

The Effect of Changing Public Policy on the Automatic Termination of Fixed-Term Employment Contracts in South Africa

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Abstract

A fixed-term contract terminates automatically by expiry after a particular period, upon completion of a project, or the occurrence of an event. The use of conditional employment arrangements is accepted as a commercial reality. Awareness of the potential for the abuse of "automatic termination" clauses in employment contracts as a mechanism for termination is increasing. Recent case law on the issue indicates that public policy, which serves as the test for the validity and/or enforceability of "automatic termination" clauses, has changed. The impetus for the protection of "non-standard" or atypical employees is underscored by policy considerations that have been incorporated by the recent legislative amendments. These developments may very well place a heavier evidentiary burden than before on employers who opt to rely on "automatic termination" clauses to sustain an argument in favour of their validity and/or enforcement.

Keywords

Automatic termination; "automatic termination" clauses; contracting out of statutory protection; contractual waiver of rights; "fixed-term contract"; public policy; public interest; "non-standard" employees; resolutive conditions; temporary employment services; termination by operation of law; validity and enforceability of contractual devices.

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1 Introduction

Not all terminations of employment contracts constitute dismissals.¹ It is also possible for employment contracts to terminate by operation of law.² Reliance upon "automatic termination" clauses³ is accepted as a means of terminating fixed-term contracts.⁴ The termination of a fixed-term contract upon the fulfilment of a resolutive condition is controversial. In certain circumstances, the enforcement of an "automatic termination" clause can be ruled as contrary to public policy, declared invalid, or not be enforced.⁵

The effect of automatic termination is that the affected employee/s would have no access to remedies against the employer.⁶ When the employment relationship terminates automatically, employers need not follow the ordinary dismissal procedures, and the affected workers are deprived of the right to receive notice and severance pay to which they may otherwise have been entitled. Moreover, in practical terms they may be deterred from

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¹ Notably, the conduct must fall within the definition of "dismissal" as contained in s 186(1) of the *Labour Relations Act* 66 of 1995 (the "LRA") before it would qualify as a dismissal.

² These terminations are referred to as automatic terminations. Grogan *Workplace Law* 46. What qualifies as automatic termination is discussed further under 2.

³ In this contribution, "automatic termination" clause refers to a contractual clause that determines what the resolutive condition or term is by which a fixed-term employment contract will terminate automatically through operation of law or *de jure*. The Labour Appeal Court in *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) used the term "automatic termination clause" similarly in this context. A time clause or term (a certain future event), or a condition (an uncertain future event) can be suspensive or resolutive, depending on the effect that it has on the contract. See Van Huyssteen *et al Contract* paras 9.155-9.156, 9.176-9.177 and De Wet and Yeats *Kontraktereg en Handelsreg* 133-138 for an explanation of the meaning and operation of suspensive and resolutive conditions and terms.

⁴ Policy makers are guided by the principle of regulated flexibility when drafting legislation. Refer to Aletter and Van Eck 2016 *SA Merc LJ* 291, 292; Cheadle 2006 *ILJ* 663, 668; Van Eck 2014 *IJCLLIR* 49, 54-55. The permissibility of automatic termination as means of the termination of fixed-term employment is discussed under section 4.

⁵ For a contract to be valid, all that needs to be proven is that the agreement was concluded freely and voluntarily. *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 17.

⁶ Grogan *Workplace Law* 179. See also *Potgieter v George Municipality* 2011 32 ILJ 104 (WCC); *Maritz v Cash Towing CC* 2002 23 ILJ 1083 (CCMA) paras 14-15; *Ndaba v Board of Trustees, Norwood Pre-school* 1996 17 ILJ 504 (Tk) 509. In *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 30 it was held that public sector employees also do not have to be afforded a hearing before the termination, and the termination of their services will not be subject to judicial review.

claiming unemployment benefits.⁷ Employers often abuse contractual termination mechanisms. This is why courts have become sceptical of the use of "automatic termination" clauses in contracts of employment.⁸

In establishing whether an "automatic termination" clause is valid and enforceable courts must, among other things, consider whether the employer included the provision in the contract, or relied upon it to evade duties in terms of the *Labour Relations Act* 66 of 1995 as amended by the *Labour Relations Amendment Act* 6 of 2014 ("the LRA").⁹ The main labour legislation has been extended to protect the job security of "non-standard" employees and to provide them with additional protection against abusive practices.¹⁰ These amendments now inform the way in which the court determines whether a termination of a fixed-term employee's employment is an automatic termination or is instead a dismissal.¹¹

In this contribution, case law is scrutinised to illustrate the development of the jurisprudence in distinguishing between dismissals and automatic terminations upon the fulfilment of a resolutive condition in terms of an "automatic termination" clause in a fixed-term employment contract. The different factors that the courts have considered in determining whether "automatic termination" clauses are valid and/or enforceable are set out, and practical examples are provided of how the different facets of public policy have been employed. In the light of the extension of the statutory protection mechanisms applicable to atypical employees,¹² it is concluded that the rationale for using contractual devices that detract from the job security of vulnerable workers has become subject to more scrutiny. The effect is that contractual "automatic termination" clauses which waive

⁷ The effects of the enforcement of automatic termination are elaborated on under heading 6.

⁸ The courts are particularly concerned about automatic termination clauses in the contracts of workers employed by labour brokers to perform temporary services. Grogan *Workplace Law* 171. The term "labour broker", which was first introduced in legislation in 1982, is commonly used in the South African context, even though "temporary employment services" has been the term used in the legislation since 1995. See Benjamin *Law and Practice* 1. Also see Aletter and Van Eck 2016 *SA Merc LJ* 287.

⁹ The factors that are considered in order to decide whether an "automatic termination" clause is valid and/or enforceable are discussed under 7.

¹⁰ The relevant amendments that have been affected by means of the *Labour Relations Amendment Act* 6 of 2014 are set out under 6, 7.

¹¹ *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

¹² The focus of the discussion is on the regulatory amendments as contained in the newly introduced Chapter IX of the LRA, which is entitled "Regulation of non-standard employment and general provisions".

certain rights will probably not so readily be considered valid and be enforced as they have been in the past.

2 Not all terminations are dismissals

In order for a termination of employment to be actionable, it must qualify as a "dismissal".¹³ An employment contract can be terminated in ways that would not constitute a dismissal.¹⁴ A fixed-term contract can expire after a particular period, after the completion of a project, or upon the occurrence of an event.¹⁵ In such instances, the contract terminates automatically.¹⁶ Ordinarily it would not be a dismissal if a fixed-term contract terminates in these instances. Nevertheless, the termination would remain subject to the employee's right to fair dismissal as contained in section 186(1)(b).¹⁷ It could still be a dismissal if the employer had created a reasonable expectation that the employment relationship would continue beyond the term agreed upon¹⁸ and the employment was, nevertheless, terminated, or if the employer failed to make an offer of continued employment on the same or similar terms.¹⁹ It has also been held at least once that if the fixed-term contract of employment stipulates that after a specific time the employee would become "permanent", the employer will not be allowed to rely on the fact that the contract was one for a fixed-term to justify the termination of the employee's employment.²⁰ The three ways that the LRA recognises as

¹³ Section 186(1)(a) of the LRA defines "dismissal" as occurring in the event "that an employer has terminated [the employees] employment with or without notice".

¹⁴ The LAC in *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) considered s 186 of the LRA's wording (paras 17-18) and indicated that there are specifically defined instances that qualify as dismissals. Axiomatically, an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined. One way is termination in accordance with a fixed-term employment contract concluded for a specific period or that is set to terminate upon the completion of a project, or the occurrence of a particular event. See also *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 29.

¹⁵ Section 198B of the LRA. "Fixed-term contract" is defined in the LRA as a contract that terminates on the occurrence of a specified event, the completion of a specified task or project or on a fixed date other than an employee's normal or agreed retirement age.

¹⁶ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) para 16.

¹⁷ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 24.

¹⁸ Grogan describes the extension of s 186(1)(b) of the LRA to also cover fixed-term employees having a reasonable expectation of being kept on indefinitely as a "direct legislative response" to *University of Pretoria v CCMA* 2012 33 ILJ 183 (LAC). Grogan *Workplace Law* 172 n 50.

¹⁹ Section 186(1)(b) of the LRA.

²⁰ *Solidarity obo Van Niekerk v Denel (Pty) Ltd (Denel Dynamics)* 2012 10 BLLR 1030 (LC) paras 7-14. In this case, Van Niekerk J noted that despite the clear wording in terms of which she had been appointed in no fewer than eight fixed-term contracts,

methods of the automatic termination of fixed-term employment contracts are elaborated on below.

2.1 Termination by the passage of time

When entering into a fixed-term contract of employment the employer and employee agree that the employment relationship will last for a particular time instead of indefinitely. The parties bind themselves for the duration of the contract. The rationale is that the parties to the contract must plan their lives based on the agreement, for the duration of the contract. Neither of the parties can later avoid the consequences of having concluding the contract for its duration, save where the other party is guilty of a material breach of contract.²¹ Automatic termination is triggered in a case of this type of fixed-term contract by a certain, future event – the lapse of the specific period that is determined in the contract. In other words, the continuation of the employment relationship is subject to a resolute term.

the fact that they all included a clause indicating that after two years of employment she would be "obliged to convert to standard conditions of employment. Membership of the retirement scheme and the medical scheme will then be compulsory" meant that she became a permanent employee after two years. Also see Grogan *Workplace Law* 45.

²¹ *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) paras 9, 10. In *Buthelezi* (para 20) the LAC reasoned that an employer is free not to enter into a fixed-term contract, but to conclude a permanent contract instead if there is a risk that he or she might have to terminate the employee's services before the expiry of the term. The employee assumes the risk that during the term of the contract, he or she could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in that. Fixed-term contracts, in terms of the common law and the LRA, cannot be terminated prematurely without good cause, unless the fixed-term employee is paid out what he or she would have been paid for the remainder of the agreed upon period. *Meyers v Abrahamson* 1952 3 SA 121 (C) 127 E; *Abdullah v Kouga Municipality* 2012 5 BLLR 425 (LC) paras 10-11. In *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) paras 62, 82 the court accepted that it was possible for a fixed-term contract to be terminated before the agreed upon term had elapsed, or before its expiry if the employee was guilty of a material breach of contract. Also see Grogan *Workplace Law* 44, 45. In limited circumstances, premature termination can be affected by mutual agreement. A fixed-term contract can stipulate that the employment relationship can be terminated by notice. See, for instance, *Mafihla v Govan Mbeki Municipality* 2005 26 ILJ 257 (LC) paras 40-42; *Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC); *Morgan v Central University of Technology, Free State* 2013 1 BLLR 52 (LC) para 5. The LAC has held that an employer can in such an event terminate the contract prematurely by giving adequate notice. In this regard see *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) para 9.

2.2 Termination on the completion of an agreed upon project

If the employer and employee agreed that the contract would terminate upon the completion of a project, the employment relationship will terminate automatically when the project is finalised. As the time when the project will be finalised is uncertain, the completion of the project could be viewed as constituting a resolutive condition. The LAC has accepted as a commercial reality that employment contracts can include suspensive or resolutive conditions. In the event of a suspensive condition there is no employment contract pending the fulfilment of the suspensive condition.²² In a case of a resolutive condition, a contract exists but it is terminated upon fulfilment of the resolutive condition.²³ The appellant's counsel in *Nogcantsi v Mnquma Local Municipality* argued that suspensive conditions are permissible, but that resolutive conditions in contracts of employment are not, and that this distinction is important.²⁴ The LAC correctly felt that the distinction is not what is important, but that what matters is whether the condition prevents the employee from exercising any right conferred by the LRA.²⁵

If the automatic termination is triggered by the completion of a project, the evidentiary burden rests on the employer to prove that the project was completed.²⁶ If the employer fails to prove this, the termination would be a "dismissal" that is actionable under the LRA.²⁷

²² *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) para 36; *Palm 15 (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A).

²³ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) para 36; *Faith Hill Holdings (Pty) Ltd v Sothiros* 1976 4 SA 197 (T) 199D; *Amoretti v Tuckers Land and Development Corporation (Pty) Ltd* 1980 2 SA 330 (W).

²⁴ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) para 37.

²⁵ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) para 38.

²⁶ *Grogan Workplace Law* 44. Likewise, the onus of proving consensual termination also rests on the employer. In this regard see *Springbok Trading (Pty) Ltd v Zondani* 2004 25 ILJ 1681 (LAC); *Kynoch Feeds (Pty) Ltd v CCMA* 1998 19 ILJ 836 (LC) 849G-H; *Ackrow v Northern Province Development Corporation* 1998 9 BLLR 916 (LC) 920F-G. However, see *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) para 33. The LAC held that the employee bore the onus of proving that a dismissal had occurred on a balance of probabilities, which he had in the LAC's view failed to do.

²⁷ In *Bottger v Ben Nomoyi Film and Video CC* 1997 2 LLD 102 (CCMA) the employer failed to prove that the project for which the employees had been appointed was concluded and the CCMA commissioner ruled that the fixed-term employee had been unfairly retrenched. Also see *Kelly Industrial Ltd v CCMA* 2015 36 ILJ 1877 (LC) paras 61, 65. In that case the employment contracts distinguished between an "assignment" and a "project". Whereas the assignment may have been finalised, the project as defined in the contract had not been completed. Accordingly, the court held that the TES by relying on the "automatic termination" provision had impermissibly attempted to evade its obligations to the employees.

2.3 Termination upon the occurrence of an event

It is also possible to link the termination of a fixed-term appointment to the occurrence of an event. The contract will then usually terminate automatically when the event occurs or the resolutive condition is fulfilled. If an "automatic termination" clause refers to an event, like the return of a permanent employee after his or her leave of absence, it would not be a dismissal if the employee's employment is terminated when the absent permanent employee returns. This would not be one of the ordinary reasons for dismissals. In other words, an "automatic termination" clause is enforceable in instances where fixed-term contracts terminate upon the occurrence of events that do not constitute an act by the employer.

Another example is that an "automatic termination" clause may include a condition that the employee's employment will automatically and simultaneously terminate when that person, or someone else, stops acting in a specific position or capacity. In *Potgieter v George Municipality*²⁸ the termination of an associated appointment terminated the employee's contract. The term of the fixed-term employment contract was linked to the term of office of the person in the position of the executive mayor. Therefore, when the executive mayor stopped performing that function, the fixed-term employee's employment was terminated simultaneously. The court ruled that this was an automatic termination and not a dismissal.²⁹

However, as soon as a decision needs to be taken or passed in order to trigger the "automatic termination" clause,³⁰ the position changes. For instance, in *South African Post Office v Mampeule*,³¹ Mampeule was appointed for five years, subject to the condition that he had to remain an executive director on the board. His contract of employment would, in terms of the resolutive condition contained in the "automatic termination" clause, terminate automatically and simultaneously if he ceased to hold office as an executive director.³² In other words, the employee's employment was linked to his holding of a position as an executive director of the company. When the minister removed Mampeule as a director, he claimed to have been unfairly dismissed.³³ The trial court and appeal court both held that the

²⁸ *Potgieter v George Municipality* 2011 32 ILJ 104 (WCC).

