ABSTRACT

The right to fair dismissal in South Africa is prescribed in the Labour Relation Act 66 of 1995 as amended. Employees may only be dismissed on grounds of misconduct, incapacity and operational requirements. The requirements for dismissal of employees based on misconduct and incapacity are further addressed in Schedule 8 to the LRA, the Code of Good Practice: Dismissal. Dismissal for misconduct needs to be fair in terms of both procedure and substance. Procedural fairness generally involves holding a disciplinary hearing before dismissing an employee. In terms of the South African Public Service Act 103 of 1994 as amended, an employee who absents him-/herself from official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month is deemed dismissed by operation of law. Employees dismissed as such by operation of law in terms of the PSA are therefore not afforded the right to appear in the disciplinary hearing as provided for in the LRA.

South African courts have dealt with a number of cases relating to dismissal by operation of law in the public service. Some of the employees dismissed were reinstated by the courts. Reasons for reinstatement included failing to meet the jurisdictional requirements before invoking dismissal by operation of law.

The research will attempt to clarify the substantive and procedural steps required to render a dismissal by operation of law in terms of the PSA fair in South Africa.
KEYWORDS

❖ Dismissal
❖ Dismissal by operation of law
❖ Absenteeism
❖ Public Service
❖ Employee
❖ Public Service Act
❖ Abscondment Policy
❖ Labour Relations Act
❖ ILO
❖ *Audi alterem partem* rule
❖ South Africa
❖ Namibia
DECLARATION

I declare that *A comparative study on dismissal by operation of law in terms of the Public Service Act: South Africa and Namibia* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Podile Jonas Podile

Signed: ____________________

Date: April 2019
ACKNOWLEDGEMENT

I would like to express my wholehearted thanks to the Almighty God, the creator of the heavens and earth. If it was not for His grace, this mini-thesis would not have been possible.

I would also like take this opportunity to thank my family for the support and encouragement throughout this journey. It was not easy.

To my supervisor, Ms Elsabé Huysamen, thank you for the guidance and support. May the Almighty God bless you abundantly.
DEDICATION

I dedicate this mini-thesis to my late parents, Taedi Phillip and Mantobolo Annah Podile.
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CHAPTER ONE

INTRODUCTION

1.1 RATIONALE/BACKGROUND

In terms of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) everyone has the right to fair labour practices. Everyone includes both employers and employees. Fair labour practices for the purposes of the Constitution includes the right employees have not to be unfairly dismissed as prescribed in the Labour Relations Act 66 of 1995 (‘the LRA’). The LRA holds that employees may only be dismissed on grounds of misconduct, incapacity and operational requirements. The substantive and procedural requirements for dismissal of employees based on misconduct and incapacity are further addressed in Schedule 8 to the LRA, the Code of Good Practice: Dismissal (‘the CGP: Dismissal’).

The LRA, specifically the CGP: Dismissal, stipulates that dismissal for misconduct needs to be fair in terms of both procedure and substance. Procedural fairness generally involves conducting a disciplinary hearing before dismissing an employee, in which the employee is provided with the opportunity to defend the charges against him/her. Substantive fairness requires finding the employee guilty of the alleged misconduct and establishing that the sanction of dismissal is appropriate under the circumstances. The concept of fairness before dismissing an employee is also emphasised in the International Labour Organisation (‘the ILO’) Convention 158, the Termination of Employment Convention.

Absence from the workplace without permission constitutes misconduct. Normally a pre-dismissal hearing must be held in cases of absenteeism in terms of the provisions of the LRA. The employer must establish the whereabouts of the employee in order to serve him/her with a charge sheet so that the employee can attend a disciplinary hearing before being dismissed.

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1 Section 23 (1).
2 NEHAWU v University of Cape Town & others (2003) 24 ILJ 95 (CC).
3 ‘Employees’ as defined by the LRA (and the BCEA) for purposes of legislative protection.
4 Dismissal is defined in Labour Relations Act section 186 (1).
6 HOSPERSA & another v MEC for Health [2003] 12 BLLR 1242 (LC).
7 CGP: Dismissal Item 7.
hearing.\textsuperscript{11} If the employee does not attend the hearing, the employer can proceed with the disciplinary hearing in the absence of the employee.\textsuperscript{12}

In the public service, however, employees employed in terms of the Public Service Act 103 of 1994 (‘the PSA’) who absent themselves without the permission of the employer for one calendar month are considered automatically dismissed without the requirement to conduct a pre-dismissal hearing.\textsuperscript{13} This type of dismissal is referred to as dismissal by operation of law.\textsuperscript{14} These dismissals are not dealt with in terms of the LRA,\textsuperscript{15} and the provisions of LRA CGP: Dismissal are therefore not applicable.\textsuperscript{16} Consequently, employees dismissed as such in terms of the EOEA and PSA cannot approach the CCMA or a bargaining council for any unfair dismissal assistance since only the Labour Court has jurisdiction to deal with these dismissals by operation of law.\textsuperscript{17}

There has been much debate among labour law practitioners within government departments about the requirements and implementation of dismissals by operation of law in accordance with the PSA. The two central issues that are grappled with are the requirements that need be met by the employer before an employee can be dismissed by operation of law, and the procedure that has to precede any such dismissal by operation of law. Furthermore, dispute resolution forums such as bargaining councils have regularly been called upon to determine the fairness of dismissals by operation of law.\textsuperscript{18} Bargaining councils have generally however indicated that they lack jurisdiction to entertain such dismissals by operation of law because they are not dismissals in terms of the LRA.\textsuperscript{19}

\section*{1.2 AIM/S OF THE RESEARCH}

The research aims to discuss the requirements (both procedural and substantive) that must be met for a dismissal by operation of law in terms of the PSA to be fair.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{11} HOSPERSA \& another v MEC for Health (2003) 12 BLLR 1242 (LC).
\item \textsuperscript{12} Dekker AH ‘Gone with the Wind and not giving A Damn: Problems and Solutions in Connection with Dismissal Based on Desertion’ (2010) 22 SA Merc LJ 107.
\item \textsuperscript{13} Employees as defined by PSA.
\item \textsuperscript{14} Cohen T ‘Termination of employment contracts by operation of law- Bypassing the unfair dismissal provisions of the Labour Relations Act’ (2006) 1 Stell LR 91.
\item \textsuperscript{15} Van Niekerk A (ed) et al Law @ Work (2008) 219.
\item \textsuperscript{16} MEC: Department of Education, Gauteng v Mswe & others (2013) 34 ILJ 650 (LC).
\item \textsuperscript{17} Department of Health v PHSDSC (2014) 35 ILJ 2166 (LC).
\item \textsuperscript{18} Lewin I ‘Deemed dismissal in the Public Service: When dismissals occur by operation of law’ (2015) 24(11) CLL 107.
\item \textsuperscript{19} Solidarity and another v Public Health and Welfare Sectoral Bargaining Council and others (2013) 4 BLLR 362 (LAC).
\end{itemize}
\end{footnotesize}
The research will then turn to a discussion of similar dismissals in Namibia with the aim to see if there is anything South Africa can learn from the approach adopted in Namibia.

