions for a general unfair labour practice jurisdiction of the Industrial Court and the non-renewal and creation of a reasonable expectation relating to fixed-term contracts was found

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79 Supremacy of the Constitution.

80 Gericke 2011 [www.nwu.ac.za/webfm\\_send/4639](http://www.nwu.ac.za/webfm_send/4639).

81 Gericke 2011 [www.nwu.ac.za/webfm\\_send/4639](http://www.nwu.ac.za/webfm_send/4639).

82 Gericke 2011 [www.nwu.ac.za/webfm\\_send/4639](http://www.nwu.ac.za/webfm_send/4639).

to be an unfair labour practice. In terms of the LRA 1956, these circumstances could constitute a dismissal.<sup>83</sup> In *MAWU and Another v A Mauchle (Pty) Ltd t/a Precision Tools*<sup>84</sup> it was confirmed that the non-renewal of a fixed-term contract and automatic termination could constitute a dismissal.

Section 185 of the LRA provides that everyone has the right not to be unfairly dismissed, which right cannot be waived by a contractual agreement.<sup>85</sup> In terms of section 186 of the LRA the legislature created the opportunity for employees employed on fixed-term contracts that were dismissed, to refer an unfair dismissal dispute.<sup>86</sup> Section 186 states that where an employee had a reasonable expectation that his or her contract would be renewed on the same or similar terms, and the employer does not renew or renews the contract on less favourable terms, the employee will be deemed dismissed.<sup>87</sup>

Section 186 of the LRA was enacted to prevent employers from exploiting employees by employing them on non-permanent contracts of employment and terminating the contracts when the employer deems fit, the employment contracts simply end by operation of law. The employer had no obligation in terms of these employees as in the case of permanent employees, with specific reference to job security, and that these employees end back in the pool of employment seekers.<sup>88</sup> In *Biggs v Rand Water*<sup>89</sup> it was held that section 186 of the LRA changed the common law principal that a fixed-term contract automatically terminates at the expiry date, now the employer will not be able to rely on automatic termination at the end of all fixed-term contracts. The employee can rely on a reasonable expectation of renewal of his or her fixed-term contract in terms of the LRA.<sup>90</sup> In terms of section 186(1)(b) of the LRA, although the employment contract automatically terminates,

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83 Mischke 2006 *Contemporary Labour Law* 13.

84 (1980) 1 *ILJ* 227 (IC).

85 In *Mahlamu v CCMA and Others* [2011] 4 BLLR 381 (LC) the court found that a right in the LRA may not be waived, as the right is conferred on the public as a whole and not an individual. The contracting out of a right in terms of the LRA is against public policy.

86 Le Roux 2010 *Contemporary Labour Law* 101.

87 S 186(1)(b) of the LRA.

88 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

89 (2003) 24 *ILJ* 1957 (LC).

90 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

the employee has remedies if he or she can prove a dismissal based on reasonable expectation.<sup>91</sup> The determination of whether a dismissal exists is an objective test, whether the reasonable employee would have believed that his or her contract would be renewed.<sup>92</sup> In terms of the above-mentioned case, a reasonable expectation can exist where the employee expected the employer to renew the fixed-term contract and where the employer renewed the fixed term contract numerous times.<sup>93</sup>

Rheeder states that:

That a fixed long term contract has been renewed a number of times is not in itself indicative of the existence of a reasonable expectation of renewal; whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee. The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded or thereafter, and the motive for terminating the relationship has been cited as factors to be considered.<sup>94</sup>

In *Sindane v Prestige Cleaning Services*<sup>95</sup> the employee was employed with a labour broker, and when the client no longer required the services of the employee, the contract between the employee and the labour broker terminated automatically.<sup>96</sup> The Labour Court stated that the employee firstly had to prove that there was a dismissal in terms of section 186(1)(a). If the termination does not constitute a dismissal, the court does not have jurisdiction to adjudicate the matter. In this case the court found that the employer did not contribute to the termination of the contract of employment, and thus the termination did not constitute a dismissal.<sup>97</sup> The court then determined the validity of the automatic termination contract and found it to be valid in so far the employer does not contribute to the termination.<sup>98</sup>

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91 S 192 of the LRA.

92 Grogan *Workplace Law* 148-150.

93 Mischke 2006 *Contemporary Labour Law* 13.

94 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts> 2.

95 [2009] 12 BLLR 1249 (LC).

96 See Chapter 4 below.

97 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

98 The court referred to *SA Post Office Ltd v Mampeule* [2009] 8 BLLR 792 (LC).

In *Swanepoel v Department of Water Affairs and Forestry*<sup>99</sup> the employee's contract was renewed numerous times before the employer contended that the contract automatically terminated. The court stated that labour legislation was enforced in order to inhibit the employer to sidestep the aims of the LRA.<sup>100</sup>

To determine reasonableness, all factors are taken into consideration. The more times a fixed-term contract is renewed, the more it supports the expectancy in terms of section 186(1)(b) of the LRA.<sup>101</sup> The expectation belongs to the employee and should be reasonable, the interpretation thereof should also be reasonable.<sup>102</sup> The expectation cannot be unfounded, the employee's subjective belief that his or her contract will be renewed should be adjudicated with an objective test.<sup>103</sup>

In *King Sabata Dalindyebo Municipality v CCMA & Others*<sup>104</sup> the court found that where fixed-term contracts were renewed numerous times, the reason for their employment still existed and the employer was in the financial position to afford the services of the employees, a reasonable expectation existed.

In *SACTWU & Another v Cadema Industries (Pty) Ltd*<sup>105</sup> the employee was employed on a series of fixed-term contracts. When the contract terminated, the employee referred an unfair dismissal dispute. The employer argued that the employee's contract was terminated as a result of operational requirements, which were not proved. The court found that where the employee has proved a reasonable expectation of renewal, the employer should follow operational requirements procedures in order to effect the dismissal. The contract terminated automatically, but the employee proved that the termination constituted an unfair dismissal.

In terms of section 188 of the LRA a dismissal will be deemed unfair if the employer cannot prove that the dismissal was for fair reason and with fair procedure, with

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99 (2005] 12 BALR 1272 (GPSSBC).

100 Mischke 2006 *Contemporary Labour Law* 14.

101 Mischke 2006 *Contemporary Labour Law* 16.

102 Mischke 2006 *Contemporary Labour Law* 16.

103 Mischke 2006 *Contemporary Labour Law* 20.

104 (2005) 26 *ILJ* 474 (LC).

105 [2008] 8 *BLLR* 790 (LC).

reference to the Code of Good Conduct: Dismissal.<sup>106</sup> Section 192 of the LRA states that the burden of proof rests on the employee to prove that the termination of his or her contract of employment constitutes a dismissal and that the dismissal is unfair.<sup>107</sup> When the employee has proven the existence of a dismissal, the employer has to prove that the dismissal was fair.<sup>108</sup> Section 193 sets out the remedies for an unfair dismissal and the competencies of the Labour Court. Section 198 of the LRA sets out the terms and conditions of temporary employment services.

Schedule 8<sup>109</sup> of the LRA deals with dismissals by delineating what can constitute fair reasons<sup>110</sup> and the fair procedure.<sup>111</sup> If these two items are not adhered to, a dismissal will be deemed to be unfair.

### **3.3 EEA**

The EEA gives effect to the constitutional right to equality<sup>112</sup> and dignity.<sup>113</sup> It ensures that the employer does not unfairly discriminate against the employee employed on a contract with an automatic termination provision. Discrimination can be found in the vulnerability of an employee employed on a fixed-term contract relating to the differentiation regarding benefits, security, salary etc.<sup>114</sup> The employee employed on an automatic termination clause is in most circumstances left vulnerable as he or she does not have any employment security.