²⁹ *Potgieter v George Municipality* 2011 32 ILJ 104 (WCC) para 48.

³⁰ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 32

³¹ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC); *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC).

³² *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 2, 16.

³³ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 3.

minister, by deciding to remove Mampeule, had dismissed him.³⁴ In *PG Group (Pty) Ltd v Mbambo*,³⁵ the facts were similar: the employee's employment was linked to his holding of a position as a director. Following his removal from the board of the employer by the employer's holding company, his employment terminated. The court again found that the termination constituted a "dismissal".³⁶

In *Pecton Outsourcing*, the "automatic termination" clause linked the continuance of the fixed-term appointments of the workers to the service contract between the TES and its client.³⁷ The resolutive condition read that, if the service contract between the TES and the client is cancelled, the employment contract would terminate automatically, and that "[s]uch termination shall not be construed as a retrenchment, but shall be a completion of the contract".³⁸ When the client terminated the entire service agreement with the TES, the TES relied on the "automatic termination" clause.³⁹ A CCMA commissioner found that the employees had been dismissed, and although the dismissals had been for a fair reason they had been procedurally unfair.⁴⁰ On review, the LC held that the commissioner had erred in finding that the "automatic termination" clause was included as an attempt to contract out of the process for fair retrenchment. However, the judge agreed with the commissioner's finding that the "automatic termination clause" was unenforceable, making the terminations a dismissal.⁴¹

Recently the LAC in two decisions reached a different in conclusion. *Enforce Security Group v Fikile*⁴² like *Pecton* involved a situation where an employment agency or "service provider" employer placed workers with a client. It had been agreed that the contract between the employer and the client would terminate as soon as the service rendered by the workers were no longer required. The client gave notice to the workers that their contracts

³⁴ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 6, 13.

³⁵ *PG Group (Pty) Ltd v Mbambo* 2005 1 BLLR 71 (LC); *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 38-41.

³⁶ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 38-40.

³⁷ This type of employment contract is called a "fixed-term eventuality contract" in *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017).

³⁸ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 3.

³⁹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 17.

⁴⁰ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 12.

⁴¹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 22. Notably, because the dismissal was based on a mass retrenchment involving some 400 workers, the CCMA did not have jurisdiction to entertain the matter in any event, and it should have been referred to the Labour Court for adjudication on that basis.

⁴² *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017).

would terminate, because the event stipulated in the contract had taken place. The commissioner in the CCMA ruled the termination as not constituting a dismissal. The LC disagreed, holding that a dismissal had occurred that was both substantively and procedurally unfair. On appeal, the LAC concluded that the commissioner was correct that this was an automatic termination, and not a dismissal as the termination of the underlying contract between the client and the employer was the trigger of the termination.

In *Nogcantsi v Mquma Local Municipality*,⁴³ the Municipality had advertised two positions, and Nogcantsi had applied for one of them, a four-year fixed-term position as a security officer. He was interviewed, after which event he was offered and he accepted the post.⁴⁴ The "automatic termination" clause indicated that the appointment was subject to a vetting and screening process and that, should negative aspects be revealed, the contract would terminate automatically.⁴⁵ On top of that, the contract contained a clause providing for six months' probation, whereafter the appointment would be confirmed if Nogcantsi's services were satisfactory.⁴⁶ However, Nogcantsi failed to cross the first hurdle as the outcome of the vetting exercise revealed negative information about him, and his employment was terminated by the Municipality, relying on the "automatic termination" clause.⁴⁷ An arbitrator ruled that no dismissal had occurred and the Labour Court and Labour Appeal Court agreed.⁴⁸

Already it is apparent that despite the existence of similar factual circumstances, the results in the court are not always the same. The courts are often called upon to determine whether employers should be permitted to rely on "automatic termination" clauses, or whether doing so would unfairly deprive the affected employee of rights that he or she would otherwise have. Some instances of patent abuse of these contractual mechanisms are considered next.

⁴³ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC).

⁴⁴ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 3-4.

⁴⁵ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 5.

⁴⁶ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 6.

⁴⁷ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 7.

⁴⁸ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 2-3, 15, 43-46.

3 Recognising the potential for abuse

In principle, employers and employees can conclude contracts on any terms that are mutually acceptable to them.⁴⁹ This opens the door to potential abuse, particularly in a tripartite employment relationship, like the labour brokerage scene, in which in principle it would be possible to terminate employment without giving notice whenever the client pleases.⁵⁰ In several cases, employers have been absolved from scrutiny regarding the fairness of the dismissal in instances where review would probably have been appropriate. For instance, in *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group*,⁵¹ the employment contract contained a provision that the client could for whatever reason terminate the employee's services without legal consequence. The TES terminated the worker's services after the client informed it that the employee's services were no longer required. A CCMA commissioner ruled that no dismissal had occurred, but that the employment had terminated automatically. In *Dladla v On-Time Labour Hire CC*,⁵² the client decided to terminate the employee's employment because the employee had been arriving late to work. Instead of following the appropriate dismissal procedures, the TES relied on the "automatic termination" clause. This was also ruled to be an automatic termination and not a dismissal. Likewise, in *Sindane v Prestige Cleaning Services*⁵³ the worker's employment contract was terminated after the client to which he had been assigned indicated that his services were no longer required. The LC concluded that no dismissal had occurred.

This may be why the jurisprudence in the last five years supports the notion that a TES, to avoid possible liability for unfair dismissal in terms of the LRA, must always follow the proper dismissal procedures when terminating workers' employment. This appears to be the stance taken in *Chokwe and*

⁴⁹ *Paiges v Van Ryn Gold Mines Estates* 1920 AD 600, 616.

⁵⁰ No notice is required when the employment contract terminates upon completion of an agreed upon task or if it had simply lapsed. Grogan *Workplace Law* 182; Theron 2003 *ILJ* 1247. Contracts between TES's and their employees often incorporate "automatic termination" clauses. Typically, these clauses provide that the contract between the TES and its employee terminates automatically if the TES's client no longer requires the services of the employee, for whatever reason. Bosch 2008 *ILJ* 813; *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane* 2014 JOL 31668 (LC) para 60; *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 *ILJ* 693 (LC) para 37; *Mahlamu v CCMA* 2011 32 *ILJ* 1122 (LC) para 14.

⁵¹ *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* 2005 26 *ILJ* 2224 (CCMA).

⁵² *Dladla v On-Time Labour Hire CC* 2006 27 *ILJ* 216 (BCA).

⁵³ *Sindane v Prestige Cleaning Services* 2010 31 *ILJ* 733 (LC) paras 4, 18-19.

Phetha Professional Services CC.⁵⁴ The "automatic termination" clause determined that the employee's appointment would last for twelve months, subject to the "client's satisfaction and needs".⁵⁵ The arbitrator noted that this type of proviso is contrary to public policy, as its enforcement would infringe the constitutional right to fair labour practices.⁵⁶ In the result, the premature termination of the fixed-term contract without consultation was ruled an unfair dismissal.⁵⁷

In *Pecton Outsourcing Solutions CC and Pillemer B*,⁵⁸ the court held that generally if the termination of the employment relationship is triggered by an "event" and not by the employer's decision, no dismissal occurs. The court found that in this particular case the employer, a TES, had not performed an act of termination. Instead, the employment contracts terminated when the underlying service contract between the TES and the client was cancelled. Notwithstanding, Whitcher J found that, if the automatic termination clause was ruled invalid or unenforceable as it was in this case, the terminations would, nevertheless, constitute dismissals affected by the TES, because the TES had a choice between following the dismissal procedure, or invoking the automatic termination clause.⁵⁹

In *Mahlamu v CCMA*⁶⁰ the employee's employment contract included an "automatic termination" clause containing a resolutive condition to the effect that his employment would terminate upon expiry of the contract between the employer and the client or if the client, for whatsoever reason, no longer required his services.⁶¹ When the client advised the TES that a contract the client had with the TES would end with immediate effect, the TES informed Mahlamu that the contract had been cancelled, and that absent alternative positions his services were no longer required. A CCMA commissioner concluded that the contract had terminated automatically as the client no longer required Mahlamu's services.⁶² On review, the LC set aside the CCMA's ruling and declared that Mahlamu had been dismissed.⁶³ In *Mahlamu*, as in *Pecton*, invoking the "automatic termination" clause was ruled the proximate cause of termination, as the TES had chosen to rely on

⁵⁴ *Chokwe and Phetha Professional Services CC* 2010 31 ILJ 3041 (CCMA).

⁵⁵ *Chokwe and Phetha Professional Services CC* 2010 31 ILJ 3041 (CCMA) para 24.

⁵⁶ *Chokwe and Phetha Professional Services CC* 2010 31 ILJ 3041 (CCMA) para 26.

⁵⁷ *Chokwe and Phetha Professional Services CC* 2010 31 ILJ 3041 (CCMA) paras 31, 34.

⁵⁸ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC).

⁵⁹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) paras 21, 35.

⁶⁰ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

⁶¹ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 2.

⁶² *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) paras 4, 5.

⁶³ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 25.1.

it instead of following the dismissal procedure. In *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd*,⁶⁴ the court reiterated that an act performed by a third party terminating a service agreement with a labour broker cannot be the proximate cause of a "dismissal" in terms of section 186(1) of the LRA.⁶⁵ In other words, what the TES as employer does or omits to do is viewed as the conduct terminating the employment relationship, and not the decision made by the client.⁶⁶

4 Reliance on "automatic termination" clauses is accepted as a means of the termination of fixed-term employment contracts

In South Africa and internationally "automatic termination" clauses that determine that a fixed-term contract will simply expire or terminate upon the completion of project or occurrence of an event are accepted as valid means of terminating employment contracts.⁶⁷ The ILO specifically provides that it is possible for a fixed-term contract to terminate upon the occurrence of a particular event, or upon the completion of a particular project.⁶⁸ In other words, the short answer as to whether it is permissible for employers to include these types of clauses in an employment contract is an undeniable yes. However, when scrutinising the divergent views of the court in different cases, it becomes apparent that the situation is less clear-cut.

When considering whether the use of a specific "automatic termination" clause should be permitted, the South Africa court often relies on the judgment by the UK Court of Appeal in *Igbo v Johnson Matthey Chemicals Ltd*.⁶⁹ *Igbo* concerned the enforceability of "automatic termination" clauses,

⁶⁴ *SATAWU obo Dube v Fidelity Supercare Service Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 32-34.

⁶⁵ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) para 16.

⁶⁶ However, compare *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017). The LAC in this case held (para 24) that the fact that the employer could retrench the employees or could have considered other options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties. The considerations of the fairness or otherwise of a dismissal does not come into play in the process of determining whether or not a dismissal had occurred.

⁶⁷ Section 198B of the LRA defines "fixed-term contract" as a contract terminating upon the agreed-upon date which is not the ordinary retirement date, the completion of a project or task, or on the happening of an event described in the contract.

⁶⁸ Article 2(a) of the *ILO Convention 158 of 1982 on the Termination of Employment*.

⁶⁹ *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA). See, for instance, *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC); *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC). Although *Igbo* concerned an employee's rights before and after a contractual amendment, it establishes relevant principles.

and the scope of protection offered to employees by the legislation.⁷⁰ The facts were: the employee wanted to go on extended vacation leave. The employer and employee entered into an agreement that if the employee should fail to return to work on a particular day, the contract of employment would terminate automatically. When the employee failed to return to work on the specified day, the employer took it as meaning that the resolutive condition had been fulfilled and the employment contract had terminated automatically. In the application for a declaratory order, the trial court having referred to *British Leyland (UK) Ltd v Ashraf*⁷¹ concluded that the consensual agreement terminated the employee's employment. On appeal, the EAT agreed with the finding of the court below, and dismissed the employee's appeal. In a further appeal, the Court of Appeal overturned the findings of both of the lower courts, and overruled the judgment in *Ashraf*.⁷² The court declared that the employee had been dismissed, and that the "automatic termination" clause was void.⁷³ The Court of Appeal held that the "automatic termination" clause had the effect that if the employee failed to return to work on the specified day, the employee's right to refer a dispute based on unfair dismissal would be excluded or restricted. This meant that enforcing the clause would render the right not to be unfairly dismissed conditional.⁷⁴ The court rejected the employer's argument that the termination of employment had been consensual on the basis that the object of the legislation could then easily be defeated. Employers could easily include clauses that would circumvent the statutory protection.⁷⁵

⁷⁰ The court in *Igbo* considered ss 5, 54 and 55 of the *Employment Protection (Consolidation) Act 1978* ("the EPA"). S 54(1) of the EPA is similar to s 185 of the LRA. It determines that "every employee shall have the right not to be unfairly dismissed by his employer". S 55(2)(a) of the EPA like s 186(1)(a) of the LRA determines that an employee is dismissed if his or her employment contract is "terminated by notice or without notice". S 140 of the EPA is very similar to s 5 of the LRA. It provides that "(1) Except as provided by the following provisions of this section, any provision in an agreement (whether a contract of employment or not) shall be void in so far as it purports— (a) to exclude or limit the operation of any provision of this Act; or (b) to preclude any person from presenting a complaint to, or bringing any proceedings under this Act before, an industrial tribunal". *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 16.

⁷¹ *British Leyland (UK) Ltd v Ashraf* 1978 IRLR 930 (EAT).

⁷² *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA) para 19; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 17.

⁷³ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 15.

⁷⁴ *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA) paras 19, 21; *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 36; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 17.

⁷⁵ *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA) para 17; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 17.

In *Mahlamu v CCMA*,⁷⁶ a South African case, the employment contract determined that, if the client of the TES no longer required the services of the employee, or no longer wished to deal with that employee, the contract would terminate automatically.⁷⁷ The LC held that a contractual stipulation having the effect of making the termination of employment something other than a dismissal so that the employee is left unable to challenge the fairness of the termination in terms of the LRA is prohibited.⁷⁸ If the contract is set to terminate upon the occurrence of an event, usually it would not be a dismissal if the agreed upon event materialises and the employment terminates. The employee could in those instances still rely upon section 186(1)(b) of the LRA if the employer fails to renew, or offers to renew a fixed-term contract on less favourable terms and the employee reasonably expected the employment relationship to continue. The right not to be unfairly dismissed is not rendered conditional. The court in *Mahlamu*⁷⁹ noted that it would be unwise to attempt to crystallise all of the instances in which the right to a fair dismissal would be converted into a conditional right. However, two examples were mentioned: if the contract would terminate automatically upon "a defined act of misconduct or incapacity", or if "a decision by a third party" has the result of terminating the employment it would render the right not to be unfairly dismissed conditional, which is impermissible.⁸⁰ Likewise, in *Pecton Outsourcing Solutions CC and Pillemer B*⁸¹ the court, despite the acceptance of this mechanism as a means of terminating employment relationships, held that an "automatic termination" clause must not attempt to make it impossible for the employee to exercise his or her rights under the LRA. This, the court held, is what is meant by "contracting out", which is prohibited in the LRA.⁸² In *Nogcantsi v Mnquma Local Municipality*,⁸³ the LAC with reference to *SA Post Office v Mampoule* and *Mahlamu* the court held that the condition in the present instance was acceptable. The court reasoned that making an appointment or continued employment conditional on a positive vetting and screening exercise was justified, given the nature of the work. Moreover, providing that the contract will terminate automatically if the result of the vetting is negative did not deprive an employee of the right to security of employment, because it was

⁷⁶ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

⁷⁷ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 2.