1.3 PROBLEM STATEMENT

Dismissal in terms of the LRA takes place when an employment relationship ceases to exist as stipulated in section 186(1) of the LRA. For a dismissal of an employee in terms of the LRA to be fair, both procedural and substantive requirements must be met. Procedural fairness, in general, requires that an employee be afforded an opportunity to defend him or herself against the instituted charge(s). This is normally done through a disciplinary hearing. The approach of affording an employee the opportunity to state his or her case is known as the *audi alteram partem* rule which is a fundamental principle of natural justice. The *audi alteram partem* rule is many times also emphasised in suspension matters (pending a disciplinary hearing and the outcome thereof). Employees employed in terms of the PSA, who are absent without permission for a period exceeding one calendar month are however dismissed automatically by operation of law. Since these dismissals take effect automatically by operation of law, the employees are not afforded the opportunity to defend themselves at a disciplinary hearing and therefore the *audi alteram partem* rule is seemingly not applicable. These employees therefore have no right to insist on or claim any form of internal hearing before a dismissal is instituted.

One of the biggest challenges faced by managers in the public service is how to correctly deal with cases of dismissal by operation of law in terms of PSA. The exact procedural and substantive requirements that need to be met before dismissal by operation of law is effected seem to be unclear and inconsistent. Managers are therefore unsure as to how to proceed in a legally fair manner with such dismissals by operation of law. This uncertainty is exacerbated by the fact that some government departments have developed policies to guide the implementation of dismissal by operation of law in terms of PSA, while others have no such guidelines to follow.

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21 Grogan J *Dismissal* 2 ed (2014) 263.
26 Mahlangu v Minister of Sport and Recreation [2010] 5 BLLR 551 (LC).
27 Public Service Act 103 of 1994 section 17 (3).
There has been a number of cases where dismissal by operation of law was effected without any requirements having been met. The decisions of the courts in many of these cases were that the dismissed employees had to be reinstated, further evidencing the lack of understanding by managers with regard to dismissal by operation of law in terms of the PSA.28

1.4 RESEARCH QUESTION

What (if any) are the substantive and procedural requirements that need to be met for a dismissal by operation of law in terms of PSA is to be fairly effected? Is there anything South Africa can learn from Namibia in this regard?

1.5 RESEARCH HYPOTHESIS

Unlike the guidance provided through Schedule 8 of the LRA: Dismissal, there are no clear and specific guidelines available to managers to assist them with dismissal by operation of law in terms of the PSA. Consequently, South African courts have dealt with a number of cases relating to dismissal by operation of law in terms of the PSA.29 In many of these cases employees were reinstated because according to the courts, requirements for dismissal by operation of law were not met. These cases further indicate that there is a lack of understanding and uncertainty in the public service as to the exact requirements that need to be met to render a dismissal by operation of law fair hence the courts reinstated those employees.

This lack of understanding in the public service with regard to dismissal by operation of law also indicates that there is a gap that could be filled by learning from other countries. For the purpose of this study, Namibia will be used as comparative jurisdiction. Namibia was previously known as South West Africa, is a neighbouring country to South Africa. Similar to South Africa, dismissal of public service employees in Namibia is dealt with in terms Namibia’s Public Service Act 13 of 1995 (‘the NPSA’). The Namibian Act holds that any staff member who absents himself or herself without permission for a period exceeding 30 days shall be deemed discharged for misconduct.30 Dismissal in Namibia is further regulated by the Labour Act 11 of 2007 (‘the NLA’).

30 Public Service Act 13 of 1995.
1.6 SCOPE/LIMITATIONS OF RESEARCH

This mini-thesis will deal with dismissal in the public service only, with the focus being specifically on dismissal by operation of law in terms of the PSA.

Dismissal by operation of law in terms of the Employment of Educators Act will not be dealt with in detail. Abscondment or desertion in the private sector, and which is exclusively dealt with in terms of the LRA will also not be dealt with in any significant detail in this mini-thesis.

1.7 SIGNIFICANCE OF RESEARCH

Dismissal by operation of law is a type of dismissal that should be applied with care because employees are not afforded the opportunity to state their case in a disciplinary hearing before they are dismissed. The loss of employment in a country like South Africa where the rate of unemployment is already high does not only affect individuals and their families but the economy of the country as well.31 This mini-thesis will discuss and analyse the procedural and substantive requirements that need to be met before an employee in the public service is dismissed by operation of law.

A lack of understanding and uncertainty in the public service with regard to dismissal by operation of law by managers will be addressed. Managers and organised labour in the public service should have a clear and common understanding with regard to dismissal by operation of law. It is anticipated that in achieving more certainty, much can be learned from the approach adopted by Namibia in dealing with similar dismissals.

1.8 RESEARCH METHODOLOGY

This research will be conducted by reviewing literature published through secondary sources that include articles in journals, academic books, web publications and newspapers. Primary sources such as policies, legislation and ministerial determinations and directives will also be reviewed. International conventions and original narratives by independent researchers, academic scholars, labour think-tanks, unions and employer federations about dismissal by operation of law and jurisdictional requirements will be reviewed. Arguments will be developed based on discourse

analysis of existing labour laws. In addition, it will make strong reference to recent court judgments on dismissal by operation of law in the public service.

1.9 CHAPTER OUTLINE

Chapter one will provide the background to the thesis and will deal with the aims of the research, problem statement, research question, research hypothesis, scope/limitations of the research, significance of the research and methodology.

Chapter two will by way of introduction discuss dismissal requirements in terms of the ILO, and the legislative dismissal provisions in terms of the LRA (specifically misconduct in terms of the LRA). The rest of the chapter will thereafter look at the dismissal by operation of law for provisions of the PSA.

Chapter three will discuss dismissal in general in terms of Namibian labour law. The focus will then shift to dismissal for misconduct specifically in terms of Namibia’s Labour Act and dismissal by operation of law for absenteeism in terms Namibia’s Public Service Act.

Chapter four will discuss the requirements that must be met before a dismissal by operation of law in terms of the South African Public Service Act can be utilised. Court judgements in which the requirements have been dealt with will be considered. The chapter will also address recourses available for employees dismissed by operation of law in terms of the PSA.