### **3.4 *International Labour Organisation Convention 158: Termination of Employment Convention, 1982***

Article 3 of the above Convention states that:

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106 Schedule 8 of the LRA.

107 S 192(1) of the LRA.

108 S 192(2) of the LRA.

109 Code of Good Practice: Dismissal.

110 Item 2 of Schedule 8.

111 Item 4 of Schedule 8.

112 S 9 of the Constitution.

113 S 1 of the Constitution.

114 Gericke 2011 [www.nwu.ac.za/webfm\\_send/4639](http://www.nwu.ac.za/webfm_send/4639).

Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from this Convention.

The main objective of the above-mentioned is to ensure that employers do not infringe the right to fair labour practices by employing an employee on numerous fixed-term contracts. The ILO aims to create employment security.

### **3.5 Amendment Bill**

Should the proposed changes envisaged in the Amendment Bill be enacted the law relating to the use of fixed-term contracts will change dramatically. The Amendment Bill proposes to amend sections 186(1)(a), 186(1)(e) and 186(1)(f) of the LRA by removing the words "a contract". This will ensure that all employees are equally covered by the LRA.<sup>115</sup>

Section 186(1)(b) will be amended so that the definition of a dismissal will be:

- (b) an employee engaged in a fixed-term contract of employment reasonably expected the employer –
- (ii) to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favorable terms, or did not offer to retain the employee.

The amendments propose to protect the vulnerable temporary employees.<sup>116</sup> It is stated that the amendments may indirectly cause that labour brokers cease to exist.<sup>117</sup> In terms of the Amendment Bill employees employed on fixed-term contracts for a period of longer than six months will be deemed to be permanent employees if the employer cannot prove the necessity of the fixed-term contract.<sup>118</sup> Fixed-term employees will receive the same protection and will receive the same favourable treatment as permanent employees. This will not be the case should the

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115 Van Eck "The Labour Bills of 2012" 7.

116 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

117 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

118 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

employer be able to show good reason for the differential treatment.<sup>119</sup> The employee employed on a fixed-term contract will also have identical prospects as indefinite employees to apply for positions at the employer. The Amendment Bill further proposed that the employer should pay the fixed-term employee who has been in its employment for more than twenty four months a severance package when the contract automatically terminates. The severance package will be the same as in the case of a permanent employee, one week's salary for each completed year worked.<sup>120</sup> The severance package does not abolish the right of the employee to refer the matter as an unfair dismissal should the employee believe that he had a reasonable expectation that his contract would be renewed.<sup>121</sup>

The Amendment Bill has the objective to strengthen labour legislation, to give effect to the Constitution and to improve the labour market.<sup>122</sup> With regards to temporary employment services, the employee who works for a client for longer than six months will be believed to be the employee of the client, unless there is validation for the extensive duration of temporary employment.<sup>123</sup> The employee will received the same treatment as any other employee in terms of section 6 of the EEA. Should the employer or client not want to be liable for the above, they should be able to justify the reasons for the temporary employment.<sup>124</sup> These provisions are only applicable to employees earning less than the prescribed threshold in terms of the BCEA.<sup>125</sup>

If an employer or client terminates an employee's contract of employment when the employee was employed on a contract with an automatic termination clause to circumvent the provisions of the Amendment Bill,<sup>126</sup> the employee will be deemed to

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119 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

120 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

121 Vatalidis and Workman-Davies 2012 <http://www.labourguide.co.za/most-recent-publications/proposed-amendments-to-the-labour-relations-act-and-the-basic-conditions-of-employment-act>.

122 Anon 2012 <http://www.labourguide.co.za/most-recent-publications/update-amendments-on-labour-legislation-27-july-2012>.

123 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

124 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

125 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

126 To terminate employment before the employee is employed for six months.

have been dismissed. The employer may not prevent the employee from obtaining an indefinite employment contract.<sup>127</sup>

Du Toit<sup>128</sup> states that:

CCMA commissioners will have jurisdiction to make a ruling in terms of the contents of an agreement between the temporary employee and the broker as well as the broker and the client. This is to avoid "dismissals" as a result of a pre-empted event that would signal the automatic and natural expiration of the contract of employment, something over which the CCMA lacked jurisdiction.

The employee has always been the employee of the labour broker and not of the client. This has left the employee in an exposed position, as the labour broker has very little liability with regard to the employee and the client can manipulate the services as it deems fit.<sup>129</sup> Lawrence and Moodley<sup>130</sup> referred to *Mahlamu v CCMA and Others*.<sup>131</sup>

This finding has profound and far-reaching consequences as regards the enforceability of an '*automatic termination*' clause included in an employment contract which provides for the automatic termination of the employment contract, should the Labour Broker no longer require the services of the employee. In terms of this case, this will now constitute a dismissal for the purposes of the Labour Relations Act and the aggrieved party will be entitled to refer the matter to the CCMA or Bargaining Council on the basis of an unfair dismissal claim. The effect of this is that Labour Brokers are now effectively precluded from including or rather enforcing these '*automatic termination*' clauses in employment contracts as this will be considered a dismissal in terms of the Labour Relations Act.

The Amendment Bill will further have an immense impact on employees who are employed in terms of fixed-term contracts who earn less than the prescribed threshold.<sup>132</sup> These employees will receive more protection, as they are seen as

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127 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

128 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

129 Lawrence and Moodley 2011 *Without prejudice* 67.

130 Lawrence and Moodley 2011 *Without prejudice* 68.

131 [2011] 4 BLLR 381 (LC).

132 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

vulnerable employees. The employer may only employ an employee on a fixed term contract for longer than six months if:<sup>133</sup>

...the nature of the work for which the employee is engaged is of a limited or definite duration; or the employer can demonstrate any other justifiable reason for fixing the term of the contract such as: replacing another employee who is temporarily absent from work; engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; engaged to work exclusively on a genuine and specific project that has a limited or defined duration; is a non-citizen who has been granted a work permit for a defined period; is engaged on a position which is funded by an external source for a limited period; has reached the normal or agreed retirement age applicable in the employer's business.

It is clear from the above that an employee employed on a fixed-term contract without good reasons for the fixed nature of the employment, will be considered to be a permanent employee.<sup>134</sup> Furthermore, the fixed-term employee will be entitled to the same treatment as permanent employees and will also have the same opportunities to apply for vacancies as other employees. Fixed-term employees will be entitled to receive severance pay if their contracts are terminated after twenty four months in the employer's employ. The employee earning under the threshold will still be entitled to lodge an unfair dismissal dispute should the employee have a reasonable expectation. Fixed-term contracts will no longer automatically terminate. Employers will also not be allowed to terminate the employee's services in order to circumvent the six month provision.

Labour brokers will no longer be able to rely on the automatic termination of the employment contract. The labour broker will not be able to circumvent the LRA anymore. In terms of the Amendment Bill it is clear that the contract of employment with the automatic termination clause will no longer be accepted as valid. The labour broker and the employer will have to justify the automatic termination with good and acceptable reasons.

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133 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

134 Du Toit 2012 <http://www.labourguide.co.za/most-recent-publications/labour-broking-the-way-forward>.

The Amendment Bill, if enacted, will prove the contract of employment with the automatic termination clause to be invalid and provide for the extensive protection of the rights of the temporary and fixed-term employees.