⁷⁸ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 22; *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 28.

⁷⁹ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

⁸⁰ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 26.

⁸¹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC).

⁸² Section 5 of the LRA.

⁸³ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC).

not aware of any cases in which such a requirement had the effect of diminishing an employee's job security.⁸⁴

It is clear that despite the acknowledgement that it is possible for fixed-term employment relationships to terminate automatically, the wording of "automatic termination" clauses and the motivation for reliance upon them play a significant role in determining whether the termination was indeed an automatic termination or a dismissal instead. Even though "automatic termination" clauses are in principle accepted as a way of terminating fixed-term employment contracts, it remains possible for the contractual clauses to be ruled invalid and/or unenforceable. This aspect is considered next.

5 Is the contract invalid or unenforceable, or both?

Fixed-term employees are more exposed to abuse than are permanent employees. It is easier for employers to find loopholes in fixed-term employment relationships that allow them to "contract out" of certain rights. This is why labour forums scrutinise "automatic termination" clauses carefully to ensure that the rights in the LRA are not denied by cleverly worded contractual clauses.⁸⁵ Notably, the court has on several occasions held that it will not consider as conclusive proof of a waiver of the dismissal protection a contractual term in a fixed-term employment contract to the effect that the employee agrees that he or she will not have a reasonable expectation of continuation of employment.⁸⁶

If a contractual stipulation is contrary to public policy, it is unenforceable. A contractual clause which is found to be inimical to the *Constitution of the Republic of South Africa, 1996* ("the *Constitution*") would, for instance, be contrary to public policy, and unenforceable for that reason.⁸⁷ If the termination clause is worded in a way which renders it contrary to public

⁸⁴ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 15, 21-24.

⁸⁵ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 23.

⁸⁶ Basson J in *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* 2009 30 ILJ 407 (LC) 418I-19B held that, despite the inclusion of a clause excluding the possibility of a reasonable expectation, the facts of the case must be considered to determine whether a reasonable expectation as envisaged in s 186(1)(b) of the LRA had been created. This principle was confirmed in *SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC) para 13. In *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* 1998 19 ILJ 731 (SCA) 733-734 the LC held that despite the inclusion of a clause excluding an expectation of a reasonable expectation, a reasonable expectation could arise that the fixed-term contract will be renewed either temporarily or indefinitely.

⁸⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 29-30.

policy, an employer would be unable to rely on it as a reason and procedure for the termination of the employment relationship.⁸⁸

A contractual clause that is contrary to the *Constitution* would be invalid if its contents constituted a law of general application for the purposes of section 36 of the *Constitution*, and "law or conduct" capable of being declared invalid for the purposes of section 172(1)(a) of the *Constitution*, which an "automatic termination" clause is not.⁸⁹ Therefore, declaring an "automatic termination" clause unconstitutional would render it unenforceable, not invalid.⁹⁰

Arguably, an "automatic termination" clause could be declared invalid by other means. In *South African Post Office v Mampeule*⁹¹ both the validity and enforceability of the "automatic termination" clause were attacked. It was submitted that the clause constituted an impermissible limitation on statutory rights in the employment contract. The employee argued that the provision "vitally limited" the dismissal protection, because the right not to be unfairly dismissed would be subject to the condition that the employee retained his position as director. It was also argued that the clause was unconstitutional, contrary to public policy and unenforceable. Moreover, it was argued that because the "automatic termination" clause conflicted with the LRA it stood to be set aside in terms of section 210 of the LRA.⁹² Unfortunately, the LAC found it unnecessary to consider the issue of the constitutionality of the "automatic

⁸⁸ Bhorat and Cheadle *Labour Reform* 23. The termination of employment will then constitute a dismissal. The employer, having relied upon the automatic termination clause, at the very least, would not have followed a fair procedure in terminating the employment. Consequently, the dismissal would usually also be ruled unfair. In some instances, the dismissal could nevertheless be fair. Compare *SATAWU obo Dube v Fidelity Supercare Service Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 25, 26. At paras 62-66 the court held that there had been a dismissal for operational reasons, but that despite the reliance upon the "automatic termination" clause, the dismissal was not unfair. The employer had consulted with the affected employee on several occasions and tried to get her to apply for a position, but the employee declined this offer and indicated that she would claim disability instead, with which the employer had also assisted her.

⁸⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 19, 20, 23, 24.

⁹⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 8, 10. In the High Court, the applicant did not argue that the contractual clause was contrary to the public policy. Instead, the case was framed around the unconstitutionality based on s 34 of the *Constitution*. The High Court declared the contractual clause invalid based on *pacta sunt servanda*. The reason why the contractual clause was not declared unconstitutional in itself was that the clause was not a law of general application as required in s 36 of the *Constitution*.

⁹¹ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC).

⁹² *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 11.

termination" clause because it agreed with the court below, and also declined to make a finding concerning the standing of the clause in the light of section 210 of the LRA.⁹³ In *Nogcantsi v Mquma Local Municipality*⁹⁴ Nogcantsi's legal representative claimed that the "automatic termination" clause in his case was invalid in terms of section 5(2)(b) read with 5(4) of the LRA. Allegedly, it denied him the opportunity of making representations, or in the alternative it was alleged that the clause was void for vagueness, because no objective basis was provided to determine whether the outcome of the vetting was "negative". Unfortunately, the LAC, rejecting the first claim and surmising that the clause was clear enough, did not consider the alternative plea of invalidity based on vagueness.⁹⁵

The relevant provision which is generally applied in terms of the LRA to declare an "automatic termination" clause invalid or unenforceable is considered below.

6 Contracting out or avoiding the application of statutory protection by relying on "automatic termination" clauses

That unscrupulous employers would attempt to avoid their obligations in terms of the LRA was anticipated. That is why section 5 was included in the LRA to prevent contracting out of the rights conferred by the LRA.⁹⁶ The relevant excerpts of this section read

- (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following- ...
 - (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act ...
- (4) 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 section 4, or this section, is invalid, unless the contractual provision is permitted by this Act.⁹⁷

Generally, the court accepts that it is impermissible for employers to include in an employment contract a stipulation that makes the duration of an employment relationship dependent on an action to be performed by the employee in relation to his or her conduct, capacity or the employer or

⁹³ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 24.

⁹⁴ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 25-27.

⁹⁵ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 25-27.

⁹⁶ Notably, this provision was included in the LRA before the recent labour law reform.

⁹⁷ Section 5 of the LRA.

client's operational requirements.⁹⁸ This would constitute a dismissal.⁹⁹ If for instance the contract determines that the fixed-term employee's employment will terminate automatically if the employee is guilty of misconduct, if the labour broker or the client takes an operational decision, or if the employee fails to meet a specified performance standard, the contractual clause¹⁰⁰ will be ruled to be of no legal force. This would clearly deprive employees of their statutory rights in terms of the LRA and the *Constitution*.

Unfortunately, employers often do not understand what is meant by the prohibition against contracting out, or they choose to ignore it. For instance, in *Pecton Outsourcing Solutions CC and Pillemer B*,¹⁰¹ the employer argued that a TES is free to contract out of the provisions related to notice and severance pay.¹⁰² Likewise, Kelly Industrial argued that a TES could simply lay off workers without that constituting a "dismissal" if the client no longer required them.¹⁰³ The question is whether these views that the right to be fairly dismissed, to receive notice of termination and severance pay can be waived by agreement are correct. The different rights that fixed-term employees are entitled to, but which are often considered as having been waived by signing a fixed-term contract, and which are negatively affected by the enforcement of "automatic termination" clauses, are scrutinised more closely below.

⁹⁸ *South African Post Office Ltd v Mampeule* 2010 30 ILJ 664 (LC); *South African Post Office Ltd v Mampeule* 2010 31 ILJ 2051 (LAC); *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC). In *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) the court distinguished *SA Post Office v Mampeule* and *Mahlamu v CCMA* in which it had been found that in terms of s 5(2)(b) and 5(4) of the LRA, parties to an employment contract cannot contract out of the protection afforded in terms of the LRA against unfair dismissal, because the condition set in this case was not one that was impermissible under the LRA (para 20). As for *Mampeule*, the LC held that there the Minister was aware that his action would trigger the termination, which was not the case in *Nogcantsi*, where he was required to undergo a vetting and come out clean on the other side (paras 23-24).

⁹⁹ Grogan *Workplace Law* 44.

¹⁰⁰ The contractual principle of severability dictates that only the parts of a contract that are considered contrary to public policy can be declared unenforceable. See Christie and Bradfield *Law of Contract* 381.

¹⁰¹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC).

¹⁰² *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 18. Notably, the right to notice and severance pay and the right to unemployment benefits are not covered by the LRA but by other pieces of legislation. Therefore, it would be misplaced to argue that these provisions are also subject to s 5 of the LRA.

¹⁰³ *Kelly Industrial Ltd v CCMA* 2015 36 ILJ 1877 (LC) para 65.

6.1 Waiver of the right to receive severance pay

A fixed-term employee that is dismissed for operational reasons,¹⁰⁴ who had been employed for longer than twelve months, even before the amendments, would have been entitled to severance pay.¹⁰⁵ Only if that fixed-term employee refuses reasonable alternative employment offered to him or her by the employer would he or she forfeit the severance pay.¹⁰⁶ The LRA states that severance pay is additional to any other payment due to the employee.¹⁰⁷ In *Bronn v University of Cape Town*¹⁰⁸ the court found that severance pay is a social security mechanism which is intended to aid workers whose services are terminated due to no fault of their own.¹⁰⁹ Nevertheless, in practice fixed-term employees often have been denied severance payment. Before the amendments, the labour tribunals did not enforce the payment of severance pay to fixed-term employees even when a dismissal for operational reasons was ruled unfair.¹¹⁰ For instance, in *Nkopane v IEC*¹¹¹ Kennedy AJ held that severance pay that the employer had paid the affected fixed-term employee on termination had to be subtracted from the subsequent compensation awarded for unfair dismissal.¹¹² Apparently, despite the fact that fixed-term employees would

¹⁰⁴ In s 213 of the LRA "operational requirements" are described as the needs of employers based on "economic, technological, structural or similar" motivations.

¹⁰⁵ Section 41 of the *Basic Conditions of Employment Act 75 of 1997* (the "BCEA"). The minister may adjust this rate from time to time after consultation with NEDLAC and the Public Service Coordinating Bargaining Council. Contracts of employment and collective agreements may provide for higher levels of redundancy pay.

¹⁰⁶ Section 41(4) of the BCEA determines that an employee who unreasonably refuses an offer of alternative employment forfeits his or her right to severance pay. Also see item 11 of the Code of Good Practice on Dismissal based on Operational Requirements (GN 1517 in GG 20254 of 16 July 1999). The reasonableness of a refusal is determined by a consideration of the reasonableness of the offer of alternative employment. Objective factors like remuneration, status, job security and the employee's personal circumstances are considered.

¹⁰⁷ Section 196 of the LRA. However, an employee would not be entitled to a severance payment despite the fact that he or she is dismissed for operational reasons if the employer is exempted from paying severance pay, or if the employer had offered other reasonable alternative employment which was refused.

¹⁰⁸ *Bronn v University of Cape Town* 1999 20 ILJ 951 (CCMA). De Villiers 2010 *SA Merc LJ* 117-118, 120.

¹⁰⁹ *Bronn v University of Cape Town* 1999 20 ILJ 951 (CCMA) 952H-J.

¹¹⁰ De Villiers 2010 *SA Merc LJ* 120. Also see *Khumalo v Supercare Cleaning* 2000 8 BALR 892 (CCMA) 897D-F. In this case the arbitrator noted that employees appointed on fixed-term contracts whose employment was conditional upon the continuation of a contract between the employer and its client were not dismissed and consequently not entitled to severance pay upon cancellation of their contracts; *SACCAWU obo Makubalo v Pro-Cut Fruit and Veg* 2002 5 BALR 543 (CCMA) 545E.

¹¹¹ *Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC).

¹¹² *Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC) para 80. Notably, in the UK, redundancy payments received after the termination of a fixed-term employee's employment would be subtracted from the compensation for unfair

be entitled to severance pay, employers and labour forums often did not apply the severance pay principles to fixed-term employees in the same way as for indefinitely appointed employees. This view is bolstered by the fact that in the recent LAC judgment the employees contested being appointed on fixed-term contracts so that they would be in a position to claim a proper retrenchment process under section 189 of the LRA and be eligible to be paid severance pay.¹¹³

6.2 Waiver of the right to receive notice of termination

All employees, including fixed-term employees, are entitled to reasonable notice of termination of their employment.¹¹⁴ However, it is well accepted that absent a stipulation providing for the possibility of terminating the contract by notice, or if the fixed-term contract is renewable,¹¹⁵ an employer can rely on the termination date in a fixed-term contract without giving notice.¹¹⁶

6.3 "Waiver" of unemployment benefits

Although the *Unemployment Insurance Act* 63 of 2001 provides for the payment of unemployment benefits to all employees,¹¹⁷ and fixed-term employees can claim unemployment benefits if their contracts are terminated,¹¹⁸ it has been held that a fixed-term employee who reasonably expects to continue working for an employer would not claim unemployment insurance.¹¹⁹ This finding by a bargaining council arbitrator cannot be

dismissal only if adding them would mean that the basic award would be exceeded, if the employee's conduct had contributed to the termination, or if the employee had failed to take steps to mitigate his or her losses. Refer to s 123(3) of the *Employment Rights Act* 1996.

¹¹³ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) paras 6, 14.

¹¹⁴ Sections 37 and 38 of the BCEA. The notice period for fixed-term employees employed for longer than a year may be reduced to two weeks by means of a collective agreement. It is also possible to pay an employee in lieu of notice. Also see *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 37.

¹¹⁵ *Mafihla v Govan Mbeki Municipality* 2005 26 ILJ 257 (LC) para 37. It is possible to include a notice period in a fixed-term contract. This agreement is called a "maximum duration contract".

¹¹⁶ Gericke 2011 *PELJ* 116; Olivier 1996 *ILJ* 1013-1014.