Chapter five will provide conclusions and recommendations with regard to dismissal by operation of law in terms of the South African PSA and Namibia’s NPSA. This will include highlighting a suggested approach that needs to be followed by the employer when effecting dismissal by operation of law.
CHAPTER TWO

DISMISSAL PROVISIONS IN SOUTH AFRICA: A DISCUSSION OF THE INTERNATIONAL LABOUR ORGANISATION, THE LABOUR RELATIONS ACT AND THE PUBLIC SERVICE ACT

2.1 INTRODUCTION

In this chapter, regard will be given to the dismissal requirements pronounced by the International Labour Organisation (‘the ILO’), with a specific focus on the Termination of Employment Convention 158 of 1982. In the South African context dismissal for misconduct in terms of the Schedule 8 to the Labour Relations Act 66 of 1995 (‘the LRA’), that is, the Code of Good Practice: Dismissal (‘the CGP: Dismissal’) will be discussed. The discussion will then turn to the deemed dismissal provisions of the Public Service Act 103 of 1994 (‘the PSA’).

2.2 THE INTERNATIONAL LABOUR ORGANISATION

The ILO is a specialised agency of the United Nations (‘the UN’) and responsible for the promotion and protection of the rights of workers internationally.32 The ILO was established in 1919 with South Africa being one of the founding members.33 The ILO was established to, amongst others, promote conditions whereby all people are treated equally and with dignity and to ensure that mechanisms are in place to establish international standards in the form of conventions and recommendations.34 Member states are encouraged to ratify conventions, and once so ratified these conventions become binding to those member states who have to take steps to implement the provisions of ratified conventions into their domestic laws.35 The constitution of the ILO requires member states to provide regular reports on the measures taken to implement the ratified conventions.36 A total of 195 ILO conventions have been adopted as at June 2017.37 Recommendations issued with conventions by the ILO are not binding on member states, but provide guidelines to member states for government action when

implementing ratified conventions. The three main bodies of the ILO are the International Labour Conference, the Governing Body and the International Labour Office. The International Labour Conference is regarded as the supreme body of the ILO and institutes policies of the ILO.

As an inception member to the ILO, South Africa was a respected member of the ILO since 1919, until about 1964. According to Van Niekerk, the relationship between South Africa and the ILO was good until 1959 at which time debates arose within ILO structures over the credential of South African delegations because of the apartheid regime in the country at the time. During 1961 the ILO took a resolution in terms of which South Africa was required to withdraw from the ILO because of the then government’s ongoing policy of apartheid. During 1964 South Africa ‘voluntarily’ withdrew from the ILO rather than face possible expulsion. The absence of South Africa at the ILO Conference of 1964 was welcomed by delegates. During a 1992 ILO conference in Harare, the ILO acknowledged that positive political changes were being made in South Africa, but it was held that it was still too early at that stage to reconsider accepting South Africa back as a member state. South Africa was finally readmitted as a member of the ILO in 1994.

The Constitution of the Republic of South Africa, 1996 requires South African courts to consider international law when interpreting the Bill of Rights. South African courts have referred to ILO standards on numerous occasions. South African legislation, such as the LRA, Basic Conditions of Employment Act 75 of 1997 66 of 1995 (‘the BCEA’) and Employment Equity Act 55 of 1998 (‘the EEA’) also makes a commitment to comply with the standards of the ILO.

49 SA Defence Force Union v Minister of Defence & another 1999 (20) ILJ 2265 (CC), NUMSA & Others v Bader Bop (Pty) Ltd & another (2003) 2 BLLR 103 (CC), S v Makwanyane 1995 (3) SA 391 (CC),
50 Section 1(b) of LRA, Section 2(b) of BCEA, Section 3(d) of EEA.
2.3 TERMINATION OF EMPLOYMENT CONVENTION 158 OF 1982

The ILO has always regarded the protection of employees and their rights as extremely important. The ILO adopted the Termination of Employment Convention of 1982 (‘the Termination Convention’) and Termination of Employment Recommendation of 1982 (‘the Termination Recommendation’) in order to provide job security for employees. According to the ILO’s Termination Convention employees may only be dismissed for reasons related to capacity, conduct or operational requirements. The ILO further states that before an employee is dismissed for reasons related to conduct, he must first be provided with the opportunity to state a case unless there are reasonable circumstances that prohibit such an opportunity. An employee dismissed for conduct may lodge an appeal within a reasonable period with an impartial body, and should an employee regard his dismissal to be on unjustified grounds, he may approach an independent body for a recourse.

Participation in the activities of a trade union, including, representing a fellow colleague and lodging a complaint against the employer do not constitute valid reasons to terminate employment. The dismissal of an employee must not be based on race, religion, sex, marital status, family responsibility, pregnancy, religion, political opinion, national extraction or social origin.

2.4 DISMISSAL FOR MISCONDUCT UNDER SOUTH AFRICAN EMPLOYMENT LAW

2.4.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitution of the Republic of South Africa, 1996, (‘the Constitution’) is the supreme law of the country and legislation in all fields of law should conform to it. Any legislation that does not conform to the Constitution may be challenged based on grounds of being unconstitutional.
From an employment perspective, the Constitution promotes values underlying equality, protection against unfair discrimination, freedom of association and employment rights. The Constitution addresses labour relations matters specifically under section 23. Section 23 provides the right to fair labour practices, to both employers and employees. The primary employment legislation enacted in South Africa to give effect to labour rights under the Constitution are the LRA, EEA and BCEA.

The central focus of section 23 of the Constitution is fairness. Fairness is however not defined in the Constitution. It is trite that consideration of fairness must not be biased towards either the employer or employee. Fairness requires consistency. As an example, it would be unfair to discipline some employees, while, in the absence of good reasons, not taking any action against others who commit the same or similar misconduct. According to Du Toit et al fairness “is by its very nature a malleable and expansive concept, which is premised on the circumstances of a particular case as well as the conflicting and evolving rights and interests of employers and employees collectively.”

The BCEA in broad deals with basic conditions of employment that employees are entitled to receive. The EEA, in turn, governs the issues of prohibition against unfair discrimination and the implementation of affirmative action measures. For purposes of this research, however, the LRA is the governing legislation. The LRA, amongst others, addresses dismissal in the workplace. This includes stipulating the permissible grounds for dismissal, grounds which can never form the basis for a dismissal which is as such and declared automatically unfair, and the process to be followed by employers in effecting any dismissal in a manner that would be deemed fair. It is to these provisions of the LRA that the discussion turns next.