### **3.6 The validity of automatic termination clauses as tested by the courts**

A dismissal can be defined as an action taken by an employer to terminate the contract of employment i.e. the employment relationship and communication by the employer to the employee that the contract has ended.<sup>135</sup> The communication can be verbal or by conduct.<sup>136</sup> The common law theory of a dismissal has been extended by section 186 of the LRA so that a dismissal is much more comprehensive than termination with or without notice.<sup>137</sup> Section 186(1) of the LRA defines a dismissal as:

- a) an employer has terminated a contract of employment with or without notice;
- b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

For the purposes of this study, the focus will be on sections 186(1)(a) and (b). These sections outline dismissals in terms of automatic termination clauses in employment contracts. The burden rests on the employee to prove that a dismissal took place. The employee must therefore prove that an employment contract existed and that the employer ended the contract unilaterally.<sup>138</sup>

When a contract of employment with an automatic termination clause ends, there is in essence no dismissal. The employee whose contract terminated automatically can therefore not institute an unfair dismissal dispute.<sup>139</sup> This is the case in fixed-term contracts.

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135 Grogan *Workplace Law* 144.

136 Grogan *Workplace Law* 144.

137 Now known as automatic termination of employment contracts.

138 Grogan *Workplace Law* 145.

139 Le Roux 2010 *Contemporary Labour Law* 101.

Employers are increasingly using automatic termination provisions in employment contracts to terminate employment without the possible accountability for an unfair dismissal dispute that is referred to an arbitrator or the Labour Court.<sup>140</sup> The Labour Courts and the legislature are aware of these contractual mechanisms that lead to the contracting out of the right not to be unfairly dismissed.<sup>141</sup> The result of this is that the legislation with regard to unfair dismissals is harshly analysed.<sup>142</sup>

Section 186(1) of the LRA applies in cases where the employer ends the employment contract with or without notice<sup>143</sup> or the employee has a reasonable expectation of renewal of a fixed term contract.<sup>144</sup> The LRA does not make provision for an employment contract that ends by operation of law and not as a result of an overt act of the employer.<sup>145</sup>

In terms of the common law a fixed term contract ends automatically when the agreed time or occurrence of an event has been reached, and this could not be deemed a dismissal.<sup>146</sup> A dismissal in terms of section 186 of the LRA will be reasoned to be a dismissal where the employee has a reasonable expectation that his or her contract of employment would be renewed on the same or similar terms, thus extending the boundaries of the common law.<sup>147</sup> The Labour Appeal Court referred to section 5<sup>148</sup> of the LRA and stated that the onus of proving that the automatic termination clauses triumph over the LRA rests on the employer.<sup>149</sup> It was made clear that rights conferred in the LRA cannot be contracted out by any form of consensus or employment contract.<sup>150</sup>

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140 Le Roux 2010 *Contemporary Labour Law* 101.

141 S 185 of the LRA and s 23 of the Constitution.

142 Le Roux 2010 *Contemporary Labour Law* 101.

143 LRA s 186(1)(a).

144 LRA s 186(1)(b).

145 Cohen "Automatic termination clauses" 6.

146 Grogan *Workplace Law* 148.

147 Cohen "Automatic termination clauses" 6.

148 S 5 of the LRA provides that "no person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute. A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of s 4, or this section, is invalid, unless the contractual provision is permitted by this Act".

149 Anon 2012 <http://www.uhrdir.co.za/index.php/latest-news/6-automatic-termination-of-contract-of-employment>.

150 Cohen "Automatic termination clauses" 7.

### 3.6.1 Automatic termination and labour brokers

Section 198<sup>151</sup> of the LRA provides for temporary employment services. In terms of this section the labour broker is the employer and there is no employment relationship between the employee and the client. In terms of these agreements the employment of the employee automatically terminates when the client either ends the contract with the labour broker or when the employee is no longer needed. Labour brokers rely on automatic termination provisions to avoid the consequences of an unfair dismissal.<sup>152</sup>

In *South African Post Office v Mampeule*<sup>153</sup> the Labour Appeal Court<sup>154</sup> dealt with the validity of an automatic termination clause in a contract of employment. In this matter the employee was the chief executive officer of the post office. The employee was suspended and the board of directors terminated his directorship. As a result of the afore-mentioned, the employee's employment was also terminated. The employee alleged that he was dismissed and claimed an unfair dismissal. The employer stated that the employee's termination as director automatically terminated his employment as well. Therefore there was no dismissal.<sup>155</sup> The matter was first referred to the Labour Court to establish the validity of an automatic termination.

The employer argued that in terms of the employee's contract of employment, his employment could be terminated in various ways. The contract stipulated that should the executive director's employment terminate, his employment would

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151 Ss 189(1) to (4) state that "In this section, 'temporary employment service' means any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client; and who are remunerated by the temporary employment service. For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer. Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person. The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; a binding arbitration award that regulates terms and conditions of employment; the Basic Conditions of Employment Act; or a determination made in terms of the Wage Act."

152 Cohen "Automatic termination clauses" 3.

153 (2009) 30 *ILJ* 664 (LC).

154 *South African Post Office V Mampeule* (JA 29/09 4 June 2010).

155 Le Roux 2010 *Contemporary Labour Law* 102.

"automatically and simultaneously" terminate.<sup>156</sup> The employer consequently argued that the employee had not been dismissed, but that his contract of employment was automatically terminated.

The Labour Court found the termination to be a dismissal and also scrutinised the validity of the automatic termination clause. The Labour Court stated that:<sup>157</sup>

In the result, the automatic termination provisions of article 8.3, which regulates the termination of the contract of employment and is thus incorporated by reference therein, are impermissible in their truncation of the provisions of chapter 8 of the LRA and, possibly even, the concomitant constitutional right to fair labour practices (*cf Igby v Johnson Matthey Chemicals (Pty) Ltd [1986] IRLR 215 (CA)*). Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights conferred.

The matter was referred to the Labour Appeal Court.

The decision made by the Labour Court was upheld in the Labour Appeal Court. The court recognised that the employee fell within the ambit of two acts, the Companies Act<sup>158</sup> and the LRA. The LRA and public policy prohibits an automatic termination clause as in this case.<sup>159</sup> The Labour Appeal Court went further and stated that:<sup>160</sup>

The onus rests on SAPO to establish that the „automatic termination“ clause prevails over the relevant provisions in the Act [referring to s 5] and clause 9.1 of the contract [a clause that established employment for a fixed term of five years subject to the employer's right to terminate the contract with due regard to fair labour practices]. A heavier onus rests on a party which contends that it is permissible to contract out of the right not to be unfairly dismissed in terms of the Act. I am in agreement with the submission made by Mampeule's counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of „automatic termination“ provisions or otherwise because the Act had been promulgated not only to cater for an individual's interest but the public's interest.

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156 Le Roux 2010 *Contemporary Labour Law* 102.

157 South African Post Office V Mampeule [2009] 8 BLLR 792 (LC) par 46.

158 71 of 2008.

159 Le Roux 2010 *Contemporary Labour Law* 102.

160 Par 23.

The court held that where the termination of the employee's employment was as a direct or indirect result of an act by the employer, the termination is deemed a dismissal.<sup>161</sup> The employer terminated the employee as director and this resulted in the employment being terminated<sup>162</sup>. Provisions<sup>163</sup> in the LRA are conferred on all employees and are incapable of being endorsed, so automatic termination clauses are invalid and against public policy.<sup>164</sup>

In *Sindane v Prestige Cleaning Services*<sup>165</sup> the employee was employed by a labour broker with an automatic termination contract. The employee was employed as a cleaner on a "fixed-term eventuality contract of employment"<sup>166</sup>. In terms of the employment contract the employee's services would automatically terminate when the client no longer needed the services of the employee. The client terminated the contract with the labour broker and the employee's employment was terminated. The employee referred the dispute to the Labour Court, claiming that his right in terms of section 185 of the LRA had been infringed.<sup>167</sup> The employee had to prove that there was indeed a dismissal.<sup>168</sup> The employee relied on *South African Post Office v Mampeule*,<sup>169</sup> stating that the decision should also apply in this case, as this type of mechanism is invalid as it infringes the employee's right not to be unfairly dismissed.<sup>170</sup>

The Court stated that although the employee was indeed an employee, his termination did not constitute a dismissal. The employee failed to prove that he was dismissed. In terms of the contract of employment the contract will automatically terminate when the client ends the contract, thus the labour broker did not directly or

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161 Cohen "Automatic termination clauses" 6.