¹¹⁷ Section 4 of the *Unemployment Insurance Act* 63 of 2001 establishes a fund to which employers and employees contribute.

¹¹⁸ Section 16(1)(a) of the *Unemployment Insurance Act* 63 of 2001; ss 5, 8 of the *Unemployment Contribution Act* 4 of 2002.

¹¹⁹ *Hlatswayo and KwaDukuza Municipality* 2012 33 ILJ 2721 (BCA) para 5.2.11. The employee was eligible to claim unemployment payments, but had failed to do so. This

viewed as setting a precedent that signing a fixed-term contract amounts to a contractual waiver of the statutory right to receive unemployment insurance fund payments. However, it serves to illustrate how the conclusion of a fixed-term contract can negate the dismissal protection afforded to fixed-term employees.

The discussion so far makes it clear that "automatic termination" clauses, despite generally being accepted as mechanisms for the termination of fixed-term employment, are contentious. Next, the focus turns to the method used by the court and the factors that are considered in determining whether an "automatic termination" clause is valid and/or enforceable.

7 How the courts determine if an "automatic termination" clause is valid and enforceable

The procedure used by the court in establishing whether or not an employer should be permitted to rely on such a clause warrants further scrutiny. The first test is to determine what actually caused the termination. This test is considered below.

7.1 The proximate cause test

The first step is to determine if a "dismissal" occurred, because otherwise the CCMA or bargaining council would lack jurisdiction to entertain the dispute.¹²⁰ The proximate cause test is used to determine whether a dismissal had occurred in instances in which the employer relied on an "automatic termination" clause.¹²¹ The principles of factual and legal causation play a role in determining what the proximate cause of termination of the employment relationship is.¹²² Automatic terminations would usually not constitute a dismissal, because the termination would not have "been occasioned by an act of the employer".¹²³ To prove that a dismissal

was considered as indicative of the fact that the employee had expected that his employment would continue.

¹²⁰ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 34; *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) paras 42-46.

¹²¹ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 8, 16, 43; *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 17.

¹²² *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 8.

¹²³ *Grogan Workplace Law* 182. Also see *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) para 16. The court accepted that in automatic terminations, an employment contract is terminated, "in ways other than the employer undertaking some action that leads to the termination" and *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 19.

occurred, the employer's conduct must have been the proximate cause of the termination.¹²⁴ A clear, unilateral and unequivocal act by the employer is required that shows the intention not to continue with the employment relationship.¹²⁵ The Labour Appeal Court in *Nogcantsi v Mquma Local Municipality* qualified this requirement further by holding that the employer's act must have been "deliberate" or "intentional" and directed at causing a dismissal.¹²⁶

In *Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation*,¹²⁷ the court stated that the event that had occurred latest in time is not necessarily the effective cause of termination.¹²⁸ An act that may seem remote to the result may be the effective cause.¹²⁹ For instance, if a fishing trawler is lost after being arrested when the owners failed to pay the fine to release it, the proximate or effective cause of the loss is not confiscation of the trawler but the failure to pay the fine.¹³⁰

What the effective cause of a termination is must be ascertained on a case-by-case basis. A small difference in the facts can change the outcome. *NULAW v Barnard*¹³¹ serves as an example. In *NULAW*, the shareholders had passed a special resolution for the company's voluntary winding-up. Consequently, all the workers' employment contracts were terminated because of the insolvency of the company. The question was whether the insolvency terminated the contracts, or whether the passing of the resolution to wind up the company was the proximate cause. In *SA Post Office Ltd v Mampeule*,¹³² Davis JA with reference to *NULAW* held that it was the special

¹²⁴ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 19.

¹²⁵ Grogan *Workplace Law* 165, 183; *Ouwehand v Hout Bay Fishing Industries* 2004 25 ILJ 731 (LC); *NULAW v Barnard* 2001 9 BLLR 1002 (LAC); *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 40. An employee who claims to have been dismissed as envisaged in s 186(1)(a) of the LRA must prove that the employer had committed an overt act that is the "sole or proximate cause" of termination of his or her employment.

¹²⁶ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 32.

¹²⁷ *Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation* 1995 3 SA 751 (A).

¹²⁸ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 44.

¹²⁹ Also see *South African Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC) para 43; *SATAWU obo Dube v Fidelity Supercare Service Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 34.

¹³⁰ *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) 862C-863B; *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 43.

¹³¹ *NULAW v Barnard* 2001 9 BLLR 1002 (LAC).

¹³² *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC).

resolution that terminated the employment relationships. Had the winding-up been compulsory and not voluntary, no dismissals would have occurred. Davis JA expressed the opinion that the court's role in a compulsory winding-up would have had the effect of breaking the causal link.¹³³

In *Nogcantsi v Mquma Local Municipality*¹³⁴ Coppin JA with Landman JA and Phatshoane AJA concurring distinguished *NULAW* and *Mampeule* by finding that Nogcantsi was not dismissed by an act or omission by the employer, but that the fulfilment of the resolutive condition - a negative outcome in a vetting and screening exercise - had the effect of triggering the "automatic termination" clause. The "automatic termination" clause in this case required that Nogcantsi undergo a positive vetting and screening or face automatic termination of his employment contract. The LAC held that it was not the municipality's conduct that produced a negative vetting result and caused the termination. The negative outcome of the vetting was an objective fact that ended the employment relationship. Moreover, it was not a third party that made the information negative to trigger the automatic termination.¹³⁵

In *Sindane v Prestige Cleaning Services*¹³⁶ the worker's contract was made dependent on the continued existence of a contract between the employer and its client. The client "scaled down" the contract with the employer by cancelling a contract in terms of which an extra cleaner had been provided, which led to the termination of the employee's contract. The court held that the employer had not performed an overt act that was the proximate cause of the termination of employment. The contract had simply lapsed. In *SA Post Office Ltd v Mampeule*¹³⁷ the outcome was different. The contract provided that the employee's employment would terminate "automatically and simultaneously" if he ceased to hold the office of director. When Mampeule was removed as a director, his employer claimed that his employment contract had terminated automatically, and that no "dismissal" had occurred.¹³⁸ Ngalwana AJ disagreed, holding that the contract of employment had to be construed together with the act of removing the employee. The court concluded that, had the minister not removed

¹³³ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) paras 16-17.

¹³⁴ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC).

¹³⁵ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 30-31.

¹³⁶ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC). This principle was applied in *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 7.

¹³⁷ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC).

¹³⁸ The employer had contended that termination of the employee's contract of employment was not caused by an act of the employer, and that no "dismissal" had occurred. *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 32.

Mampeule from the board of directors, his employment would not have terminated. Therefore, the removal proximately or effectively caused the termination of his employment.¹³⁹ The LC in *Mampeule* held, and the LAC agreed, that any act by the employer which results directly or indirectly in the termination of the employee's contract of employment that results directly or indirectly in the termination of the employee's contract of employment constitutes a dismissal.¹⁴⁰

Where a series of events led up to the termination, the court must determine which event terminated the contract.¹⁴¹ The general stance taken by the court is that if the employer's conduct or an act by the employee is not the proximate cause of the termination of the employment contract, the termination does not constitute a dismissal.¹⁴² Nevertheless, the court in *Pecton* held that, even if the employer did not perform an act of termination, it remains possible for the employee to claim based on unfair dismissal if the "automatic termination" clause is invalid and/or unenforceable.¹⁴³ These aspects are considered below.

7.2 Determining whether or not the "automatic termination" clause is lawful and enforceable

When deciding if an "automatic termination" clause amounts to impermissible "contracting out", the court determines whether the particular clause falls foul of section 5(2)(b) of the LRA.¹⁴⁴ Even if it does fall foul of this provision, it can still be saved from invalidity by the section 5(4)-exception.¹⁴⁵ The LRA must be purposively construed to give effect to the *Constitution*.¹⁴⁶ Accordingly, section 5 must be interpreted in favour of protecting employees against unfair dismissal.¹⁴⁷ The employer bears the evidentiary burden of proving that the "automatic termination" provision is

¹³⁹ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 44.

¹⁴⁰ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) paras 21, 32; *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 12.

¹⁴¹ *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 33-34; *SA Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC) para 43.

¹⁴² *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) paras 33-34; *SA Post Office Ltd v Mampeule* 2009 30 ILJ 664 (LC) para 43.

¹⁴³ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) paras 21, 35.

¹⁴⁴ See the wording of the section as cited under 6.

¹⁴⁵ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 14.

¹⁴⁶ Section 3(b) of the LRA. *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 11.

¹⁴⁷ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 12.

permitted, and that in the circumstances it is permissible to contract out of the unfair dismissal protection.¹⁴⁸

In *Pecton Outsourcing Solutions CC v Pillemer B*,¹⁴⁹ a process for determining whether an "automatic termination" clause should be enforced was set out.¹⁵⁰ First, the reason for the dismissal must be considered, ie whether it was misconduct, incapacity, operational requirements or no reason at all. In this determination, the content of the reason must take precedence over the form of the contractual device. If on the facts the reason for the termination of the contract is a typical reason for a dismissal, this evidences the possible attempt to "contract out" of the LRA. It would then be presumed that the termination was an unfair dismissal.¹⁵¹ Next it must be decided whether the dismissal was substantively, and/or procedurally unfair, and the labour forum must award the appropriate relief.¹⁵²

The enquiry does not end there, as several additional factors are considered by the court before employers are permitted to rely on "automatic termination" clauses for the termination of fixed-term employment contracts. The court in *Enforce Security Group v Fikile*¹⁵³ had to determine whether relying on the "automatic termination" clause was impermissible in the circumstances. The court set out factors that must be taken into account in determining whether the contracting parties have contracted out of the unfair dismissal protection contained in the LRA. The court stressed that the list is not a closed one. In determining whether in the circumstances of a particular case the clause was intended to circumvent the obligations imposed by the LRA and the *Constitution*, relevant considerations include: the wording of the automatic termination clause; the context of the agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose who must render the services under the service agreement; whether the clause

¹⁴⁸ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 19.

¹⁴⁹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC).

¹⁵⁰ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 46. The court stated that the reason for setting these criteria was "at a policy level to cure the ill of TES providers constructing employment contracts that, while not inviting cancellation by a client in times of conflict with labour, certainly signal that the TES, and by extension the client, will not suffer significant legal and financial consequences should the client, for good reason or bad, turn its face against the workforce as a whole".

¹⁵¹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 43.

¹⁵² *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 30.

¹⁵³ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017).

is used to unfairly target a particular employee; and whether the event is based on proper economic and commercial considerations.¹⁵⁴ Several facets that form part of the public policy which is the basis of the test for the enforceability of termination clauses in fixed-term contracts are highlighted below. Reference is made to the cases in which they have been applied, and an attempt is made to highlight the focus of the presiding officer's scrutiny and what was considered as carrying particular weight in the different cases.

7.3 Public policy as a measure for enforceability

Before and after the legislative amendments, public policy played and continues to play a role in determining whether an employee whose services had been terminated, was dismissed. Public policy is not a stagnant concept. Policy assists in shaping interests that are considered worthy of recognition, and eventually these interests influence and shape the policy. When determining whether the clause is contrary to public policy the court must be guided by the constitutional values¹⁵⁵ and measure these against the *pacta sunt servanda* principle.¹⁵⁶ The courts can in so doing decline to enforce contractual terms found to be in conflict with the constitutional values, despite the fact that the parties had agreed to them. Public policy dictates that contractual clauses must be reasonable and fair. Fixed-term employees must also be afforded a fair opportunity to seek judicial redress. Several factors that the courts have considered in determining whether an automatic termination or a dismissal has occurred are briefly considered below.

¹⁵⁴ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) para 41.

¹⁵⁵ In *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 7 the SCA linked public policy to the *Constitution* by finding that public policy "... now derives from the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism". Clauses that are ruled "unreasonable, oppressive or unconscionable" by the court would generally be considered contrary to the constitutional values. Also see *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 11, 13, 15, 51, 140. Public policy also needs to consider "the necessity to do simple justice between individuals. The court has held that the public policy is informed by the principle of ubuntu" - *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51; see further *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9F-G; *Jajbhay v Cassim* 1939 AD 537 544.

¹⁵⁶ The principle of *pacta sunt servanda* is subject to the *Constitution*. *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 15.

7.3.1 Constitutional values

The values entrenched in the *Constitution* and the Bill of Rights¹⁵⁷ form the foundation of public policy.¹⁵⁸ Fixed-term employment relationships are based on the notion that employers and employees have the right to contract freely to ensure predictability and control in so far as the terms of their engagement are concerned.¹⁵⁹ The fundamental constitutional values of freedom, equality, and human dignity favour the recognition of the freedom to contract and to be bound to contracts voluntarily entered into. Public policy dictates that agreements concluded freely and voluntarily should be enforced no matter how unfair they appear to be.¹⁶⁰ This principle is premised on the understanding that the creation of a contract is the result of a free choice.¹⁶¹ However, the principle which is acknowledged as part of public policy is also qualified by it.¹⁶² The court can declare contractual terms that conflict with the constitutional values or the public policy unenforceable despite the fact that the parties had agreed upon them.¹⁶³ Public policy also requires fairness, justice, and reasonableness.¹⁶⁴ Different aspects of these requirements are elaborated on below.

7.3.1.1 The right to fair labour practices

The LRA was enacted to give effect to the right to fair labour practices established in section 23(1) of the *Constitution*.¹⁶⁵ The right not to be unfairly dismissed is essential to this constitutional right.¹⁶⁶ It serves to protect

¹⁵⁷ Chapter 2 of the *Constitution*.

¹⁵⁸ Sections 1, 7(1) of the *Constitution*. Also see *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 28-29.

¹⁵⁹ Gericke 2011 *PELJ*; *Buthlezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) paras 10-11.

¹⁶⁰ Bhana, Bonthuys and Nortje *Student's Guide* 162. *New Reclamation Group (Pty) Ltd v Davies* (17200/2013) 2014 ZAGPJHC 63 (20 March 2014) para 4; *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794B-D; *Reddy v Siemens Telecommunication (Pty) Ltd* 2007 2 SA 486 (SCA) para 15.

¹⁶¹ Hutchison and Pretorius *Law of Contract* 23; *New Reclamation Group (Pty) Ltd v Davies* (17200/2013) 2014 ZAGPJHC 63 (20 March 2014) para 4; *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794B-D. Also see *Reddy v Siemens Telecommunication (Pty) Ltd* 2007 2 SA 486 (SCA) para 15.

¹⁶² Van Jaarsveld 2003 *SA Merc LJ* 326, 328.

¹⁶³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 30.

¹⁶⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73.

¹⁶⁵ Section 1(a) of the LRA. *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 11.