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61 Section 23(1) of Constitution.
65 NEHAWU v University of Cape Town 2003 (2) BCLR 154 (CC).
69 In terms of section 188(1)(a) of the LRA an employee’s dismissal may only be justified on grounds of misconduct, incapacity and operational requirements of the employer.
70 See section 187 of the LRA.
71 Section 188(1)(b) of the LRA, CGP of LRA.
2.4.2 THE LABOUR RELATIONS ACT 66 OF 1995 (AS AMENDED)

The LRA was the first piece of legislation to be promulgated post-apartheid under the new democratic dispensation in South Africa. The ILO played an important role in assisting the South African government of the time to draft the LRA in such a way that it complied with international standards. It is well-known that the application and interpretation of the LRA must take the Constitution into cognisance.

The LRA’s provisions are applicable to both the private and public sectors, unless indicated otherwise by an Act of Parliament.

The LRA provides employees with the right not to be unfairly dismissed or subjected to unfair labour practices. It also provides for collective bargaining. Only employees as defined within section 213 of the LRA fall within the scope of the LRA and are as such protected from, for example, unfair dismissals. Employees specifically excluded from the scope of the LRA are individuals employed in terms of the National Defence Force Act 42 of 2002 and the Intelligence Services Act 65 of 2002. Judges and magistrates are also excluded from the scope of the LRA.

Section 186 of the LRA defines dismissal as the situation where:

(a) “an employer has terminated employment with or without notice;
(b) an employee employed in terms of a fixed-term contract of employment reasonably expected employer to—

(i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

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75 Section 3(b) of LRA.
77 Section 185(a) of LRA, Grogan J Dismissal 2 ed (2014) 10.
78 Section 185(b) of LRA.
79 Sections 11 – 63 of LRA.
80 Section 213 of LRA defines an employee as (a) “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer”.
81 Section 3 of LRA.
(ii) to retain the employee in employment on an indefinite basis but otherwise on the
same or similar terms as the fixed-term contract, but the employer offered to
retain the employee on less favourable terms, or did not retain the employee;

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

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

(ii) ...

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

(e) An employee terminated employment with or without notice because the
employer made continued employment intolerable for the employee; or

(f) an employee terminated employment with or without notice because the new
employer, after a transfer in terms of section 197 or section 197A, provided the
employee with conditions or circumstances at work that are substantially less
favourable to the employee than those provided by the old employer”.

In line with the ILO’s Termination Convention the LRA provides that a dismissal may only
be justified on the grounds of misconduct, incapacity or the employer’s operational
requirements.\textsuperscript{83} While not defined in the LRA, misconduct is said to be related to failure
to perform work according to the set standards,\textsuperscript{84} and the conduct of the employee.\textsuperscript{85}
Abscondment of an employee is regarded as a form of misconduct, which could potentially lead to dismissal of an employee.\textsuperscript{86}

\begin{footnotes}
\item[83] In terms of section 188(1)(a) of the LRA.
\end{footnotes}
2.5 DISMISSAL FOR MISCONDUCT IN TERMS OF THE LRA

For a dismissal in terms of the LRA to be regarded as fair, the dismissal of an employee must be both substantively and procedurally fair.\(^{87}\) Dismissal for misconduct must, therefore, be in line with the requirements of the LRA.\(^{88}\) Schedule 8 of the LRA, the Code of Good Practice: Dismissal (‘the CGP: Dismissal’) provides guidelines to establish substantive and procedural fairness in cases of misconduct.\(^{89}\) Substantive fairness in misconduct cases focusses on whether an employee breached an employment rule or not and whether the sanction imposed was fair.\(^{90}\) Procedural fairness focusses on the procedure that an employer is required to follow before taking disciplinary action against an employee.\(^{91}\) Item 4.1 of the CGP: Dismissal sets out the procedure to be followed.\(^{92}\)

2.5.1 DISMISSAL FOR MISCONDUCT IN TERMS OF THE LRA: PROCEDURAL FAIRNESS\(^{93}\)

It is the duty of the employer to ensure that the dismissal of an employee is procedurally fair.\(^{94}\) The employer should comply with any applicable disciplinary code and collective agreement when taking disciplinary action against employees, which,\(^{95}\) according to Grogan, is the starting point to determine procedural fairness.\(^{96}\) Generally, a disciplinary hearing should take place before a decision is taken to dismiss an employee because that provides an employee with the opportunity to respond to the allegations levelled against him or her.\(^{97}\) The approach of affording an employee the opportunity to state his or her case

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\(^{87}\) Van Niekerk A (ed) et al Law @ Work (2008) 238.
\(^{88}\) Cohen T 'Termination of employment contracts by operation of law-- Bypassing the unfair dismissal provisions of the Labour Relations Act' (2006) 1 Stell LR 96.
\(^{89}\) Smit P & van Eck BPS 'International Perspective on South Africa’s Unfair Dismissal Law' (2010) XIII CISLA 65.
\(^{92}\) Item 4.1 of CGP: Dismissal sets the procedures as (1) “normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employer should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision. (2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union. (3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement. (4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures”.
\(^{93}\) CGP: Dismissal Item 4.
\(^{94}\) Cohen T 'Termination of employment contracts by operation of law-- Bypassing the unfair dismissal provisions of the Labour Relations Act' (2006) 1 Stell LR 91.
in a disciplinary hearing case is consistent with the *audi alterem partem* rule which is a fundamental principle of natural justice\textsuperscript{98} and is also referred to as ‘hear the other side’.\textsuperscript{99} The *audi alterem partem* rule is also intended to deter employers from acting in a rush and arbitrary manner before taking a final decision to dismiss employees.\textsuperscript{100} The chairperson at the disciplinary hearing must not be biased towards either the employer or employee.\textsuperscript{101}

The chairperson of a disciplinary hearing must not be a person who was involved in the incident that resulted in a disciplinary hearing against an employee or someone who has a personal interest in the outcome of the disciplinary hearing.\textsuperscript{102} Failure to follow a fair procedure will render the dismissal procedurally unfair.\textsuperscript{103}

Generally, a disciplinary hearing should take place before a decision is taken to dismiss an employee because that provides an employee with the opportunity to respond to the allegations levelled against him or her.\textsuperscript{104} The approach of affording an employee the opportunity to state his or her case in a disciplinary hearing case is consistent with the *audi alterem partem* rule which is a fundamental principle of natural justice\textsuperscript{105} and is also referred to as ‘hear the other side’.\textsuperscript{106} The *audi alterem partem* rule is also intended to deter employers from acting in a rush and arbitrary manner before taking a final decision to dismiss employees.\textsuperscript{107}

In *Semenya v CCMA & others*,\textsuperscript{108} the court emphasised the need to hold a disciplinary hearing before a decision to dismiss an employee is taken, but also mentioned that the employer may convene a disciplinary hearing after the employee was dismissed. The court made reference to the situation where an employer only became aware of the requirement of a disciplinary hearing after the employee had already been dismissed.