162 Cohen "Automatic termination clauses" 6.

163 S 185 and 186 of the LRA.

164 Cohen "Automatic termination clauses" 7.

165 [2009] 12 BLLR 1249 (LC).

166 Giles 2009 <http://www.gilesfiles.co.za/judgments/labour-broking-validity-of-%E2%80%9Cfixed-term-eventuality%E2%80%9D-employment-contracts/>.

167 The right not to be unfairly dismissed.

168 S 192 of the LRA places the burden of proving the existence of a dismissal on the employee. Only after the employee has proved that he was dismissed, does the burden of proof shift to the employer who has to prove that the dismissal was substantively and procedurally fair.

169 (2009) 30 *ILJ* 664 (LC).

170 Le Roux 2010 *Contemporary Labour Law* 102.

indirectly contribute to the termination.<sup>171</sup> The court further distinguished between this particular case and the *SA Post Office Ltd v Mampeule*<sup>172</sup> case. In the latter the employer directly or indirectly contributed to the employee's termination by terminating the directorship and thus causing the termination of employment.<sup>173</sup>

Giles<sup>174</sup> states further that:

Assuming that Basson J is correct and if a similar 'eventuality clause' is included in such employment contracts then all contracts entered into by labour brokers with individuals whose services are provided to clients will simply terminate automatically upon the loss of the main contract. There would not be any need for the labour broker to follow a fair procedure nor provide a valid and fair reason to terminate because the individual would not be able to prove a 'dismissal' by the employer as required by the Labour Relations Act, 1995.

Thus *Sindane v Prestige Cleaning Services*<sup>175</sup> and *SA Post Office Ltd v Mampeule*<sup>176</sup> made it clear that where the employer directly or indirectly contributes to the termination of a contract, it will be deemed a dismissal, but where a client is the cause of the termination, the contract would be deemed to have automatically terminated and there would be no dismissal.

It cannot be assumed that every contract of employment would constitute a dismissal in terms of section 189 of the LRA, a realistic approach should be followed.<sup>177</sup> Where the termination is due to an act of a third party and the employer is not the immediate cause of the employment contract ending, a dismissal cannot exist.<sup>178</sup>

The *Sindane v Prestige Cleaning Services*<sup>179</sup> case was criticised in *Nape v INTCS Corporate Solutions (Pty) Ltd*.<sup>180</sup>

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171 Giles 2009 <http://www.gilesfiles.co.za/judgments/labour-broking-validity-of-%E2%80%9Cfixed-term-eventuality%E2%80%9D-employment-contracts/>.

172 [2009] 8 BLLR 792 LC.

173 Giles 2009 <http://www.gilesfiles.co.za/judgments/labour-broking-validity-of-%E2%80%9Cfixed-term-eventuality%E2%80%9D-employment-contracts/>.

174 Giles 2009 <http://www.gilesfiles.co.za/judgments/labour-broking-validity-of-%E2%80%9Cfixed-term-eventuality%E2%80%9D-employment-contracts/>.

175 [2009] 12 BLLR 1249 (LC).

176 [2009] 8 BLLR 792 LC.

177 Le Roux 2010 *Contemporary Labour Law* 102.

178 Cohen "Automatic termination clauses" 4.

179 [2009] 12 BLLR 1249 (LC).

180 [2010] 8 BLLR 852 (LC).

In *Nape v INTCS Corporate Solutions (Pty) Ltd*<sup>181</sup> the employee was in the employment of a labour broker and worked at Nissan (herein after the client). The employee sent offensive electronic mails and the client<sup>182</sup> instructed the labour broker to remove the employee from their premises. The employer held a disciplinary hearing and found that a dismissal would not be the appropriate sanction. The employer sent the employee back to the client, who refused his services. The employee was employed on an automatic termination contract. When the client refused the services of the employee, the employer had no other choice but to dismiss the employee for operational requirements.<sup>183</sup> The court stated that the dismissal was unfair.

The court provided that the client of the labour broker was not the employer, the client may not act in a manner that will infringe the employee's rights not to be unfairly dismissed,<sup>184</sup> and the client therefore infringed the right conferred onto the employee in the Constitution.<sup>185</sup> The client is also not allowed to make unlawful demands on the labour broker that could result in the dismissal of the employee.<sup>186</sup> The labour broker can approach the court to interdict the client from demands that will lead to the termination of the employee's contract.<sup>187</sup>

Section 198 of the LRA does not allow the labour broker or the client to infringe the rights of the employee, although the employee has no remedy against the employer.<sup>188</sup> In this case the court found that section 189 of the LRA could have been applied.<sup>189</sup>

In *Mahlamu v CCMA & Others*<sup>190</sup> the employee was employed on an automatic termination agreement as a security guard. The contract provided that should the client no longer need the services of the employee, the contract would end

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181 [2010] 8 BLLR 852 (LC).

182 Anon 2010 <http://gulf.co.za/?p=752>.

183 Also known as a retrenchment.

184 S 185 of the LRA.

185 S 23 of the Constitution, the right to fair labour practices.

186 Anon 2010 <http://gulf.co.za/?p=752>.

187 Le Roux 2010 *Contemporary Labour Law* 109.

188 Cohen "Automatic termination clauses" 9.

189 Le Roux 2010 *Contemporary Labour Law* 103.

190 [2011] 4 BLLR 381 (LC).

automatically by operation of law. This is exactly what happened and the employee referred an unfair dismissal dispute.

The Labour Court stated that section 185 of the LRA is not negotiable. The court also stated that a contractual term that infringes section 185 of the LRA is unenforceable.<sup>191</sup> Allardyce<sup>192</sup> summarizes the court's decision:

The Court considered whether an 'automatic termination' clause falls foul of section 5 (4) and whether such a clause is invalid in terms of section 5 (4). In concluding that an 'automatic termination' clause is invalid the Court held that the effect of such a clause is to contract out of an employee's right not to be unfairly dismissed. Some may argue that there was no dismissal because the 'automatic termination' clause provides for a consensual termination. The Court in overcoming this argument had regard to two English cases, *Igbo v Johnson Mathey Chemical Ltd* [1986] IRLR 215 (CA) and *British Leyland (UK) Ltd v Ashraf* [1978] IRLR 930 (EAT). In short the Court held that in order to give effect to the injunction to interpret the LRA in terms of its primary objectives and in compliance with the constitution the an 'automatic termination' regard must be had to the compelling English judgments of *Igbo*. These judgments provided that a clause that had the effect of contracting out of the statutory right not to be unfairly dismissed was void. Applying the same reasoning the Court in the *Mahlamu* matter provided that the 'automatic termination' void. Practically this meant that the employment relationship was not terminated in terms of the 'automatic termination' clause and therefore the employment relationship came to an end as a result of the employer's dismissal of the employee.

The court has to decide whether a person can contract out his right not to be unfairly dismissed. The court stated that it had to determine whether the right not to be unfairly dismissed was a personal right or a matter of public interest. The court noted that this was a matter of public interest and that the right therefore could not be waived. The employee was deemed to have been dismissed.<sup>193</sup>

It is clear from the above that fixed-term contracts are lawful contracts, but these contracts do not eliminate the remedies as afforded in terms of the LRA when the employee is unfairly dismissed. It is further clear that the direct and indirect cause of the termination of employment should be established to determine its fairness. Furthermore, any contractual mechanism that infringes any right in the LRA or Constitution is not valid. Even though an employee waives his rights in terms of the

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191 Allardyce 2011 <http://www.allardyce.co.za/articles/the-judgement-in-mahlamu-vs-ccma/>.