¹⁶⁶ *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) para 42; *Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 (A) para 32.

vulnerable employees, which is consistent with the main purpose of labour law.¹⁶⁷

Section 185 of the LRA determines that every employee has the right not to be unfairly dismissed. In assessing whether an "automatic termination" clause should be enforced in a particular instance, the right to job security that fixed-term employees enjoy must be weighed against the principle of the sanctity of contract.¹⁶⁸

7.3.1.2 The right to job security of an individual worker as opposed to the entire workforce

In *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane*¹⁶⁹ Snyman AJ held that, if the entire service agreement between the client and the TES is either completed or terminated, it is not individual workers being dealt with. The termination of the whole service agreement would amount to the completion of the entire project. If the entire underlying contract between the TES and the client is terminated, the employees' contracts would terminate automatically if their contracts include provisions to the effect that the contracts would terminate in that event, and properly defines that as the terminating event.¹⁷⁰ By this reasoning, the employment of workers in a temporary employment service situation is made an accessory contract. The main contract is the one between the TES and the client. If the principal contract is extinguished, the accessory agreement is also terminated without legal consequence.

However, in *Pecton Outsourcing Solutions CC v Pillemer B*,¹⁷¹ the question of whether it makes a difference whether one employee is affected or the entire workforce was answered: no, it does not.¹⁷² In *Pecton*, a third party had initiated the termination. The entire workforce was left jobless, because the entire service agreement had been terminated.¹⁷³ In *Mahlamu v*

¹⁶⁷ *Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC) paras 72, 74; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 11; *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) para 42; *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 21.

¹⁶⁸ Hutchison and Pretorius *Law of Contract* 196.

¹⁶⁹ *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane* 2014 JOL 31668 (LC) para 60.

¹⁷⁰ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 38; *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane* 2014 JOL 31668 (LC) para 63.

¹⁷¹ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC).

¹⁷² *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 39.

¹⁷³ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 32.

CCMA¹⁷⁴ an individual worker had been targeted, but the service agreement between the TES and the client remained in place. The LC in *Pecton* noted that the effect was the same: the operation of the "automatic termination" clauses "left the employees' security of employment entirely dependent on the will (and the whim) of the client".¹⁷⁵ The client could at any time, for any reason, simply state that the applicant's services were no longer required. That would have resulted in an automatic termination, leaving the employee with no recourse.¹⁷⁶ In *Pecton*, the court held that, despite the fact that the affected employees' contracts were not terminated by "conduct relating to or directed at a particular employee" or "an act of the employer",¹⁷⁷ and that it had not been an individual employee who had been targeted, the termination of employment could still be a dismissal.¹⁷⁸ Although this case was decided before the amendments to the LRA, it nevertheless indicates a judicial move towards stricter scrutiny of "automatic termination" clauses better to protect the job security of agency workers.

7.3.1.3 The commercial rationale for using fixed-term contracts

The commercial rationale or the permissibility for the use of fixed-term contracts is also an important consideration. Public policy requires that everyone should be free to participate productively in the business and professional world. Consequently, an unreasonable restriction of a person's freedom to do so will not be enforced.¹⁷⁹ Fixed-term employment serves a valid commercial function. It may be necessary for employers to make use of additional temporary labour when there is a seasonal influx of work. Using temporary employment services also offers employers the advantage of accessing specialised skills at a fraction of the costs associated with the employment of standard employees.¹⁸⁰ Basson J in *Sindane v Prestige Cleaning Services*¹⁸¹ indicated what the commercial rationale is for the conclusion of fixed-term contracts that terminate upon the occurrence of a specific event. This particular type of fixed-term contract is used if it is not possible to agree on a fixed period of employment, or because there is no definitive starting and ending date, because it is not certain when the project or building contract which the employee is appointed to work on will be

¹⁷⁴ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

¹⁷⁵ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 33.

¹⁷⁶ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 10.

¹⁷⁷ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 41.

¹⁷⁸ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 42.

¹⁷⁹ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) paras 11, 15.

¹⁸⁰ *Forere* 2016 SA Merc LJ 388.

¹⁸¹ *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC).

completed.¹⁸² For instance, in *Enforce Security Group v Fikile* the LAC acknowledged the commercial rationale of this type of contract by noting that including an "automatic termination" clause that links the termination of employment to the completion of a contract should not immediately make a termination of that contract on legitimate terms or for legitimate reasons a dismissal. That would in the court's view defeat the whole purpose of concluding fixed-term contracts of this nature.¹⁸³

7.3.2 *The right to access to legal redress*

Section 34 of the *Constitution* determines that everyone has the right to seek assistance from the courts or other forums to resolve their disputes.¹⁸⁴ That people should not be denied the right to access to justice by referring a dispute for resolution due to a contractual undertaking is also part of our common law. In *Schierhout v Minister of Justice*¹⁸⁵ it was held that if clauses in a contract have the effect of depriving one of the contracting parties of legal rights or prohibit him or her from seeking redress that he or she would ordinarily be entitled to, those clauses of the agreement would be "against the public law of the land".¹⁸⁶

To prevent persons from seeking assistance from the courts or other tribunals and to access judicial redress would be contrary to public policy.¹⁸⁷ However, the highest court has acknowledged that it is possible to restrict the right to legal redress in certain circumstances, which is also part of public policy.¹⁸⁸

¹⁸² *Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC) para 16.

¹⁸³ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) para 42.

¹⁸⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 31-33.

¹⁸⁵ *Schierhout v Minister of Justice* 1925 AD 417.

¹⁸⁶ *Schierhout v Minister of Justice* 1925 AD 417 424; *Bonino v De Lange* 1906 TS 120 123-124; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 34.

¹⁸⁷ See, for instance, *Administrator Transvaal v Traub* 1989 4 SA 729 (A) 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 AD 621F-G; *Stokes v Fish Hoek Municipality* 1966 4 SA 421 (C) 423H-424C; *Gibbons v Cape Divisional Council* 1928 CPD 198 200; *Benning v Union Government (Minister of Finance)* 1914 AD 29 31.

¹⁸⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 48.

7.4 Sanctity of contract and minimum judicial interference in contracts

The English case, *Printing and Numerical Registering Co v Sampson*¹⁸⁹ that has been applied in South African cases determines that public policy requires that mature and competent men should be free to contract, and that they should be bound to the agreements that they enter into voluntarily.¹⁹⁰ The SCA has also cautioned against undue judicial interference with contracts by the court, even if the terms appear unfair or operate harshly against one of the parties. The court stressed that dignity and autonomy finds expression in the freedom to regulate one's life by contracting freely, and that judges should avoid the contractual arena, especially if they could risk imposing their own conceptions of justice and fairness on the parties.¹⁹¹ This is why the principle of sanctity of contract has so often prevailed.¹⁹²

7.5 The public interest element

The LRA caters for both individual interests and for the public interest.¹⁹³ Brassey states that employers are often regarded as strong enough to fend for themselves, but not employees. That is why employees are seldom considered to be in a position to waive or abandon statutory rights. The accepted approach is that a statutory right can be waived, unless the right also serves the public interest. As the public has an interest in ensuring that the weak are not exploited, provisions cannot be waived if they are intended for the special protection of persons who are considered to be incapable of protecting themselves.¹⁹⁴

In *Igbo v Johnson Matthey Chemicals Ltd*,¹⁹⁵ it was held that statutory rights

¹⁸⁹ *Printing and Numerical Registering Co v Sampson* 1875 LR 19 Eq 462. In *Wells v South African Aluminite Company* 1927 AD 69 73 this passage was quoted with approval.

¹⁹⁰ Jessel MR in *Printing and Numerical Registering Co v Sampson* 1875 LR 19 Eq 462 465.

¹⁹¹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 12; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 12.

¹⁹² *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 4 SA 494 (N) 505F; *Basson v Chilwan* 1993 3 SA 742 (A) para 50.

¹⁹³ *Brassey Commentary on the Labour Relations Act A2-9, A211*; *SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A) 49G-H; *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) para 10; *Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC) para 24; *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 21.

¹⁹⁴ *Brassey Commentary on the Labour Relations Act A9-6 - A9-7*; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 20.

¹⁹⁵ *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA).

cannot be waived, even by consensual agreement.¹⁹⁶ In *SA Post Office Ltd v Mampeule*¹⁹⁷ the court agreed that contractual terms that amount to a "contracting out" of the protection against unfair dismissal in terms of section 5 of the LRA¹⁹⁸ is prohibited.¹⁹⁹ In the LAC Patel JA agreed with the LC that provisions like the "automatic termination" provisions on which the employer had relied restricts the protections in the LRA and possibly of the rights in the *Constitution* in an impermissible way. These clauses are against public policy as the dismissal protection benefits all employees and not just the individual worker. The court reasoned that to uphold the "automatic termination" provision in that case would set a dangerous precedent. The LRA's provisions would then be too easily circumvented by similar terms in future contracts.²⁰⁰ The LAC in *Mampeule* held that automatic termination clauses are undesirable in the labour relations context as they could undermine the developments in progressive disciplinary measures provided for in the LRA, and render the legislation ineffectual.²⁰¹ Likewise, in *Mahlamu v CCMA*²⁰² the court acknowledged that the issue of the validity and enforceability of "automatic termination" clauses is important "beyond the direct interests of the parties".²⁰³ Amendments to the working conditions, and the way in which they are regulated have a material impact on the lives of affected workers and the way in which employment agencies run their undertakings in South Africa.²⁰⁴ A need exists to maintain labour flexibility to promote the economy.²⁰⁵ However, this must be viewed in the light of the rights and values entrenched in the Constitution as the supreme law of South Africa, and the protections extended by the LRA, which was enacted to give effect to the right to fair labour practices.

¹⁹⁶ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 46.

¹⁹⁷ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 23; *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 8.

¹⁹⁸ Notably, s 5 of the LRA had not been referred to specifically by Ngalwana J in the lower court in reaching the same conclusion.

¹⁹⁹ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) paras 8, 21.

²⁰⁰ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 46; *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 5.

²⁰¹ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 33.

²⁰² *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC).

²⁰³ *Mahlamu v CCMA* 2011 32 ILJ 1122 (LC) para 14.

²⁰⁴ See the discussion of the different views concerning whether the amendments led to increased use of agency work or to job losses in the introduction of Aletter and Van Eck 2016 *SA Merc LJ* 286, 287.

²⁰⁵ Forere 2016 *SA Merc LJ* 396. The author argues that the competing interests that must be weighed up are the need to protect non-standard workers and the need to maintain a level of flexibility in the labour legislation to counter the high levels of unemployment in the country.

7.5.1 Good faith

Good faith is a factor that the court takes into account in determining the public interest, which is part of public policy.²⁰⁶ In assessing the validity of "automatic termination" clauses, it is considered whether "public morality is offended" by the enforcement.²⁰⁷

The relationship between an employer and an employee is of a fiduciary nature.²⁰⁸ The good faith requirement is implied into contracts of employment.²⁰⁹ Therefore, whether the employer and the employee acted in good faith at the time of termination of the employment relationship,²¹⁰ or whether one or both had breached the fiduciary relationship, would play a role in determining whether a dismissal had occurred. In *Nogcantsi v Mquma Local Municipality*,²¹¹ the employee had failed to disclose at his interview that there was a pending case against him, and this was revealed only after the vetting yielded a negative result, which was the trigger for the automatic termination. The LAC considered requiring the vetting to be justified considering the nature of the work.²¹² In other words, this was a material term of the employment contract. In my opinion, the employer, based on the breach of the duty of good faith, could have cancelled the employment contract without relying on the automatic termination clause.²¹³

The question of whether contributory fault on the part of the employee has an influence on an employee's claim has come to the fore in several decisions concerning the premature termination of fixed-term contracts. In *Dladla v On-Time Labour Hire CC*,²¹⁴ the employee had continually arrived

²⁰⁶ Van Huyssteen *et al Contract* paras 7.25-7.27.

²⁰⁷ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 23.

²⁰⁸ There is a common-law duty of trust and confidence between employers and employees. See *Council for Scientific & Industrial Research v Fijen* 1996 17 ILJ 18 (A) 20B-D.

²⁰⁹ The *Constitution* has caused the common law to develop so that an implied undertaking that the employer will treat the employee fairly is included in every contract of employment. See *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 21, 80; *Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA); *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 29 ILJ 1426 (E). Also see Grogan *Workplace Law* 62.

²¹⁰ A court must have regard to the circumstances of the case at the time enforcement of the agreement is sought. *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794D; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 893-894.

²¹¹ *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC).

²¹² *Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC) para 42.

²¹³ Also see Van Huyssteen *et al Contract* para 3.59, which supports that at a pre-contractual stage the parties already have a duty of good faith. In para 11.70 breach of a material term of a contract is recognised as ground for cancellation.

²¹⁴ *Dladla v On-Time Labour Hire CC* 2006 27 ILJ 216 (BCA) 219, 222.

late to work, and the client terminated his employment. The employee was considered to have been partly to blame for the client's decision not to continue with the employment relationship. This was ruled to be an automatic termination.

In *Pecton Outsourcing Solutions CC v Pillemer B*,²¹⁵ the commissioner found that the termination of the workers' employment had not been caused by the unprotected strike which the workers had embarked upon, but that having gone on an illegal strike did play a contributory role. On review, Whitcher J in the LC rejected this finding as it suggested that the employees had been partially to blame for the termination of their employment. The court held that the termination had resulted from the termination of the service agreement by the client instead.

In *Buthelezi v Municipal Demarcation Board*²¹⁶ Brassey AJ in the trial court ruled the fixed-term employee's dismissal substantively unfair, to a limited extent. He held that the appropriate compensation to redress the substantive unfairness was an amount equivalent to the remuneration the appellant would have been paid for the balance of the contract period, less what he got from other employment. Nevertheless, Brassey AJ found that Buthelezi was not entitled to compensation because he had committed misconduct before the dismissal had become effective, which the court felt could justify dismissal.²¹⁷ The LAC disagreed, finding that denying the employee compensation as a remedy was unjust because the lower court's view that Buthelezi could have been justifiably dismissed was based on speculation.²¹⁸

Lack of good faith is not a stand-alone ground that can be raised to deny the enforcement of an "automatic termination" clause.²¹⁹ Nevertheless, it may play a role when it comes to determining whether the employment contract was genuinely terminated by operation of law, or whether in fact there existed a different reason for the termination of the employee's employment. For instance, if the employer seeks to rely upon an "automatic termination" clause relating to the happening of a certain event, and the court rules that the event was contrived, the "automatic termination" clause

²¹⁵ *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) para 17.

²¹⁶ The case dealt with the premature termination of a fixed-term contract, and not so much termination by means of an automatic termination clause. Nevertheless, the principle applied is relevant.

²¹⁷ *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) para 6.

²¹⁸ *Buthelezi v Municipal Demarcation Board* 2004 25 ILJ 2317 (LAC) para 19.