In *Semenya* the employer proceeded to dismiss the employee without first having convened a disciplinary hearing. The employer only later offered the employee the opportunity to appear at a disciplinary hearing. The employer also offered the employee

\textsuperscript{98} Levy A ‘Can Anybody Hear Me?’ The *Audi* Rule and Dismissal of Unprocedural Strikers’ (2009) 31 ILJ 825.

\textsuperscript{99} Grogan J *Dismissal* 2 ed (2014) 274.

\textsuperscript{100} Grogan J *Dismissal* 2 ed (2014) 264.

\textsuperscript{101} Coin Security Group (Pty) Ltd v TGWU [1997] 10 BLLR 1261 (LAC).

\textsuperscript{102} Grogan J *Dismissal* 2 ed (2014) 297.

\textsuperscript{103} Cohen T ‘Procedurally Fair Dismissals – Losing the Plot?’ (2005) 17 SA Merc LJ 32.

\textsuperscript{104} Grogan J *Dismissal* 2 ed (2014) 285.

\textsuperscript{105} Levy A ‘Can Anybody Hear Me?’ The *Audi* Rule and Dismissal of Unprocedural Strikers’ (2009) 31 ILJ 825.

\textsuperscript{106} Grogan J *Dismissal* 2 ed (2014) 274.

\textsuperscript{107} Grogan J *Dismissal* 2 ed (2014) 264.

\textsuperscript{108} [2006] 6 BLLR 521 (LAC).
the opportunity to choose an independent chairperson in an attempt to ensure fairness. However, the employee turned down the offer. The court held that because the employee had refused the opportunity to appear at a disciplinary hearing, the *audi alteram partem* rule had been complied with by the employer.

Even though the *audi alteram partem* rule is a requirement to ensure procedural fairness before a decision to dismiss an employee is taken, the CGP: Dismissal provides that under *exceptional circumstances* the employer may dismiss an employee without first conducting the hearing. The CGP: Dismissal does not, however, state what would be regarded as *exceptional circumstances*. Turning to the courts for guidance in this regard, South African courts have permitted employers to dismiss employees without a pre-hearing where employees participated in a strike action that turned violent. In *Lefu v Western Areas Gold Mining Co* the court held that the circumstances of the particular industrial action embarking upon by workers compelled the employer to dismiss the employees without any pre-hearing in order to protect lives and property.

Grogan agrees that employers may be permitted to dismiss employees without first convening a hearing in situations where it is reasonably not possible to hold a hearing, or it is necessary to dismiss some employees to calm a volatile situation (such as in the *Lefu* case). Similarly, in *Modise & others v Steve's Spar Blackheath* : employees embarked on an unprotected strike and were dismissed without being afforded the opportunity to appear in a disciplinary hearing first. After the employees embarked on their unprotected strike action, the employer successfully applied to court for an interim interdict, prohibiting the employees from striking. Subsequent to granting of the interim interdict, the employer issued an ultimatum to striking employees, instructing them to return to work or face dismissal. The employees failed to heed the ultimatum and were dismissed. The court held that the dismissal was fair under the circumstances.

A disciplinary hearing that is held in the absence of an employee is generally regarded as unfair. However, a dismissal might be found to be fair where the employee, without good reasons, failed to attend the disciplinary hearing. In *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLR 699 (SCA).
Assurance Co SA Ltd v Gumbi the court held that the dismissal of an employee who failed to appear at a hearing without good reasons was fair. The court held that the employer’s role is to afford an employee with a platform to rebut the allegations against him and the employee is obliged to avail himself. Similarly, in Foschini Group v Maidi, a group of employees was charged collectively and failed to appear at their disciplinary hearing. The disciplinary hearing was held in their absence and the court held that the employees’ absence was unreasonable and therefore the dismissal was fair.

2.5.2 DISMISSAL FOR MISCONDUCT IN TERMS OF THE LRA: SUBSTANTIVE FAIRNESS

The dismissal of an employee will only be substantively fair where there is an acceptable reason for the dismissal. Where misconduct is tendered as the reason for dismissal, in order to demonstrate substantive fairness the employer would have to prove that the employee contravened a workplace rule. The employer can show the existence of the rule through a disciplinary code, policies and/or employment contracts. The employer must prove that the employee contravened a workplace rule on a balance of probabilities, and is not required to show contravention beyond a reasonable doubt.

A valid workplace rule should not be contrary to any law or public policy. A rule is reasonable if it is not unfair and is related to the performance or standard of conduct required from the employee. It is the responsibility of the employer to make the employees aware of workplace rules. The same rules and standards of conduct in the workplace should be applied consistently, meaning, disciplinary action must be taken against all employees who break the same rule or standard of conduct in the workplace. Appropriate sanction depends on the seriousness of the offence and it is the responsibility of the commissioners to determine whether the sanction is appropriate or not by considering certain factors. The factors that the commissioners must consider include the importance of the rule, the reason employer imposed the

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120 CGP: Dismis Item 7.
128 Bosch C ‘Consistency as an Element of Fairness in Dismissal’ (2014) 35 ILJ 898.
130 Sidumo and another v Rustenburg Platinum Mines Ltd and others (2007) 12 BLLR 1097 (CC).
sanction of dismissal, the basis of the employee’s challenge to the dismissal, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct and the effects of dismissal on the employee.  

2.6 REMEDIES FOR UNFAIR DISMISSAL IN TERMS OF THE LRA

Employees who believe they were unfairly dismissed (whether substantively or procedurally so, or both) may refer an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (‘the CCMA) or relevant Bargaining Council.  

The remedies for unfair dismissal as provided for in the LRA are reinstatement, re-employment and compensation. Reinstatement is where the employer is required to take back the employee as if nothing had happened and there is no need for a new contract of employment. Reinstatement may be retrospective and the employee will be entitled to receive money for the period he was not paid. Re-employment is where the employer is required to employ the employee again, but this could be under a new contract and possibly even on new terms. Compensation may be awarded to an employee where reinstatement or re-employment is not appropriate, but cannot exceed 12 months’ remuneration at the rate of the employee’s earnings at the time of dismissal. In the case of an automatically unfair dismissal, compensation may be awarded to a maximum of 24 months’ income. Reinstatement and re-employment may not be awarded where the employee does not wish to be employed by the employer again, where it would be impractical to order the employer to take the employee back into its employ, or where the dismissal was held to be unfair solely on procedural grounds.