192 Allardyce 2011 <http://www.allardyce.co.za/articles/the-judgement-in-mahlamu-vs-ccma/>.

193 Cohen "Automatic termination clauses" 10.

Constitution and the LRA, such a distancing is not valid or enforceable.<sup>194</sup> Lastly, there is clearly uncertainty regarding the validity of automatic termination provisions. Cohen<sup>195</sup> stated that "Automatic termination clauses in broker's contracts are unenforceable". It is clear that the waiver of a fundamental right can never be valid.

### 3.6.2 *Automatic termination and impossibility of performance*

In terms of the common law when performance becomes impossible, the contract ends automatically. Neither party should prevent performance nor should impossibility be as a result of the act of one party. When it becomes impossible to perform in terms of the employment contract, the contract terminates automatically and the termination does not constitute a dismissal.<sup>196</sup>

In *Chilibush v Johnston & Others*<sup>197</sup> the court had to determine whether the termination of the directorship automatically ended the employment relationship as well. The employee was expelled from the board of directors and his employment automatically terminated in terms of an agreement. The employee referred an unfair dismissal dispute.

It was held that the employer cannot negotiate terms of termination, as this will constitute an infringement of the employee's right not to be unfairly dismissed. Even though the parties agreed that the expulsion of a director would automatically terminate the employment contract, this does not make it a valid termination. The employee cannot waive his right not to be unfairly dismissed. Such abandonment will infringe the employee's constitutional right, as well as his right not to be unfairly dismissed.<sup>198</sup> The expulsion of the employee as director was held to be fair under the Company Act, but the automatic termination of his employment was deemed to be an unfair dismissal in terms of the LRA. The employee is entitled to the remedies as provided for in the LRA.<sup>199</sup>

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194 Cohen "Automatic termination clauses" 11.

195 Cohen "Automatic termination clauses" 11.

196 Cohen "Automatic termination clauses" 12.

197 [2010] 6 BLLR 607 (LC).

198 Cohen "Automatic termination clauses" 13.

199 Van Voore 2010 Case Law Overview 18.

In *National Union of Mineworkers and Another v CCMA* the employee was convicted of a crime in the criminal court and was sentenced to ten months' imprisonment. The employer argued that the employee's contract of employment terminated automatically due to the impossibility of the employee to perform the work in terms of the contractual agreement (the employee could not perform his duties while in prison).

In this case it was held that if the impossibility is not permanent, the contract is only suspended for the period of impossibility. Where the impossibility is permanent, the contract is automatically terminated. The dismissal of the employee was unfair as the impossibility was not permanent.<sup>200</sup>

It is clear from the above that where impossibility is not permanent, an automatic termination would not be lawful and any provision in the employment contract contradicting this view would be invalid.

### 3.6.3 *Desertion in the private sector and automatic termination*

Some employment contracts state that where an employee is absent from work without leave, he would be deemed to have absconded and his contract of employment would automatically terminate.<sup>201</sup>

In *Jammin Retail (Pty) Ltd v Mokwane & Others*<sup>202</sup> the employee's contract of employment stated that should the employee be absent for more than five days without authorisation, the employment contract would automatically terminate by operation of law.<sup>203</sup>

An automatic termination clause that relates to absence is not a valid mechanism in terms of the LRA and Constitution.

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200 Cohen "Automatic termination clauses" 14.

201 Cohen "Automatic termination clauses" 19.

202 2010 4 BLLR 404 (LC).

203 Cohen "Automatic termination clauses" 19.

### 3.6.4 Automatic termination and the public service

The State uses section 186 of the LRA as a mechanism to terminate employees' employment without the termination being deemed a dismissal. The *Public Service Act* 103 of 1994 (herein after the Public Service Act) provides that an employee who is absent from work for more than one month will be considered to have been dismissed.<sup>204</sup> The employer in these circumstances do not dismiss the employee, the contract of employment automatically terminates.<sup>205</sup>

The employee was absent from work and only returned when the employer contacted her to return. Upon her return she was informed that her contract of employment had terminated automatically. The employee claimed to be unfairly dismissed. The employer argued that in terms of her employment contract there was a provision that her contract would automatically terminate in these circumstances and that she was not dismissed. The CCMA found the dismissal to be procedurally unfair. The employer referred the matter to the Labour Court. The Labour Court pointed out that although this approach is followed in the public sector, it is invalid in terms of the LRA.<sup>206</sup>

It is clear from the above paragraphs that an automatic termination clause with the objective to circumvent the LRA and the recourse of an unfair dismissal is invalid and unlawful.<sup>207</sup> Therefore the only question that remains is why the LRA permits automatic termination in fixed-term contracts, but not in other employment contracts with automatic termination clauses. It is clear that automatic termination contracts that relate to labour brokers, unauthorised absences, removal of directors etc. are invalid.<sup>208</sup> Le Roux<sup>209</sup> explains that this is what the LRA envisioned when enacting section 186. Fixed-term contracts are valid and provide for the protection of employees, even though these contracts terminate automatically. The LRA does not provide for any other form of automatic termination. He further states that the *South*

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204 S 17(5)(a) of the *Public Service Act*.

205 Le Roux 2010 *Contemporary Labour Law* 101.

206 Le Roux 2010 *Contemporary Labour Law* 104.

207 Le Roux 2010 *Contemporary Labour Law* 104.

208 Le Roux 2010 *Contemporary Labour Law* 104.

209 Le Roux 2010 *Contemporary Labour Law* 104-105.

*African Post Office v Mampeule*<sup>210</sup> case will be applied to other contracts that attempt to use automatic termination clauses. Therefore it is necessary to discuss automatic termination relating to fixed term contracts.

### 3.6.5 Fixed-term agreements

Section 186(1)(b) of the LRA clearly provides protection for employees employed in fixed-term contracts and dismissals relating to these contracts. It is vital to distinguish when the termination of a fixed-term contract constitutes a dismissal and when the termination is by operation of law.<sup>211</sup>

Timothy<sup>212</sup> states that:

Since the inception of the unfair labour practice regime, it is no longer unconditionally accepted that a fixed-term contract of employment automatically terminates at the effluxion of the contract.

A fixed-term contract is a temporary contract for a specified period of for a specific project and terminates when the agreed date is reached or the specified event occurs, thus the contract terminates automatically.<sup>213</sup>

The LRA provides for when the termination of a fixed term contract will constitute a dismissal as discussed in Chapter 3 above. Du Toit<sup>214</sup> states that are a few principals regarding reasonable expectation. The reasonable expectation does not have to be acknowledged by the employer, the employee merely has to believe that such an expectation is possible, the purpose for entering into a fixed term contact is imperative, the wording of the contract can play a great role in determining whether a reasonable expectation exists and other factors such as the number of renewals and the behaviour of the employer. The termination of fixed term contracts can be divided into two groups, namely termination that constitutes a legally permitted automatic termination and termination that constitutes a dismissal.

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210 (JA 29/09 4 June 2010).