²¹⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

will not be enforced.²²⁰ If it appears to the court that the employer abused the "automatic termination" clause, the inference can be drawn that it is relied upon by the employer to avoid legal obligations in terms of the LRA.²²¹

The motivation for the inclusion of the "automatic termination" clause in the contract could arguably also play a role. For instance, in *Nogcantsi v Mngquma Local Municipality* the LC and LAC agreed that there was a sound reason for the inclusion of the condition requiring vetting of a security officer in the contract, and the court concluded that no dismissal had occurred.²²² However, a pure motive would not necessarily mean that the clause would be enforced. For example, in *Igbo v Johnson Matthey Chemicals Ltd*²²³ the "automatic termination" clause was included to ensure that the employee going overseas did not overstay her leave. The aim was to prevent loss resulting from her absenteeism. Despite the noble motivation for the inclusion of the "automatic termination" clause, and for its enforcement, the Appeal Court declared the "automatic termination" clause invalid and held that the employee, who had failed to return on the stipulated date, was dismissed.

If the true reason for the termination of the employee's employment relates to the employee's conduct or capacity, or the employer's financial situation, it would constitute a dismissal, despite the "automatic termination" clause in a fixed-term contract.²²⁴ In *Pecton Outsourcing Solutions CC v Pillemer B*²²⁵ the LC found that the underlying reason for the termination of the employee's contract was financial. Pecton had lost its only client, and could no longer afford to keep on its workers. However, if the "automatic termination" clause were enforced it would effectively have deprived the employees of the right to have their dispute concerning an unfair retrenchment heard by the court. Ordinarily, employees who are dismissed for operational reasons would be entitled to severance pay. This they would also have been denied if the "automatic termination" clause had been

²²⁰ In *Trio Glass t/a The Glass Group v Molapo* 2013 34 ILJ 2662 (LC) the employer, for instance, unsuccessfully sought to rely on an alleged agreement that the contract would lapse automatically "if things didn't work out". Also see *Grogan Workplace Law* 167. In *Pecton Outsourcing Solutions CC v Pillemer B* 2016 37 ILJ 693 (LC) paras 34-35 the court considered the "true cause" of the termination of the employee's employment. However, it noted that the crisp issue to be decided was whether the termination clause was enforceable in terms of section 5 of the LRA.

²²¹ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 24.

²²² *Nogcantsi v Mngquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 27-29.

²²³ *Igbo v Johnson Matthey Chemicals Ltd* 1986 IRLR 215 (CA).

²²⁴ *Pecton Outsourcing Solutions CC v Pillemer B* 2016 37 ILJ 693 (LC) para 44.

²²⁵ *Pecton Outsourcing Solutions CC v Pillemer B* 2016 37 ILJ 693 (LC).

enforced. In the result, the court agreed with the commissioner's finding that in terms of section 5 of the LRA the automatic termination clause was unenforceable.²²⁶

In *South African Post Office v Mampeule*,²²⁷ the question was asked whether the employer had implemented the "automatic termination" clause in good faith.²²⁸ The court noted that the employer had failed to explain why the "automatic termination" clause had been triggered, and why the employee had been suspended. The court inferred that this was done to avoid obligations under the LRA. In the result, the court held that section 5 of the LRA trumped the "automatic termination" clause. The employer had put forward as a reason for his removal as a director that Mampeule's "conduct led to the shareholder losing trust and confidence in [him]".²²⁹ The LAC correctly held that this would not entitle the employer to rely on an "automatic termination" clause, adding that chapter 8 of the LRA, and the right to fair labour practices, could be circumvented by including a clause in every employee's contract that his or her employment would terminate automatically on the occurrence for example of an act of misconduct or incapacity.²³⁰ However, in *Enforce Security Group v Fikile* the "automatic termination" clause that determined that the workers' employment would terminate when the contract between the employer and the client was terminated contained a sub-clause. It stated that "the employee agrees that the contract of employment would terminate automatically upon termination of the Boardwalk contract and that *such termination would not constitute a retrenchment but a completion of the contract*". Although this appears to be a patent exclusion of the dismissal protection in terms of the LRA for dismissal for operational reasons, the LAC accepted that the sub-clause served only to explain the consequences of the agreed upon terms.²³¹

7.5.2 Fairness

A court cannot set aside an agreement unless the provisions are unfair.²³² However, fairness, like good faith, is an abstract concept.²³³ Moreover, the concept applies to both the employer and the employee.²³⁴ Finding the right

²²⁶ *Pecton Outsourcing Solutions CC v Pillemer B* 2016 37 ILJ 693 (LC) para 45.

²²⁷ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC).

²²⁸ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 15.

²²⁹ *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 20.

²³⁰ *South African Post Office v Mampeule* 2009 30 ILJ 664 (LC) para 33.

²³¹ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) para 42.

²³² *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

²³³ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22.

²³⁴ *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) paras 40-41.

balance between the competing rights of employers and employees when it comes to automatic termination of employment is complicated. Employees would rather be employed on a non-standard basis than be unemployed.²³⁵ Arguably, they may be more inclined to sign employment contracts, even on detrimental terms, than to join the ranks of the unemployed. This supports the general sentiment that agreements that have been freely entered into must be honoured.²³⁶ However, enforcement could result in the denial of an employee's statutory rights.²³⁷ Therefore, the enforcement of a contractual clause must be fair and reasonable.²³⁸ Although *pacta sunt servanda* cannot be ignored, the court should be able to decline enforcing a contractually agreed upon clause if doing so would be unreasonable or lead to injustice.²³⁹

The circumstances under which the contract was terminated must be considered.²⁴⁰ Objective factors like the terms of the contract must be evaluated. In addition, the relative situation of the parties and their respective bargaining power must be taken into account.²⁴¹ Immoral agreements violate the public policy. In some instances contractual clauses are "so unreasonable that their unfairness is manifest" and no further enquiry would be necessary to conclude that they should not be enforced.

²³⁵ Forere 2016 SA Merc LJ 377.

²³⁶ See for instance, *Chiloane v Rema Tip Top Industries (Pty) Ltd* 2002 11 BLLR 1066 (LC) in particular paras 5, 7.

²³⁷ Cohen 1998 SA Merc LJ 383, 385.

²³⁸ *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009) para 59.

²³⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 70.

²⁴⁰ Compare *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 58.

²⁴¹ *Basson v Chilwan* 1993 3 SA 742 (A) paras 55-56, 59; *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56, 59. In *South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC) para 41 the court held that in determining the proximate cause of the termination of employment it is not possible to consider the employment contract in isolation without considering the act of termination, in this case the employee's removal from the board. In the dissenting judgment in *Barkhuizen* para 87 Sachs J stated that the power imbalances and relative bargaining powers of the parties comes into play when determining whether true consensus had been reached between the parties. However, a contrary view was raised that the notion that employers and employees are unequal bargaining parties was outmoded, and that an urgent reason for a desire to contract did not result in unequal bargaining power. See Christie and Bradfield *Law of Contract* 383; Van Huyssteen *et al Contract* paras 1.37, 1.52. Moseneke DCJ in his dissenting judgment in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 96-105 also felt that the question is of whether the contractual clause itself clashes with the public norms. In other words, it must be assessed whether the contractual clause itself is, objectively speaking, so unreasonable as to offend the public policy. This objective assessment that Moseneke DCJ proposes would render the personal attributes of the party seeking to avoid the operation of the clause, the employee, irrelevant.

An example is an outright contractual denial of the right to seek judicial redress.²⁴²

When determining whether a clause is fair or unfair, it must be asked whether the clause is in itself unreasonable, and if not, whether circumstances dictate that the clause should be enforced.²⁴³ When answering this question, establishing if the contract had been entered into freely and voluntarily is pivotal.²⁴⁴ In *Nogcantsi v Mnquma Local Municipality*,²⁴⁵ the LAC stressed that Nogcantsi had freely agreed to the vetting and the "automatic termination" clause, and that he was fully aware of the implications of the agreement that he had signed. Referring to *SA Post Office v Mampeule* and *Mahlamu* the court held that the condition in the present instance was acceptable. The court reasoned that making an appointment or continued employment conditional on a positive vetting and screening exercise was justified given the nature of the work. Moreover, providing that the contract would terminate automatically if the result of the vetting was negative did not deprive an employee of the right to security of employment.²⁴⁶

The court has previously grappled with the question of when intervention is called for, because enforcement of an "automatic termination" clause would be unfair. For instance, in *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group*²⁴⁷ the commissioner, despite acknowledging the unfairness of the enforcement of the "automatic termination" clause, considered it to be a loophole in the LRA as it was before the amendment, and felt that this did not warrant declaring the "automatic termination" clause invalid. This decision was based squarely on *pacta sunt servanda*.²⁴⁸ The recent finding of the LAC in *Enforce Security Group v Fikile*²⁴⁹ also supports that fairness is placed on the back burner when it comes to determining

²⁴² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 60.

²⁴³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56. With reference to *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) Breitenbach AJ in *Zero Model Management (Pty) Ltd v Barnard* (25541/2009) 2009 ZAWCHC 232 (18 December 2009), which concerned the validity of a restraint of trade clause paras 34-40, noted that whether a contractual term is enforceable or not depends on the circumstances, and on whether enforcing the contractual clause would be contrary to public policy. If it would be, the clause would be unenforceable.

²⁴⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57.

²⁴⁵ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC).

²⁴⁶ *Nogcantsi v Mnquma Local Municipality* 2017 4 BLLR 358 (LAC) paras 15, 21-24.

²⁴⁷ *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA).

²⁴⁸ *April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group* 2005 26 ILJ 2224 (CCMA) 2228-2234. Forere 2016 SA Merc LJ 381.

²⁴⁹ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017).

whether a dismissal or an automatic termination occurred. It was held that the fact that the employer could retrench the employees or could have considered other options instead of relying on the "automatic termination" clause cannot be used to negate the clear terms agreed to by the parties. The considerations of the fairness or otherwise of a dismissal does not come into play in the process of determining whether a dismissal had occurred.²⁵⁰

The amendments to the LRA that have informed recent decisions and could influence future determinations regarding the validity and enforceability of "automatic termination" clauses are considered next.

8 The impact of the extension of labour protection to vulnerable workers

One of the main amendments that have been made to the LRA is that for the first time atypical employees are recognised as being particularly vulnerable to abuse. Brassey and Cheadle indicate that, before the legislative interventions to provide protection to agency workers, employment agencies used to structure their relationships so that these workers would not be recognised as employees, but rather be viewed as being independent contractors. This was done predominantly to avoid being subject to the wage regulation mechanisms in legislation at the time.²⁵¹ In due course, the 1982 legislation was amended so that the employment agency would be "deemed" the employer if it was the agency who paid the agency worker/s to provide the workers with more certainty.²⁵² Nevertheless, employers were able to avoid the legislative protective measures for unfair dismissal.²⁵³

Concerns regarding the lack of security that "non-standard" employees enjoy, particularly those working for labour brokers, obviously informed the labour reform. That these employees remain particularly vulnerable was confirmed when COSATU urged the legislature to ban the use of employment agencies altogether.²⁵⁴ There is also no denying that there is a

²⁵⁰ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) para 24. However, compare *Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC) paras 21, 35, where the principle of fairness apparently bore more weight.

²⁵¹ Brassey and Cheadle 1983 *ILJ* 31, 37.

²⁵² Benjamin *Law and Practice* 2.

²⁵³ Benjamin *Law and Practice* 2.

²⁵⁴ Van Niekerk *et al Law@work* 68. Also see Aletter and Van Eck 2016 *SA Merc LJ* 289.

paramount need to preserve employment and to address the unemployment crisis in South Africa in the light of soaring unemployment rates.²⁵⁵

Section 198 of the LRA was amended to address more effectively certain problems associated with temporary employment. The main thrust of the amendment is to limit the employment of more vulnerable, lower-paid workers to situations of genuine temporary work.²⁵⁶ Moreover, the amendments aim to protect workers from the abusive practices associated with labour broking and other types of "non-standard" employment.²⁵⁷ The extension of the protection provided, particularly to "non-standard" employees who earn below the threshold as provided for in section 6(3) of the *Basic Conditions of Employment Act 75 of 1997* as amended by the *Basic Conditions of Employment Amendment Act 20 of 2013* ("the BCEA"), is significant.²⁵⁸ The legislature did not change much in so far as higher-paid fixed-term employees are concerned. They are assumed to be on a better footing to negotiate contractual remedies.²⁵⁹

²⁵⁵ The Statistics South Africa Quarterly Labour Force Survey indicates that the unemployment rate is currently set at around 27,1% (Statistics South Africa 2016 <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2016.pdf>).

²⁵⁶ Employers have often abused non-standard employment arrangements to retain employees in poor working conditions without the prospect of becoming permanent, despite the fact that the nature of the work better suits indefinite employment. Van Van Eck 2014 *IJCLLIR* 29, 30; Cohen and Moodley 2012 *PELJ* 320.

²⁵⁷ The impetus for doing so is well summarised in *Dyokwe v De Kock* 2012 10 BLLR 1012 (LC). In *Dyokwe*, the employer had shifted employees to the labour broker in order to exploit them. Also see Le Roux 2012 *CLL* 21; Van Eck 2012 *IJCLLIR* 29, 37, 38; Forere 2016 *SA Merc LJ* 375, 393; Scheepers 2015 <http://www.linkedin.com/pulse/regulation-non-standard-a-typical-employment-south-scheepers>.

²⁵⁸ The amount is currently set at R205 433,30 per annum. The threshold is anticipated to increase with effect from July 1, 2017. Aletter and Van Eck 2016 *SA Merc LJ* 285, 310. Workers earning more than the threshold amount are excluded from most of the new protections. The legislature focussed on less affluent workers, who are regarded as more vulnerable to exploitation. In Le Roux 2012 *CLL* 95-99, the statutory provisions before the amendments and after the amendments to the LRA are summarised.

²⁵⁹ Forere 2016 *SA Merc LJ* 382. The author indicates that higher-earning employees are probably less vulnerable because they are usually university graduates who are in a better position to "negotiate and to claim statutory rights". This statement is unsupported by evidence and probably incorrect. The notion that someone appointed on a fixed-term basis or to perform temporary employment services earning above a specific amount suddenly acquires better negotiation skills, whereas someone earning below the specified amount does not have them, is in my opinion facile. The amount that is set and the distinction that results from the enforcement of this provision are arbitrary. In addition, the legislative provisions in s 198 exclude higher-earning employees from their operation, so the author must have meant that they are in a better position to negotiate contractual remedies, and not statutory rights.