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131 Sidumo and another v Rustenburg Platinum Mines Ltd and others (2007) 12 BLLR 1097 (CC).
133 Section 193 (1) of LRA.
138 Section 194(2) of LRA.
139 Section 194(3) of LRA.
140 Section 193(2) of LRA.
2.7 DEEMED DISMISSAL IN TERMS OF THE PUBLIC SERVICE ACT 103 OF 1994 OF SOUTH AFRICA

2.7.1 EMPLOYMENT IN THE PUBLIC SERVICE OF SOUTH AFRICA IN TERMS OF THE PSA

An employee in terms of the PSA is defined as “a person contemplated in section 8, but excludes a person employed in terms section 12A”. Section 8 holds that the public service is comprised of persons employed in posts on the establishment of departments as well as those employed additional to the staff establishment. Persons appointed in terms of section 12A are employed to advise executing authorities. According to Van Niekerk employees in the public service are employed at national departments and provincial departments. Employment in terms of the PSA excludes National Defence Force members and State Security Agency staff. Individuals employed by the local government are also not employed in terms of the PSA. A deemed dismissal in accordance with the PSA is not regarded as a dismissal for purposes of the LRA, and therefore only the provisions of the PSA will apply.

2.7.2 MANAGEMENT OF MISCONDUCT IN TERMS OF THE PSA

Similar to the LRA, employees in the public service may be dismissed for misconduct. The term misconduct is not defined in the PSA, however, it relates to the failure to perform work according to set standards and the conduct of the employee. Disciplinary action in the public service is implemented and governed in terms of the Disciplinary Code and Procedures for the Public Service (‘the Disciplinary Code’) as resolved in the Public Service Coordinating Bargaining Council (‘the PSCBC’) and contained in the Senior Management Service Handbook (‘SMS Handbook’). Annexure A of the Disciplinary Code and Annexure A of Chapter 7 of the SMS Handbook list certain acts as examples of misconduct. These examples include theft, bribery, fraud, sexual...

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141 Section 1 of PSA.
142 Section 8 of PSA.
143 Section 12A of PSA.
145 Section 2 of PSA.
146 Van der Walt A, Abrahams D & Qotoyi T ‘Regulating the termination of employment of absconding in the public sector and public education in South Africa: A preliminary view’ 2016 Obiter 140.
148 Section 2 of PSA.
149 Section 17(2)(d) of PSA.
152 Annexure A of PSCBC Resolution 1 of 2003, PSCBC Resolution 1 of 2003
harassment, negligence and absenteeism without permission. It is this latter example to which the discussion next turns.

2.7.3 ABSENTEEISM WITHOUT PERMISSION: DEEMED DISMISSAL

Employees employed in the public service may be charged for absenteeism without permission in terms of the Disciplinary Code and the SMS Handbook.\(^{155}\) This can happen where the period of absence was less than one calendar month.\(^{156}\) In such an instance, the employer can serve the employee with a charge sheet.\(^{157}\) The Public Health and Social Development Sectoral Bargaining Council (‘PHDSBSC’) in the matter of \textit{NEHAWU obo Mgweba and Department of Health, Eastern Cape}\(^{158}\) held that the dismissal of an employee who was absent without permission for 22 days was fair. In \textit{Vusi Shabalala and Department of Health, KwaZulu Natal}\(^{159}\), the PHDSBSC likewise found the dismissal of an employee who was absent for 3 days without permission to have been fair.

Employees who are however absent without permission for a period exceeding one calendar month may be dismissed automatically in terms of the provisions of section 17(3) of the PSA.\(^{160}\) Termination of employment in terms section 17(3) of PSA is applied outside the Disciplinary Code\(^{161}\) and the SMS Handbook and does not constitute a dismissal for purposes of the LRA\(^{162}\) and it is not based on the decision of the employer.\(^{163}\) It is a termination that is caused by an event.\(^{164}\)

Section 17(3)\(^{165}\) of the PSA provides that:

\begin{enumerate}[label=(a),itemindent=2em]
  \item ‘\(i\) An employee, other than member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been
\end{enumerate}

\(^{155}\) Van Niekerk A (ed) et al \textit{Law @ Work} (2018) 257.
\(^{156}\) \textit{NEHAWU obo Mgweba and Department of Health, Eastern Cape} PSHS564-11/12
\(^{157}\) HOSPERSA \& another \textit{v MEC for Health} [2003] 12 BLLR 1242 (LC)
\(^{158}\) PSHS564-11/12.
\(^{159}\) PSHS588-16/17.
\(^{160}\) Section 17(3) of PSA.
\(^{162}\) Grogan J \textit{Labour Litigation and Dispute Resolution} 2 ed (2014) 328.
\(^{163}\) Van der Walt A, Abrahams D \& Qotoyi T ‘Regulating the termination of employment of absconding in the public sector and public education in South Africa: A preliminary view’ 2016 Obiter 144.
\(^{164}\) Cohen T ‘Termination of employment contracts by operation of law- Bypassing the unfair dismissal provisions of the Labour Relations Act’ (2006) 1 Stell LR 92.
\(^{165}\) Section 17(3) was prior to the amendments of the PSA effected on 1 April 2008 known as section 17(5), Lewin I ‘Deemed dismissals in the Public Service: When dismissal occur by operation of law’ (2015) 24(11) CLL 104, General Public Service Sectoral Bargaining Council ‘Dispute Resolution and Labour Law Amendments’ (2016) 69.
dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or place of duty.

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

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

The calendar month is defined as “a period extending from a day in one month to a day preceding the day corresponding numerically to that day in the following month, both days inclusive”. The effect of section 17(3) is that where an employee is absent without permission for a period in excess of one calendar month, the services of such employee terminates automatically at the expiry of a calendar month.

From the discussion above, it is evident that the approach required to deal with absenteeism without permission in the public service depends on the period of absenteeism. Dismissal for absenteeism without permission for a period less than one calendar month would be similar to the process of the LRA (i.e. generally a disciplinary hearing would be required), whereas absenteeism without permission for a period exceeding one calendar month would trigger the automatic dismissal provisions of the PSA.