211 Automatic termination contracts end by operation of law.

212 Timothy *Employment Contract* 29.

213 Grogan *Dismissal* 188.

214 Du Toit *et al Labour Relations Law* 383-384.

### 3.6.5.1 Fixed-term contracts and dismissal

Section 186 of the LRA defines a dismissal as when an employee who had a reasonable expectation of renewal's contract was not renewed. The employee will have to prove<sup>215</sup> the reasonable expectation, as this cannot be accepted by a commissioner.<sup>216</sup> The term reasonable expectation is not defined by the LRA and each case will be determined on its own merit.<sup>217</sup> If the employee has proven that the non-renewal of the fixed-term contract does constitute a dismissal<sup>218</sup> in terms of section 186 of the LRA, the commissioner must determine whether the dismissal was substantially and procedurally fair.<sup>219</sup>

In *SARPA obo Bands and Others v SA Rugby (Pty) Ltd*<sup>220</sup> three employees referred an unfair dismissal dispute after the employer refused to renew their contracts. The employees contended that the employer's behaviour gave rise to their reasonable expectation. The employer maintained that the contract of employment provided for a "no expectation clause". The court stated that whether the employees had a reasonable expectation had to be determined with an objective test.<sup>221</sup> The commissioner took into account that the employer did not inform the employees that their contracts would end, and therefore decided that the employees had a reasonable expectation.<sup>222</sup>

Another element to be considered is the amount of times the contract was renewed and the duration of interrupted employment.<sup>223</sup> In *Swanepoel v Department of Water*

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215 S 192 of the LRA.

216 Mischke *Contemporary Labour Law* 13.

217 Mischke *Contemporary Labour Law* 13.

218 S 192 of the LRA.

219 Mischke *Contemporary Labour Law* 13.

220 [2005] 2 BALR 209 (CCMA).

221 All relevant factors should be considered, including the contract of employment and the treatment of fixed-term contracts by the employer in the past.

222 The commissioner referred to *Mtshamba and Others v Boland Houtnywerhede* ((1986) 7 ILJ 563 (IC)), where the court stated that another factor that should be considered regarding reasonable expectation is whether the employer gave sufficient notice that the contract would not be renewed.

223 Mischke *Contemporary Labour Law* 14.

*Affairs and Forestry*<sup>224</sup> the employee worked seven years on various fixed-term contracts before his contract was terminated. The court stated the following:<sup>225</sup>

Given that the aim of this specific kind of statutory dismissal is to ensure that employers do not circumvent the aims and requirements of law of dismissal by keeping employees on fixed-term contracts perpetuity, I am satisfied that the applicant did have a reasonable expectation that his contract would have been extended, at least until such time as he was either appointed or rejected when the post ultimately became advertised. The factual basis for the expectation would arise from the fact that there was still a need for services such as the applicant rendered, the post had not yet been advertised and someone would have to provide the services in the meantime and the respondent's custom of continuously extending his contract, even when they told the applicant they would definitely not extend it.

Another element to consider is whether the employee continued working after the contract had in fact expired.<sup>226</sup> In *Alvillar v NUM*<sup>227</sup> the employee was employed for a specific task, when the contract ended, the task was not completed. The commissioner found that the employee had a reasonable expectation in these circumstances.

In *Owen and Others v Department of Health, KwaZulu-Natal*<sup>228</sup> the court stated that where an employee continued working after the fixed-term contract was supposed to terminate automatically, the employee either has reasonable expectation of renewal or permanent employment.<sup>229</sup>

In *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*<sup>230</sup> the court indicated that where the employer specifically or with implication implied that the contract of employment would be renewed, the non-renewal would constitute a dismissal.<sup>231</sup>

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224 [2005] 12 BALR 1272 (GPSSBC).

225 Mischke *Contemporary Labour Law* 14.

226 Mischke *Contemporary Labour Law* 15.

227 [1998] 12 BALR 1553 (CCMA).

228 (2009) 30 *ILJ* 2561 (LC).

229 Le Roux 2010 *Current Labour Law* 21-48.

230 [2008] 11 BLLR 111 (LC).

231 In *Ngcobo v Walter Sisulu University* [2009] 1 BALR 64 (CCMA) it was indicated that where the employer made a promise of renewal and the contract is not renewed, the employee would have had a reasonable expectation.

The non-renewal of a fixed-term contract may constitute a dismissal in terms of section 186 of the LRA where the employer's conduct gives rise to a reasonable expectation, the duration the employee has been in the employment of the employer, the amount of times the fixed-term contract has been renewed, whether the services of the employee is still needed and the task has not been completed, whether the employee continued to work after the contract automatically terminated and continued to be paid, the purpose of concluding a fixed-term contract, the employer's treatment of the fixed-term contracts in the past, promises made by the employer and whether the employer expressly or tacitly made the implication that the employee's fixed-term contract would be renewed. In these circumstances the employee is protected by the LRA. Even though the contract expires automatically by operation of law, the employee is still entitled to relief.

It is important to note that not all non-renewals of fixed-term contracts constitute a dismissal, some contracts do automatically end. In these circumstances there is no dismissal and the employee will not be entitled to relief. As stated previously, the burden rests on the employee to prove that the non-renewal of the fixed-term contract constitutes a dismissal. Where the employee cannot discharge the burden, the contract would be deemed to have terminated automatically.<sup>232</sup>

#### *3.6.5.2 Fixed-term contracts and automatic termination*

In terms of contractual principals, when the date or event agreed between the parties is reached, the fixed-term contract expires automatically and there is no dismissal.<sup>233</sup> Section 186 of the LRA has provided protection to employees employed on fixed-term contracts, but it is important to note that not all non-renewals constitute a dismissal. The refusal to renew an employment contract does not constitute a dismissal, unless the employee can prove reasonable expectation.<sup>234</sup>

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232 Le Roux 2009 *Current Labour Law* 1-18.

233 Le Roux 2009 *Current Labour Law* 1-18.

234 Du Toit *et al Labour Relations Law* 396.

In *Nobubele v Kujawa and Another*<sup>235</sup> the court concluded that the employee cannot rely on section 186 of the LRA where there can in fact be no reasonable expectation.<sup>236</sup>

In *NUMSA obo Mnyakeni v Janong Security Services CC*<sup>237</sup> the employee had been employed on three consecutive fixed term contracts. The contracts stated the employee should not acquire a reasonable expectation. The contract was not renewed and the employee contended that he had been unfairly dismissed. The commissioner stated that the employee should prove a subjective expectation of renewal. The expectation should be based on a promise, either implied or expressly. There can also be an expectation if the employer made himself guilty of continuous renewal. The commissioner stated further that the burden of proof lies with the employee and the trust that the contract would have been renewed. The employee's case that he had a reasonable expectation because his contract had been renewed three times before does not prove a reasonable expectation. The automatic termination of the contract does not constitute a dismissal.<sup>238</sup>

In *SA Bank of Athens Ltd v Cellier NO & Others*<sup>239</sup> the employer repeatedly renewed the employee's fixed-term contract. The commissioner stated that the repeated renewal should not be the exclusive basis for the belief that an employment contract will be renewed again. The more important factors are the communications between the employee and employer after the contract had been entered into and the reason for the termination or non-renewal of the contract. The contract stated that the employee had no right to renewal.<sup>240</sup> The employee could not prove a reasonable expectation, therefore the contract of employment terminated automatically.<sup>241</sup>

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235 [2008] 10 BLLR 980 (LC).

236 In this case the employee was employed on a series of fixed term contracts. The employee was suspended awaiting a disciplinary hearing. The court stated that the employee could not have reasonably expected that her contract would be renewed after the misconduct.

237 (2011) 20 MEIBC 1.1.2 and [2011] 7 BALR 749 (MEIBC).

238 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

239 (2009) 30 ILJ 197 (LC).

240 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

241 Rheeder 2012 <http://www.labourguide.co.za/most-recent-publications/reasonable-expectation-of-renewal-of-fixed-term-contracts>.