In the tripartite relationship, employees used to have difficulties in identifying against whom the rights that they have can be enforced.²⁶⁰ This problem has been resolved to some extent. That written particulars of employment must be provided by the TES to employees engaged in temporary employment services makes it clear who the employer is.²⁶¹ Written details of the terms and conditions of employment under the client to which he or she is assigned must be provided.²⁶² These terms and conditions of employment must comply with employment law, sectoral determination, or the bargaining council agreement applicable to a particular client.²⁶³ Offers to renew fixed-term contracts must also be in writing, and state the reasons for the extension.²⁶⁴ These requirements apply to all TES employees, and not only to those earning less than the threshold amount.²⁶⁵ In terms of the new provisions in the LRA, employers are required after three months of employment to treat a fixed-term employee earning below the prescribed threshold amount no less unfavourably than a comparable indefinitely appointed employee working in the same workplace.²⁶⁶ This would in practical terms probably reinforce that fixed-term employees should receive notice before termination of their employment. Moreover, the fact that the dismissal protection of fixed-term employees has been extended also to cover instances where an employee expected to be kept on permanently²⁶⁷ arguably places a stricter duty on the employer, particularly in instances where contracts have been renewed, to give notice.

Before the amendments were promulgated, a fixed-term employee's only remedy for unfair dismissal fell under section 186(1)(b) of the LRA. The problems with section 186(1)(b) as opposed to the ordinary unfair dismissal provision in section 186(1)(a) were manifold. One concern was that uncertainty existed concerning the proper construct that should be afforded to the section. In particular, it was unclear whether the section applied only to instances where fixed-term employees expected temporary renewal of their contracts, or whether it could cover the situation where the employer had created the expectation that the employee would be kept on

²⁶⁰ Tshoose and Tsweledi 2014 *LDD* 334.

²⁶¹ Section 198(4B) of the LRA.

²⁶² Refer to s 29 of the BCEA, which describes the details that must be provided in these written particulars.

²⁶³ Section 198(4C) of the LRA.

²⁶⁴ Section 198B(6)(a) and (b) of the LRA.

²⁶⁵ Aletter and Van Eck 2016 *SA Merc LJ* 291.

²⁶⁶ Section 198A(5) of the LRA applies in respect of employees performing temporary employment services. A similar principle is contained in respect of other fixed-term employees earning below the threshold in s 198B(8)(a) of the LRA.

²⁶⁷ The wording of s 186(1)(b) has been extended expressly to cover this situation so as to remove the uncertainty regarding the scope of the dismissal protection.

permanently. This question has been resolved. Section 186(1)(b) has been amended in a way that leaves no room for doubt that if an employee harboured a reasonable expectation of being kept on in the position indefinitely, that employee would be covered by section 186(1)(b).²⁶⁸

Another important amendment in so far as the dismissal protection available to fixed-term employees is concerned is the new dismissal provision relating to agency employment in particular. Fixed-term employment for employees earning below the stipulated threshold amount can be only for three months unless it is justified or if the situation falls into one of the exceptions.²⁶⁹ In doing this, the legislature has ensured that non-standard employment relationships are used for genuine temporary reasons.²⁷⁰ If none of the exceptions applies, or if no justification exists for employing the employee on a fixed-term basis instead of permanently, the employment relationship converts into an indefinite employment relationship after the three-month period. If an employer or a client terminates a fixed-term contract in order to avoid the operation of this provision, it constitutes a dismissal.²⁷¹

An employee who is "deemed to be the employee of the client"²⁷² must be treated "on the whole not less favourably" than the permanently appointed employees working for the client, who perform the same or similar work, unless a justifiable reason exists for treating him or her differently.²⁷³ A justifiable reason includes reasons based on seniority, experience, or length of service, merit, the quality or quantity of work performed, or any other

²⁶⁸ In *University of Pretoria v CCMA* 2012 33 ILJ 183 (LAC) Davies AJ held that s 186(1)(b) was limited to instances where the employee expects a temporary renewal, and that because the employee in that case had a reasonable expectation of permanent employment the situation fell outside of the scope of the statutory unfair dismissal protection. Grogan describes the extension of s 186(1)(b) as also covering fixed-term employees having a reasonable expectation of being kept on indefinitely as a "direct legislative response" to this case. See Grogan *Workplace Law* 172 n 50.

²⁶⁹ Section 198B of the LRA.

²⁷⁰ Forere 2016 *SA Merc LJ* 375, 387, 398.

²⁷¹ Grogan *Workplace Law* 44.

²⁷² Section 198A(3)(b) of the LRA determines that after three months an employee, if s/he has not been performing "temporary service" for a client, is "deemed" to be the employee of the client. The employee is also "deemed" to be employed on a permanent basis by the client. The deeming provision was applied in *Mphirime and Value Logistics Ltd* 2015 36 ILJ 2433 (BCA); *Assign Services (Pty) Ltd and Krost Shelving & Racking (Pty) Ltd* 2015 36 ILJ 2408 (CCMA); *Assign Services (Pty) Ltd v CCMA* 2015 11 BLLR 1160 (LC). Also see Grogan 2014 *ELJ* 3; Grogan 2015 *ELJ* 4; Van Eck 2013 *De Jure* 600, 606.

²⁷³ Section 198D(2) of the LRA.

criteria of a similar nature that are not prohibited by the *Employment Equity Act* 55 of 1998.²⁷⁴

Whether or not the legislature has ousted the approach followed in *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane*²⁷⁵ that the contract between a TES and its client is the main agreement and the contract between the TES and the employee can be made accessory thereto is uncertain. The amendments that determine that employees in tripartite relationships can hold the client responsible jointly and/or severally does not clearly define the parameters of the liability of the respective employer parties.²⁷⁶

In *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd*,²⁷⁷ which was decided after the amendments to the LRA, Mosime AJ held that automatic terminations of employment contracts are impermissible as the LRA prohibits contractual devices having the effect of preventing an employee from exercising rights under the LRA. He proceeded to rule that any contractual provision, even if the contract had been voluntarily

²⁷⁴ Section 198D of the LRA. CCMA commissioners and bargaining council arbitrators are, among other things, empowered by the provisions in s 198A and B to evaluate the reasons for fixing the term of appointment; to identify comparable full-time or standard employees and ensure that non-standard employees receive the same treatment and benefits; to declare the client to be the "deemed" employer; or determine if the employer's conduct was aimed at avoiding the deeming provision.

²⁷⁵ *Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane* 2014 JOL 31668 (LC) para 60.

²⁷⁶ Forere 2016 *SA Merc LJ* 380, 395. Before the amendments, s 198(2) of the LRA determined that the TES was the employer of the employee assigned to a client. When a person assigned to a client by a TES claimed that he or she had been unfairly dismissed, his or her remedy was against the TES. However, it is not entirely clear whether the new provision for joint and several liability also applies to unfair dismissals. No clear allocation of duties is set in the legislation. See in this regard Aletter and Van Eck 2016 *SA Merc LJ* 309. Grogan comments that s 198 regulates liability only for breaches of the BCEA, breaches of bargaining council agreements or sectoral determinations. Unfair dismissals and unfair labour practices are not mentioned. Consequently, he asserts that as before the amendments, a dismissed employee may institute action only against the TES as the employer. See in this regard Grogan 2015 *ELJ* 4. However, a different view is proposed by Brassey in *Assign Services (Pty) Ltd v CCMA* 2015 11 BLLR 1160 (LC): when terminating the services of someone appointed to perform temporary services both the client and the TES must comply with s 188 of the LRA. This would imply that, even if a TES must terminate its employees' contracts because its client no longer wants or needs their services, the TES must have a fair reason, and follow a fair procedure. The TES must, in either event, face any potential unfair dismissal claims and the consequences if the dismissal is ruled unfair.

²⁷⁷ *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

concluded, that either directly, or indirectly restricts or excludes the right not to be unfairly dismissed, is invalid.²⁷⁸

Mosime AJ based his finding on the following. First, parties cannot contract out of the unfair dismissal protection. This, the court said, is amplified by the recent amendments to the LRA. He referred to the new definition of "fixed-term contract",²⁷⁹ noting that the employee in *casu* was appointed on a fixed-term contract. Then he applied section 198(4C) of the LRA, which determines that employees employed by a TES cannot be employed on terms and conditions that are not allowed in terms of the LRA. This finding supports the tenet that the amendments to the LRA and the extension of the rights applicable to fixed-term employees have become factors that are considered by the court in determining whether a particular "automatic termination" clause is valid and/or enforceable. In this case, instead of finding that the automatic termination provision was valid but unenforceable because the "automatic termination" clause was contrary to public policy, the court ruled that the "automatic termination" clause was prohibited, and declared it invalid.²⁸⁰ This approach clearly contradicts the principles that were laid down in several other decisions.²⁸¹ However, it also serves to illustrate that the court has, since the coming into operation of the new sections of the LRA, chosen to take a different, stricter stance when it comes to deciding whether employers should be permitted to rely on "automatic termination" clauses.

In terms of the new amendments, if a fixed-term employee has worked for his or her employer continuously for longer than 24 months, he or she subject to certain conditions²⁸² would qualify for severance pay of one week

²⁷⁸ Sections 5 (2)(b), 5(4) of the LRA.

²⁷⁹ Section 198B (1) of the LRA.

²⁸⁰ *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC) para 44.

²⁸¹ Refer to the discussion under 5.

²⁸² There must not be a collective agreement to the contrary to which the employee is bound. The fixed-term employee/s must have worked for the employer on a specific project for longer than 24 months (s 198B(10) of the LRA). He or she must not have rejected a reasonable offer of other suitable employment made by the employer, (s 198B(11) of the LRA) and the employee must earn below the prescribed earnings threshold (s 198B(2)(a) of the LRA). Employers employing fewer than ten employees or that employ more than 50 employees, but who have not yet been in business for two years are also excluded. This is so, unless the employer conducts more than one business, or if the business in which the affected fixed-term employee is working was formed by a division or dissolution of another business (s 198B(2)(b) of the LRA). In addition, a fixed-term employee who is engaged under contract that is regulated by other legislation, a sectoral determination, or a collective agreement is not covered by the new severance pay provision (s 198B(2)(b) of the LRA).

for every completed year of service.²⁸³ This severance pay is payable even if the reason for the termination of work does not relate to the employer's operational reasons. In other words, this payment is made in recognition of long service.²⁸⁴ In the light of this new provision, it would be very difficult for an employer to argue that a fixed-term employee that meets its eligibility criteria is not entitled to severance pay when his or her service is terminated. Even if the court finds that the employment relationship was terminated by the operation of a valid "automatic termination" clause, this payment should still be made to him or her as it is made in recognition of the length of service, not to serve as severance pay for a dismissal for operational requirements only.

Two amendments may affect the matter of the eligibility to unemployment insurance and the nugatory effect that this used to have on employees' right to claim in terms of section 186(1)(b) of the LRA: employers must now provide employees with details of their employment, and renewals must be affected in writing. Moreover, the extension of section 186(1)(b) to include the situation where an employee reasonably expects to be retained by the employer on an indefinite basis, and the requirement that employers treat employees equitably in comparison with their permanent colleagues, may serve to address this problem.

The LRA mandates CCMA commissioners and bargaining council arbitrators to interpret and apply the new provisions.²⁸⁵ This extends significantly the powers that commissioners and arbitrators have to intervene in the contractual arrangements between employers and "non-standard" employees. Some of the powers that are granted to arbitrators under the new amendments actually require that at times they must make awards that would inadvertently impose changes in the continued contractual relationship between the employer and employee. For instance, if it is found that a fixed-term employee is not after three months of employment treated the same as permanently employed workers in the workplace, the commissioner would have to remedy this. If a commissioner were to find that a fixed-term employee who reasonably expected to be kept on permanently in terms of section 186(1)(b) had been unfairly dismissed, changes to the original contract would have to be ordered to ensure that the employee's continued employment with the employer was on the same

²⁸³ Section 198B(10) of the LRA.

²⁸⁴ See the Memorandum of the Objects Labour Relations Bill, 2012 (Department of Labour 2012 <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf> 26).

²⁸⁵ Section 198A-C of the LRA.

terms as that of other indefinitely appointed employees. In other words, in order to protect the interests of these workers, who are now acknowledged as being vulnerable in the legislation. CCMA commissioners and bargaining council arbitrators are required to step into the contractual arena if the circumstances require it.

The extension of the statutory protection of vulnerable employees generally reflects judicial distaste for arrangements by which employers treat temporary employees disparately, or in a way in which they can be dispensed with without being subject to the unfair labour practices or unfair dismissal provisions.²⁸⁶ The way in which the jurisprudence is developing appears to be in keeping with the changing public policy.

However, the lack of defined public policy factors that must be applied in all cases involving the automatic termination of fixed-term employment contracts has serious negative implications as well. Whereas in one case decided after the promulgation of the amendments the court applied the new legislation applicable to fixed-term employees in the LRA,²⁸⁷ the LAC has not done so in even more recent decisions.²⁸⁸

Moreover, what weight must be attached to different facets of the public policy is unclear, and this lack of clarity has the potential to influence the outcome of an investigation of the validity/enforceability of an "automatic termination" clause drastically. For example, in *Enforce Security Group v Fikile* the LC, relying on *South African Post Office v Mampeule* and *Mahlamu v CCMA*, held that a contractual clause that infringes on the rights conferred in terms of the LRA or Constitution is invalid. Despite the fact that the employee may have been deemed to waive his or her rights, the waiver would not be valid or enforceable. Based on this principle, which has been applied similarly in several other cases discussed in this contribution, the LC concluded that the employer should have followed the retrenchment procedures in the dismissal for operational reasons.²⁸⁹ However, the lower court's finding that the conduct constituted a dismissal was overturned on appeal, because the LAC felt that too little attention had been paid to the meaning and implication of the terms of the contract, and because the court

²⁸⁶ See, for instance, *National Union of Metal Workers of South Africa v Abancedisi Labour Services* CC 2012 11 BLLR 1123 (LAC).

²⁸⁷ *SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC).

²⁸⁸ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017).

²⁸⁹ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) para 11.

below should have corrected an error made in the arbitration concerning the nature of the contracts.²⁹⁰

9 Conclusion

At common law, it is recognised that the premature termination of fixed-term contracts should be permitted in very limited cases only. However, there are ways in which a contract of employment can terminate without the termination's constituting a "dismissal" in terms of the LRA. Some of the ways in which automatic terminations can be effected apply to fixed-term employees in particular. Fixed-term employees, particularly those who are lower-paid, are identified as a vulnerable group of workers in the LRA. Important amendments have been made that affect the termination of the employment of fixed-term employees. The protection offered by section 186(1)(b) has been extended to cover fixed-term employees having a reasonable expectation of permanent continuance of their employment, and it is a dismissal if a TES aims to avoid the operation of the deeming provisions. In addition, fixed-term employment has been reserved for instances of true temporary employment engagements and provisions have been included to afford these employees additional job security. Moreover, employers are required to treat fixed-term employees no less favourably than their permanent colleagues, and their terms of engagement cannot be made on terms that are not permitted in terms of the LRA.