Employees are required to be at their workstations during working hours, failing which they could be regarded as being absent. However, employees who are prevented by

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166 Section 1 of PSA.
their employer to be at their workstations, for example, employees placed on precautionary suspension pending an investigation into allegations of misconduct, cannot be dismissed by operation of law in terms of section 17(3) of the PSA.\textsuperscript{170}

In \textit{Solidarity obo Kotze v Public Health \& Welfare Sectoral Bargaining Council and Others}\textsuperscript{171} the LC dealt with a case of an employee who had been placed on precautionary suspension pending an investigation into allegations of misconduct. The Department of Health: Free State placed the employee on precautionary suspension on 3 July 2007, subsequent to which the employee assumed employment with Compu Africa on 23 July 2007. The Department of Health: Free State invoked the dismissal by operation of law provisions of the PSA. The employee lodged an unfair dismissal dispute with the Welfare Sectoral Bargaining Council. The commissioner ruled that the Bargaining Council lacked jurisdiction to deal with the matter. As a result, the employee approached the Labour Court to review the decision of the Bargaining Council. The Labour Court held that by accepting employment with Compu Africa, the employee had absented himself without permission. The court concluded that the Bargaining Council therefore indeed lacked jurisdiction since the termination of employment took effect by operation of law in terms of the PSA.

An employee whose employment has been terminated by operation of law in terms of section 17(3) of the PSA is permitted to submit an application for reinstatement, in which the employee must show good cause as to why he should be reinstated.\textsuperscript{172}

Application for reinstatement must be made to the relevant executive authority.\textsuperscript{173} Employers may not deprive employees of this opportunity.\textsuperscript{174} Employees should show good cause why they should be reinstated and provide reasons for their absence.\textsuperscript{175} The executive authority must apply its mind in deciding whether or not to reinstate the employee.\textsuperscript{176}

\textsuperscript{170} Grootboom v National Prosecuting Authority and Another [2014] 1 BLJR 1 (CC).
\textsuperscript{171} (2010) 31 ILJ 3022 (LC).
\textsuperscript{172} Grogan J \textit{Dismissal 2 ed} (2014) 181.
\textsuperscript{173} Section 17(3)(b) of PSA. In terms of PSA section 1, executive authority refers to “in relation to- (a) the Presidency or a national government component within the President’s portfolio, means the President; (b) a national department or national government component within a Cabinet portfolio, means the Minister responsible for such portfolio; (c) the Office of the Commission, means the Chairperson of the Commission; (d) the Office of a Premier or a provincial government component within a Premier’s portfolio, means the Premier of that province; and (e) a provincial department or a provincial government component within an Executive Council portfolio, means the member of the Executive Council responsible for such portfolio;”
\textsuperscript{174} MEC: Department of Education, Gauteng v Msweli & others (2013) 34 ILJ 650 (LC).
\textsuperscript{175} Public Servants Association of SA obo Van der Walt v Minister of Public Enterprises and Another (2010) 31 ILJ 420 (LC).
\textsuperscript{176} Mahlangu v Minister of Sport and Recreation [2010] 5 BLJR 551 (LC).
In *DENOSA obo Mangena v MEC for Department of Health, Western Cape*\(^{177}\) and *Weder v MEC Department of Health, Western Cape*\(^{178}\) the two employees were employed by the same employer. Both employees were booked-off sick by their medical practitioners for a period exceeding one calendar month. The employer terminated their employment contracts through invoking the dismissal by operation of law provisions of the PSA. Both employees applied to the executive authority for reinstatement, which applications failed. Both employees then applied to the Labour Court to review the decision of the executing authority to not reinstate them. The Labour Court in both instances upheld the applications because the executing authority did not provide reasons for not reinstating the employees. The Labour Court ordered that the employees be reinstated. The employer subsequently took the matter on appeal to the Labour Appeals Court, at which stage both matters were heard simultaneously by the latter court (because of the similarity in the matters). The Labour Appeals Court held that even though the employees were at fault for not having informed their managers that they were sick, their absence was not wilful, nor deliberate. The Labour Appeals Court also concluded that the executing authority was obliged to provide reasons for not reinstating the employees. Without such reason(s), the Labour Appeals Court held that it would be difficult to establish if the decision of the employer was rational. The employer’s appeal was dismissed.

The executing authority must consider all the facts as well as the circumstances of the employee, and whether the conduct of the employee had rendered the employment relationship intolerable.\(^{179}\) The absence of the employee must have at least disrupted the operations of the employer.\(^{180}\) Employees whose applications for reinstatement were not successful may make an application to review the decision of the executing authority in terms of the LRA to the Labour Court.\(^{181}\)

### 2.8 CONCLUSION

In this chapter, it has been shown that the ILO and South Africa have a historical background since the establishment of the ILO, the withdrawal of South Africa from the ILO and the readmission of South Africa as a member in 1994. It is evident that the LRA was drafted in line with the ILO’s Termination of Employment Convention of 1982. The

\(^{177}\) [2013] 5 BLLR 479 (LC).

\(^{178}\) [2013] 1 BLLR 94 (LC)

\(^{179}\) *De Villiers v Head of Department Western Cape Province* (2010) ILJ 1377 (LC).

\(^{180}\) *NEHAU W obo Ndw eni v Member of Executive Council, Social Development and Another* (JR1488/15) [2017] ZALCJHB 90 (14 March 2017).

\(^{181}\) Section 158 (1) (h) of LRA, *De Villiers v Head of Department Western Cape Province* (2010) ILJ 1377 (LC).

http://etd.uwc.ac.za/
LRA is applicable in both the private and public sector. The dismissal of employees employed in terms of PSA who absent themselves for a period not more than one calendar month must take place in terms of the LRA. When an employee employed in terms of the PSA, however, absents himself for a period exceeding one calendar month, section 17(3) which deals with the dismissal by operation of law, becomes applicable. In these circumstances, employees are automatically deemed to have been dismissed, without the need by the employer to institute a disciplinary hearing first. Such dismissals are therefore not in line with the LRA, though it is acceptable in terms of the PSA.

The CGP: Dismissal of the LRA focusses on the procedural and substantive fairness aspects of dismissal of employees. It provides guidance to the CCMA, Bargaining Councils, and Labour Courts in determining the fairness or otherwise of dismissals. As a general rule, dismissal in terms of the LRA requires a pre-hearing before a final decision is taken to dismiss or not. The dismissal of an employee who, without good reason, opts not to avail himself at a hearing, may be regarded as fair. Also, the CGP: Dismissal provides that under exceptional circumstances the employer may dismiss an employee without first conducting a hearing. Exceptional circumstances are however not defined. It is left to the courts to determine what would be regarded as exceptional circumstances.