In *SA Rugby Player Association v SA Rugby (Pty) Ltd*<sup>242</sup> the court found that where one person promised the renewal of a contract and that person was no longer the coach, the belief that the contracts would be renewed was also diminished.<sup>243</sup>

In *Black v John Snow Public Health Group*<sup>244</sup> the court stated that the employee could not have a reasonable expectation where the employee knew that the financial position of the employer did not allow for permanent employees or continuous renewal. The fact that the employer wanted to change the fixed-term employment contracts to permanent contracts is not enough to justify a reasonable expectation.<sup>245</sup>

In *Sindane v Prestige Cleaning Services*<sup>246</sup> as mentioned above, an employee cannot rely on a reasonable expectation where the employer cannot keep the employee in his employ. Where a client is the reason for the termination, no reasonable expectation can exist and the fixed-term contract expires automatically.<sup>247</sup>

It is clear from the above that the termination of fixed-term contracts does not always constitute a dismissal. Some fixed-term contracts terminate automatically by operation of law. When the afore-mentioned occurs, the employee is not entitled to any remedy as provided for in the LRA.

It is further important to note that an employee cannot have a reasonable expectation of permanent employment, as section 186 of the LRA only refers to

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242 (2008) 29 *ILJ* 2218 (LAC).

243 Du Toit and Claassen 2012 <http://www.labourguide.co.za/most-recent-publications/fixed-term-contracts-and-the-expectation-of-permanent-employment>.

244 (2010) 31 *ILJ* 1152 (LC).

245 Du Toit and Claassen 2012 <http://www.labourguide.co.za/most-recent-publications/fixed-term-contracts-and-the-expectation-of-permanent-employment>.

246 [2009] 12 *BLLR* 1249 (LC).

247 Du Toit and Claassen 2012 <http://www.labourguide.co.za/most-recent-publications/fixed-term-contracts-and-the-expectation-of-permanent-employment>.

fixed-term contracts.<sup>248</sup> This will not be the case when the Amendment Bill is enacted.<sup>249</sup>

### 3.6.6 Comments

It is clear from the above that not all terminations relating to automatic termination contracts constitute dismissals. When a contract of employment with an automatic termination clause ends, there is no dismissal. The employee whose contract terminated automatically cannot institute an unfair dismissal dispute.

Where the termination of the employee's employment was as a direct or indirect result of an act by the employer, the termination is deemed a dismissal. Provisions in the LRA were enacted to protect all employees and are incapable of being endorsed, so automatic termination clauses that provide for the "contracting out of the right not to be unfairly dismissed" are invalid and against public policy.

In terms of the common law a fixed term contract ended automatically when the agreed time or occurrence of an event has been reached, this could not be deemed a dismissal, this was changed by the LRA. A dismissal in terms of section 186 of the LRA will be reasoned to be a dismissal where the employee had a reasonable expectation that his or her contract of employment would be renewed on the same or similar terms, thus extending the boundaries of the common law. The burden of proving that an automatic termination clause triumphs over the LRA rests on the employer. It was made clear that rights conferred in the LRA cannot be contracted out by any form of consensus or employment contract.

*Sindane v Prestige Cleaning Services*<sup>250</sup> and *SA Post Office Ltd v Mampheule*<sup>251</sup> made it clear that where the employer directly or indirectly contributes to the termination of a contract, it will be deemed a dismissal, but where a client is the cause of the termination, the contract would be deemed to have automatically

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248 *University of Pretoria v Commission for Conciliation Mediation and Arbitration and Others* (2012) 33 ILJ 183 (LAC).

249 Du Toit and Claassen 2012 <http://www.labourguide.co.za/most-recent-publications/fixed-term-contracts-and-the-expectation-of-permanent-employment>.

250 [2009] 12 BLLR 1249 (LC).

251 [2009] 8 BLLR 792 LC.

terminated, and there would be no dismissal. It cannot be assumed that every contract of employment in terms of section 189 of the LRA would constitute a dismissal. Where the termination is due to an act of a third party the employer is not the immediate cause of the employment contract ending and therefore a dismissal cannot exist.

It is clear from the above that fixed-term contracts are lawful contracts, but these contracts do not eliminate the remedies as afforded in terms of the LRA when the employee is unfairly dismissed. The direct and indirect cause of the termination of employment should be established to determine its fairness. Furthermore, any contractual mechanism that infringes any right in the LRA or Constitution is not valid. Even though an employee waives his rights in terms of the Constitution and the LRA, such a distancing is not valid or enforceable. It is clear that the waiver of a fundamental right can never be valid.

An automatic termination clause with the objective to circumvent the LRA and the recourses of an unfair dismissal is invalid and unlawful. Therefore the only question that remains is why the LRA permits automatic termination in fixed-term contracts, but not in other employment contracts with automatic termination clauses. It is clear that automatic termination contracts that relate to labour brokers, unauthorised absences, removal of directors etc. are invalid. The LRA does not provide for any form of automatic termination other than fixed-term contracts.

The non-renewal of a fixed-term contract may constitute a dismissal in terms of section 186 of the LRA where the employer's conduct gives rise to a reasonable expectation, the duration the employee has been in the employment of the employer, the amount of times the fixed-term contract has been renewed, whether the services of the employee is still needed and the task has not been completed, whether the employee continued to work after the contract automatically terminated and continued to be paid, the purpose of concluding a fixed-term contract, the employer's treatment of the fixed-term contracts in the past, promises made by the employer and whether the employer expressly or tacitly made the implication that the employee's fixed-term contract would be renewed. In these circumstances the

employee is protected by the LRA. Even though the contract expires automatically by operation of law, the employee is still entitled to relief.

Not all non-renewals of fixed-term contracts constitute a dismissal, some contracts do automatically end. In these circumstances there is no dismissal and the employee will not be entitled to relief. Some fixed-term contracts terminate automatically by operation of law. When the afore-mentioned occurs, the employee is not entitled to any remedy as provided for in the LRA. An employee also cannot have the reasonable expectation of permanent employment, as section 186 of the LRA only refers to fixed-term contracts. This will not be the case when the Amendment Bill is enacted.

Thus the validity of automatic termination clauses in employment contracts depends on the circumstances of the employment relationship and the contractual provisions. The Amendment Bill will most certainly have an immense impact on automatic termination contracts.

Cohen T<sup>252</sup> states that:

To the extent to which labour legislation fails to regulate the employment relationship comprehensively the common law of contract continues to apply. However, in order to withstand judicial scrutiny the common law must be compatible with constitutional values, as reflected in legislative and public policy. Legislative policy, in keeping with the doctrine of separation of powers, is to be enforced by the courts without unwarranted interference. Thus the statutorily mandated "deemed dismissal" provisions of application to public-sector employees will withstand judicial scrutiny in the absence of legislative amendment. Public policy, on the other hand, requires the courts to balance the interests of the employer in enforcing the agreed terms of the contract against the employee's interests in being treated fairly. Employers' reliance upon automatic termination clauses in contracts of employment, in order to contract out of legislative protections, has been rejected by the courts as being contrary to both legislative and public-policy considerations. The courts have confirmed that statutory rights are conferred for the benefit of all employees and are incapable of consensual invalidation by the parties. Thus, in keeping with public policy, labour-brokers may no longer hide behind automatic termination provisions which serve nothing more than to perpetuate the commoditisation and exploitation of vulnerable labour-broking employees. Similarly, in keeping with legislative policy, private-sector employers faced with imprisoned and absconding employees are required to comply with the dismissal provisions of the LRA. It is only in the event of employers facing a

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252 Cohen "The legality of the automatic termination of employment contracts" 677.

situation of absolute or permanent impossibility of performance of the contract that the common law will prevail and the employment contract can be terminated by operation of law.