The protection of fixed-term employees is not only of individual interest between the two contracting parties in the employment relationship. The public also has an interest in how jobs are preserved and in seeing to it that employees who may not be able to take care of themselves are protected. Individual employees cannot waive certain rights. In the light of the newly introduced legislative provisions, it should be less conceivable that employees will be able to rely upon and enforce "automatic termination" clauses, as they are more likely to be perceived as contracting out of the unfair dismissal protection, unemployment entitlements, the right to receive notice of termination, and the statutory right to receive severance pay.

Courts appear, in general, to have become more scrupulous when evaluating whether or not an "automatic termination" clause in a fixed-term contract should be ruled as valid and enforceable. The courts consider several factors when making this determination. Given the introduction of

²⁹⁰ *Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017) paras 22, 24, 46.

the new legislation, these factors should include that the contract was temporary, and that the LRA provides that the terms of the engagement should not be contrary to the LRA. However, one of the negatives attached to the fluidity of public policy is that it is not possible to cast in stone principles to be applied by the courts in all cases, and this detracts from legal certainty. It is unassailable in the absence of clear guidelines that are consistently applied that different courts will consider different factors important and place different weights on specific facets of public policy when determining whether or not an "automatic termination" clause is valid and should be enforced.

Bibliography

Literature

Aletter and Van Eck 2016 *SA Merc LJ*

Aletter C and Van Eck S "Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisation's Standards?" 2016 *SA Merc LJ* 285-310

Benjamin *Law and Practice*

Benjamin P *Law and Practice of Private Employment Agency Work in South Africa* (International Labour Office Geneva 2013)

Bhana, Bonthuys and Nortje *Student's Guide*

Bhana D, Bonthuys E and Nortje M *Student's Guide to the Law of Contract* 4th ed (Juta Cape Town 2015)

Bhorat and Cheadle *Labour Reform*

Bhorat H and Cheadle H *Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions* (University of Cape Town, Development Policy Research Unit Cape Town 2010)

Bosch 2008 *ILJ*

Bosch C "Contract as a Barrier to 'Dismissal': The Plight of the Labour Broker's Employee" 2008 *ILJ* 813-840

Brassey *Commentary on the Labour Relations Act*

Brassey M *Commentary on the Labour Relations Act* (Juta Cape Town 1999)

Brassey and Cheadle 1983 *ILJ*

Brassey MSM and Cheadle H "Labour Relations Amendment Act 51 of 1982" 1983 *ILJ* 31-38

Cheadle 2006 *ILJ*

Cheadle H "Regulated Flexibility: Revisiting the LRA and the BCEA" 2006 *ILJ* 663-704

Christie and Bradfield *Law of Contract*

Christie RH and Bradfield GB *Christie's The Law of Contract in South Africa* 6th ed (LexisNexis Butterworths Durban 2011)

Cohen 1998 *SA Merc LJ*

Cohen T "The Enforceability of Restraint Provisions within a Wrongfully Terminated Contract of Employment" 1998 *SA Merc LJ* 383-391

Cohen and Moodley 2012 *PELJ*

Cohen T and Moodley L "Achieving 'Decent Work' in South Africa?" 2012 *PELJ* 320-344

De Villiers 2010 *SA Merc LJ*

De Villiers DW "The Entitlement to Severance Pay Revisited" 2010 *SA Merc LJ* 114-126

De Wet and Yeats *Kontraktereg en Handelsreg*

De Wet JC and Van Wyk AH (eds) *Kontraktereg en Handelsreg* 4th ed (Butterworths Durban 1978)

Forere 2016 *SA Merc LJ*

Forere M "From Exclusion to Labour Security: To what Extent does Section 198 of the Labour Relations Act of 2014 Strike a Balance between Employers and Employees?" 2016 *SA Merc LJ* 375-398

Gericke 2011 *PELJ*

Gericke SB "A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed-Term Contracts as opposed to Indefinite Employment" 2011 *PELJ* 105-136

Grogan *Workplace Law*

Grogan J *Workplace Law* 11th ed (Juta Cape Town 2014)

Grogan 2014 *ELJ*

Grogan J "The New Dispensation – The Amendments to the Labour Relations Act, Part 1 – Non-Standard Employment" 2014 *ELJ* 3-8

Grogan 2015 *ELJ*

Grogan J "Let the 'Deemed' be Damned: Section 198A(3)(b) Deconstructed" 2015 December *ELJ* 4-9

Hutchison and Pretorius *Law of Contract*

Hutchison D and Pretorius C-J (eds) *The Law of Contract in South Africa* 2nd ed (Oxford University Press Cape Town 2013)

Le Roux 2012 *CLL*

Le Roux PAK "Protecting the Employees of Temporary Employment Services: Recent Decisions" 2012 October *CLL* 21-27

Olivier 1996 *ILJ*

Olivier M "Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Developments" 1996 *ILJ* 1001-1040

Theron 2003 *ILJ*

Theron J "Employment is not what it used to be" 2003 *ILJ* 1247-1282

Tshoose and Tsweledi 2014 *LDD*

Tshoose C and Tsweledi B "A Critique of the Protection afforded to Non-Standard Workers in a Temporary Employment Context in South Africa" 2014 *LDD* 334-346

Van Huyssteen *et al Contract*

Van der Merwe SWJ *et al Contract: General Principles* 5th ed (Juta Cape Town 2016)

Van Eck 2012 *IJCLLIR*

Van Eck S "Employment Agencies: International Norms and Developments in South Africa" 2012 *IJCLLIR* 29-44

Van Eck 2013 *De Jure*

Van Eck S "Regulated Flexibility and the Labour Relations Amendment Bill of 2012" 2013 *De Jure* 600-612

Van Eck 2014 *IJCLLIR*

Van Eck S "Revisiting Agency Work in Namibia and South Africa: Any Lessons from Decent Work Agenda and Flexicurity Approach?" 2014 *IJCLLIR* 49-66

Van Jaarsveld 2003 *SA Merc LJ*

Van Jaarsveld M "The Validity of a Restraint of Trade Clause in an Employment Contract" 2003 *SA Merc LJ* 326-345

Van Niekerk *et al Law@work*

Van Niekerk A *et al Law@work* 3rd ed (LexisNexis Butterworths Durban 2015)

Case law

South Africa

Abdullah v Kouga Municipality 2012 5 BLLR 425 (LC)

Ackrow v Northern Province Development Corporation 1998 9 BLLR 916 (LC)

Administrator Transvaal v Traub 1989 4 SA 729 (A)

Amoretti v Tuckers Land and Development Corporation (Pty) Ltd 1980 2 SA 330 (W)

April v Workforce Group Holdings (Pty) Limited t/a The Workforce Group 2005 26 ILJ 2224 (CCMA)

Assign Services (Pty) Ltd and Krost Shelving and Racking (Pty) Ltd 2015 36 ILJ 2408 (CCMA)

Assign Services (Pty) Ltd v CCMA 2015 11 BLLR 1160 (LC)

Avex Air (Pty) Ltd v Borough of Vryheid 1973 1 SA 617 (AD)

Bafana Finance Mabopane v Makwakwa 2006 4 SA 581 (SCA)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Basson v Chilwan 1993 3 SA 742 (A)

Benning v Union Government (Minister of Finance) 1914 AD 29

Bonino v De Lange 1906 TS 120

Bottger v Ben Nomoyi Film and Video CC 1997 2 LLD 102 (CCMA)

Brisley v Drotsky 2002 4 SA 1 (SCA)

Bronn v University of Cape Town 1999 20 ILJ 951 (CCMA)

Buthelezi v Municipal Demarcation Board 2004 25 ILJ 2317 (LAC)

- Chiloane v Rema Tip Top Industries (Pty) Ltd* 2002 11 BLLR 1066 (LC)
- Chokwe and Phetha Professional Services CC* 2010 31 ILJ 3041 (CCMA)
- Commercial Union Assurance Co of South Africa Ltd v KwaZulu Finance and Investment Corporation* 1995 3 SA 751 (A)
- Council for Scientific and Industrial Research v Fijen* 1996 17 ILJ 18 (A)
- Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC)
- Dladla v On-Time Labour Hire CC* 2006 27 ILJ 216 (BCA)
- Dyokwe v De Kock* 2012 10 BLLR 1012 (LC)
- Enforce Security Group v Fikile* (DA24/15) 2017 ZALCD 2 (25 January 2017)
- Faith Hill Holdings (Pty) Ltd v Sothiros* 1976 4 SA 197 (T)
- Fedlife Assurance Ltd v Wolfaardt* 2001 12 BLLR 1301 (A)
- Gibbons v Cape Divisional Council* 1928 CPD 198
- Hlatswayo and KwaDukuza Municipality* 2012 33 ILJ 2721 (BCA)
- Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A)
- Jajbhay v Cassim* 1939 AD 537
- Kelly Industrial Ltd v CCMA* 2015 36 ILJ 1877 (LC)
- Khumalo v Supercare Cleaning* 2000 8 BALR 892 (CCMA)
- Kynoch Feeds (Pty) Ltd v CCMA* 1998 19 ILJ 836 (LC)
- Mafihla v Govan Mbeki Municipality* 2005 26 ILJ 257 (LC)
- Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A)
- Mahlamu v CCMA* 2011 32 ILJ 1122 (LC)
- Maritz v Cash Towing CC* 2002 23 ILJ 1083 (CCMA)
- Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC)

- Mediterranean Woollen Mills (Pty) Ltd v SACTWU* 1998 19 ILJ 731 (SCA)
- Meyers v Abrahamson* 1952 3 SA 121 (C)
- Morgan v Central University of Technology, Free State* 2013 1 BLLR 52 (LC)
- Mphirime and Value Logistics Ltd* 2015 36 ILJ 2433 (BCA)
- Murray v Minister of Defence* 2008 29 ILJ 1369 (SCA)
- Nakin v MEC, Department of Education, Eastern Cape Province* 2008 29 ILJ 1426 (E)
- Napier v Barkhuizen* 2006 4 SA 1 (SCA)
- National Union of Metal Workers of South Africa v Abancedisi Labour Services CC* 2012 11 BLLR 1123 (LAC)
- Ndaba v Board of Trustees, Norwood Pre-school* 1996 17 ILJ 504 (Tk)
- NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC)
- New Reclamation Group (Pty) Ltd v Davies* (17200/2013) 2014 ZAGPJHC 63 (20 March 2014)
- Nkopane v Independent Electoral Commission* 2007 28 ILJ 670 (LC)
- Nogcantsi v Mquma Local Municipality* 2017 4 BLLR 358 (LAC)
- NULAW v Barnard* 2001 9 BLLR 1002 (LAC)
- Ouwehand v Hout Bay Fishing Industries* 2004 25 ILJ 731 (LC)
- Paiges v Van Ryn Gold Mines Estates* 1920 AD 600
- Palm 15 (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 2 SA 872 (A)
- Pecton Outsourcing Solutions CC and Pillemer B* 2016 37 ILJ 693 (LC)
- PG Group (Pty) Ltd v Mbambo* 2005 1 BLLR 71 (LC)
- Potgieter v George Municipality* 2011 32 ILJ 104 (WCC)
- Reddy v Siemens Telecommunication (Pty) Ltd* 2007 2 SA 486 (SCA)
- Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 4 SA 494 (N)

- SA Eagle Insurance Co Ltd v Bavuma* 1985 3 SA 42 (A)
- SA Rugby (Pty) Ltd v CCMA* 2006 27 ILJ 1041 (LC)
- SACCAWU obo Makubalo v Pro-Cut Fruit and Veg* 2002 5 BALR 543 (CCMA)
- Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A)
- SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd* 2015 36 ILJ 1923 (LC)
- Schierhout v Minister of Justice* 1925 AD 417
- Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC)
- Sindane v Prestige Cleaning Services* 2010 31 ILJ 733 (LC)
- Solidarity obo Van Niekerk v Denel (Pty) Ltd (Denel Dynamics)* 2012 10 BLLR 1030 (LC)
- South African Post Office v Mampeule* 2009 30 ILJ 664 (LC)
- South African Post Office v Mampeule* 2010 31 ILJ 2051 (LAC)
- Springbok Trading (Pty) Ltd v Zondani* 2004 25 ILJ 1681 (LAC)
- Stokes v Fish Hoek Municipality* 1966 4 SA 421 (C)
- Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A)
- Trio Glass t/a The Glass Group v Molapo* 2013 34 ILJ 2662 (LC)
- Twoline Trading 413 (Pty) Ltd t/a Skosana Contract Labour v Abram Mongatane* 2014 JOL 31668 (LC)
- University of Pretoria v CCMA* 2012 33 ILJ 183 (LAC)
- Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* 2009 30 ILJ 407 (LC)
- Wells v South African Aluminite Company* 1927 AD 69
- Zero Model Management (Pty) Ltd v Barnard (25541/2009)* 2009 ZAWCHC 232 (18 December 2009)

United Kingdom

British Leyland (UK) Ltd v Ashraf 1978 IRLR 930 (EAT)

Igbo v Johnson Matthey Chemicals Ltd 1986 IRLR 215 (CA)

Printing and Numerical Registering Co v Sampson 1875 LR 19 Eq 462

Legislation

South Africa

Constitution of the Republic of South Africa, 1996

Basic Conditions of Employment Act 75 of 1997

Basic Conditions of Employment Amendment Act 20 of 2013

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 6 of 2014

Unemployment Contribution Act 4 of 2002

Unemployment Insurance Act 63 of 2001

United Kingdom

Employment Protection (Consolidation) Act 1978

Employment Rights Act 1996

Government publications

GN 1517 in GG 20254 of 16 July 1999 (Code of Good Practice on Dismissal based on Operational Requirements)

International instruments

ILO Convention 158 of 1982 on the Termination of Employment

Internet sources

Department of Labour 2012 <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsIra.pdf>

Department of Labour 2012 *Memorandum of the Objects Labour Relations Bill* <http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectsira.pdf> accessed 7 December 2016

Scheepers 2015 <http://www.linkedin.com/pulse/regulation-non-standard-atypical-employment-south-scheepers>

Scheepers J 2015 *Regulation of 'non-Standard' or 'A-Typical Employment' – South Africa* <http://www.linkedin.com/pulse/regulation-non-standard-atypical-employment-south-scheepers> accessed 12 December 2016

Statistics South Africa 2016 <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2016.pdf>

Statistics South Africa 2016 *Quarterly Labour Force Survey Quarter 3, 2016* <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2016.pdf> accessed 7 December 2016

List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1995
CCMA	Commission for Conciliation, Mediation and Arbitration
CLL	Contemporary Labour Law
COSATU	Congress of South African Trade Unions
EAT	Employment Appeal Tribunal
ELJ	Employment Law Journal
EPA	Employment Protection (Consolidation) Act 1978
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LDD	Law, Democracy and Development
LRA	Labour Relations Act 66 of 1995
NEDLAC	National Economic Development and Labour Council
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SCA	Supreme Court of Appeal
TES	Temporary employment service
UK	United Kingdom