### **3.7 Recommendations**

As stated above, these contracts end automatically for the reason agreed upon. The validity thereof and the remedies of the employee have been discussed. The employer however, cannot be without remedies. The employer should always have sound operational reasons for employing employees on temporary contracts.

It is clear that the employee whose contract automatically terminated is thrown back in the pool of job seekers or in the alternative, as is the case with labour brokers, has to patiently wait for a new job opportunity to come to light. The employee will not receive a salary while waiting for his next job opportunity. In most cases, it is these employees who refer an unfair dismissal dispute. It is furthermore clear that not all employment contracts with automatic termination provisions are invalid. Therefore the options of the employer should be discussed with reference to employees who are thrown back in pool as a result of a contract that ended with a client.

The employer can have the employee wait out a next contract, but as stated above, this is not very practical. Most employees cannot survive without a monthly salary and will therefore not wait it out.

The employer can end the employment contract based on operational requirements in terms of section 189 of the LRA. Operational requirements are based on economical, structural, technological or similar needs.<sup>253</sup> Therefore an employer will be able to retrench an employee whose services are no longer required by a client. Where the use of this kind of employment is based on operational reason, for example to fill the vacancy of an employee who is on maternity leave or a temporary increase in workload, the employer should be able to terminate the employment based on operational requirements, as the temporary need of the employee's services no longer exists. The employer cannot terminate a fixed term agreement before its expiry date, unless the contract provides for termination on an earlier date.

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253 Grogan *Workplace Law* 271.

Employers should ensure that all the contractual terms in the employment contract with automatic termination clauses are in line with the objectives of the contract, the terms should also be in line with the LRA.

Automatic termination clauses in employment contracts are valid in so far a justifiable reason for the contract exists. Employers should be wary of using automatic termination contracts to circumvent the LRA, as this will be a costly move.

Thus the employer can continue to use employment contracts with automatic termination clauses as long as the employer has a justifiable reason for the temporary employment and the contract of employment is in line with the objectives thereof. Even with the amendments, the automatic termination contract will still be valid in cases stated above. The employer who uses these contracts to circumvent the LRA and not for operational reasons will not be able to continue this kind of employment.

## 4 Conclusion

This study aimed to establish whether automatic termination clauses in employment contracts are valid. When a contract with an automatic termination clause ends, there is in essence no dismissal. It is therefore important to determine whether the employee can waive his right not to be unfairly dismissed.

In terms of the common law an employment contract with an automatic termination clause, like a fixed-term contract, terminated without any liability for the employer and without recourse for the employee. The common law did not provide for the protection of employees employed in terms of these contracts of employment. Where the abovementioned contracts expired, it was deemed to have automatically terminated and did not constitute a dismissal. Employees were undoubtedly in a compromising position.

The 1956 LRA was enacted to overcome the common law principal regarding automatic termination contracts. The 1956 LRA made provisions that the non-renewal of a fixed-term contract and automatic termination could constitute a dismissal.

The Constitution ensures every person the right to fair labour practices. In terms of the Constitution there is no differentiation between the permanent and temporary employee.

The LRA provides that where a fixed-term contract is not renewed, and the employee reasonably expected the contract of employment to be renewed on the same or similar times, and the employer does not renew the contract or renews the contract on lesser terms, may constitute a dismissal. Section 185 of the LRA ensures every person the right not to be unfairly dismissed. There is some contradiction in the LRA and the enforcement thereof; the LRA attempted to fill the void created by the common law regarding automatic termination contracts, but it was not quite as successful in all circumstances, i.e. continuous renewal.

In *South African Post Office v Mampeule* the Labour Court dealt with the validity of the automatic termination clauses in employment contracts. The Labour Court found that where an employment contract terminates automatically as a result of the

conduct of the employer, the automatic termination clause is invalid. The matter was referred to the Labour Appeal Court where the decision of the Labour Court was upheld. An automatic termination which is the direct or indirect result of the conduct of the employer constitutes an invalid automatic termination and is contrary to public policy.

In *Sindane v Prestige Cleaning Services* the direct or indirect cause of the automatic termination was due to an act of the client. The court found that the termination did not constitute a dismissal, the contract simply automatically terminated. The court distinguished between *Sindane v Prestige Cleaning Services* and *South African Post Office v Mampeule*, and stated that where the employer did not contribute to the automatic termination, there can be no dismissal.

From the above it is clear that these automatic termination clauses in employment contracts are invalid. Whether the termination constitutes a dismissal, depends on who was the cause of the termination.

In *Nape v INTCS Corporate Solutions (Pty) Ltd* it was stated that the client may not infringe the right of the temporary employee not to be unfairly dismissed.

In *Mahlamu v CCMA and Others* the validity of the automatic termination in an employment contract was challenged. The court noted that when an employee signs a contract with an automatic termination clause, the employee waives his right not to be unfairly dismissed in terms of the Constitution and the LRA. The court attempted to determine whether an employee can waive his right not to be unfairly dismissed. The court found that the rights conferred on the employee in terms of the LRA and Constitution are a matter of public interest and cannot be waived by the individual. Employment contracts with automatic termination clauses fall foul of the LRA and the Constitution, are against public policy and thus invalid.

It is clear that an automatic termination clause with the objective to evade the responsibilities in terms of the LRA and the remedies of an unfair dismissal is invalid and unlawful. This is what the LRA envisioned when enacting section 186. Fixed-term contracts are valid and provide for the protection of employees, even though these contracts terminate automatically. The LRA does not provide for any other form of automatic termination. Fixed-term contracts are lawful contracts, but these

contracts do not eliminate the remedies as afforded in terms of the LRA when the employee is unfairly dismissed. Any contractual mechanism that intrudes on any right in the LRA or Constitution is not valid. Even though an employee waives his rights in terms of the Constitution and the LRA, such a distancing is not valid or enforceable.

The non-renewal of a fixed-term contract may constitute a dismissal in terms of section 186 of the LRA where the employer's conduct gives rise to a reasonable expectation. In these circumstances the employee is protected by the LRA. Even though the contract expires automatically by operation of law, the employee is still entitled to relief.

Not all non-renewals of fixed-term contracts constitute a dismissal, some contracts do automatically end. In these circumstances there is no dismissal and the employee will not be entitled to relief. When the aforementioned occurs, the employee is not entitled to any remedy as provided for in the LRA.

Thus the validity of automatic termination clauses in employment contracts depends on the circumstances of the employment relationship and the contractual provisions. The Amendment Bill will most certainly have an immense impact on automatic termination contracts.

In terms of the Amendment Bill, an employee employed on a fixed-term contract, without good reasons for the fixed nature of the employment, will be considered to be a permanent employee. The fixed-term employee will be entitled to the same treatment as permanent employees and will also have the same opportunities as other employees. Fixed-term employees will be entitled to receive severance pay when their contracts are terminated after twelve months in the employer's employ. The employee earning under the threshold will still be entitled to lodge an unfair dismissal dispute, should the employee have a reasonable expectation. Employers will also not be allowed to terminate the employee's services in order to circumvent the six month provision. The employer will have to justify fixed employment for an employee who will be employed for longer than six months.

Labour brokers will no longer be able to rely on the automatic termination of the employment contract. The labour broker will not be able to circumvent the LRA

anymore. The contract of employment with the automatic termination clause will no longer be accepted to be valid, without a justifiable reason therefore. The labour broker and the employer will have to justify the automatic termination with good and acceptable reasons.

The Amendment Bill, if enacted, will prove the contract of employment with the automatic termination clause to be invalid where the employer cannot justify the reason for the contract. The Amendment Bill will furthermore provide for the extensive protection of the rights of the temporary and fixed-term employees.

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