It was shown in this chapter that a dismissal by operation of law in terms of the PSA is not a dismissal in terms of the LRA and having a pre-dismissal hearing is not a requirement. The PSA prescribes the jurisdictional requirements that must be met before the dismissal by operation of law can be invoked. These are that an employee absents himself without permission from the employer for a period exceeding one calendar month. Employees dismissed by operation of law in terms of the PSA have recourse in that they may apply for reinstatement to the executing authority and must show good cause why they should be reinstated. The executing authority must consider the application and decide whether to reinstate the employee or not. When the decision is to not reinstate, the executing authority is required to provide reasons for such decision. The decision by the executing authority to not reinstate the employee does not constitute a dismissal in terms of the LRA. That decision can, however, be challenged by an employee through an application to the Labour Court to review the decision of the executing authority. Neither the CCMA nor Bargaining Councils have jurisdiction over cases where employees were dismissed by operation of law, provided that the jurisdictional requirements of such automatic dismissals in terms of the PSA were met.
In the next chapter dismissal in Namibia will be discussed and the focus will be on the Labour Act 11 of 2007 (‘the NLA’) and the Public Service Act 13 of 1995 (‘the NPSA’).
CHAPTER THREE

THE LAW OF DISMISSAL IN NAMIBIA

3.1 INTRODUCTION

In this chapter dismissal in general in terms of Namibian labour law will first be considered. The focus will then shift to dismissal for misconduct specifically in terms of Namibia’s Labour Act 11 of 2007 (‘the NLA’) and dismissal by operation of law for absenteeism in terms Namibia’s Public Service Act 13 of 1995 (‘the NPSA).

3.2 AN OVERVIEW OF THE NAMIBIAN LABOUR LAW LEGISLATIVE SCHEME

Namibia became independent from South Africa on 21 March 1990. 182 Before independence labour laws in Namibia imitated those of South Africa and were often reflective of discriminatory practices and racial divide. 183 Subsequent to gaining independence from South Africa, labour laws in Namibia were amended to provide for, amongst others, freedom of association, equal opportunities for all, fair employment practices and sound labour relations. 184 The most significant labour laws currently in operation in Namibia, and giving effect to the rights contained in the Constitution of Namibia, are the NLA, and the Affirmative Action Act 29 of 1998 (‘the AAA’). 185 Namibia is also a member of the ILO. 186 To date, Namibia has adopted and ratified several ILO Conventions and Recommendations, 187 including, the Termination of Employment Convention 158 of 1982. 188 This Convention concerns the dismissal of employees for reasons related to capacity, conduct or operational requirements. 189

3.2.1 THE CONSTITUTION OF REPUBLIC OF NAMIBIA ACT 7 OF 2010

Similar to the position in SA, the Constitution of Namibia is regarded as the supreme law of the country. 190 The drafting of the Namibian Constitution was largely influenced by

190 Article 1 (6) of Constitution of Namibia
the Wiehahn Commission of 1987 and the ILO.\footnote{Fenwick C ‘Labour Law in Namibia: Towards an Indigenous Solution?’ 2005 123 SALJ 673.} The Wiehahn Commission was tasked to analyse and suggest necessary changes to labour laws in Namibia.\footnote{‘Credibility test for Labour Commission’ The Namibian 9 October 1987 4.} The Commission emphasised compliance with international labour standards of the ILO, particularly in far as the rights to form and join a trade unions and collective bargaining were concerned. The Namibian Constitution provides for rights such as the right to equality before the law\footnote{Article 10 (1) of Constitution of Namibia.}, protection against discrimination\footnote{Article 10 (2) of Constitution of Namibia.}, implementation of affirmative action\footnote{Article 23 of Constitution of Namibia.} and freedom of association.\footnote{Article 21 (1) (e) of Constitution of Namibia.}

3.2.2 THE AFFIRMATIVE ACTION ACT 29 OF 1998 (AAA)

Faudez defines affirmative action as steps taken to treat a previously disadvantaged person better so as to place the individual in an equal position with those who previously had an advantage.\footnote{Faudez J ‘Promoting Affirmative Action’ 1994 ILJ 1187.} The Namibian AAA gives effect to articles 10 and 23 of the Constitution of Namibia.\footnote{Preamble of Constitution of Namibia.} Article 10 of the Namibian Constitution stipulates that all citizens of Namibia are equal before the law. Article 23 of the Namibian Constitution forbids apartheid practices and acknowledges that women in Namibia historically suffered more discrimination and must be allowed to take part in the political, social, economic and cultural life of the nation of Namibia. The AAA is applicable to relevant employers as identified by the Minister of Labour.\footnote{Section 20 of AAA.} Affirmative action measure in terms of the AAA refers to steps that a relevant employer must take to ensure that designated groups of people are afforded equal opportunity in the workplace.\footnote{Section 17 of AAA.} Designated groups refer to individuals who were previously racially disadvantaged because of apartheid, women, and people with disabilities.\footnote{Section 18 of AAA.} Disputes relating to affirmative action may be referred to the Employment Equity Commission of Namibia.\footnote{Section 45 of AAA.}

3.2.3 THE NAMIBIA LABOUR ACT 11 OF 2007 (NLA)

The NLA supports the Constitution of Namibia by amongst others, promoting collective bargaining, improving conditions of employment and addressing imbalances that
historic discriminatory laws caused in Namibia. The NLA also takes into account conventions and recommendations of the ILO. The NLA is applicable to all employers and employees in Namibia, safe for independent contractors, the Namibian Defence Force, the Namibian Intelligence Service, the Prison Service, and the Police Force. The NLA encourages trade unions, employer and employer organisations to engage in collective bargaining and also to bargain in good faith.

Basic conditions of employment are also provided for in the NLA. These provisions include, amongst others, declaration of continuous shift, ordinary hours of work, overtime, meal intervals, and night work.

The NLA further prohibits discrimination in employment on the grounds of, to name a few, sex, race, colour, ethnic origin and religion. A dismissal is regarded as unfair if the reason for the dismissal is based on any of the listed grounds. A dismissal will be regarded as automatically unfair where the reason for the dismissal is based on an employee’s disclosure of information which the employees are entitled or required to disclose to another person; failure or refusal to do anything that an employer may not lawfully permit or require an employee to do; the exercise of any right conferred by the NLA or the terms of an employment contract or a collective agreement; membership of a trade union; and participation in the activities of a trade union.

The NLA also provides for the steps an employer must follow where there is a need to reduce the workforce (i.e. retrenchment). The NLA further permits employers to dismiss employees for misconduct if the dismissal is for a fair and valid reason and a fair procedure was followed. It is also permissible to dismiss an employee for incapacity, whether performance or health related, employee incompatibility and the unsuitability of a probationary employee.

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203 Preamble of NLA.
204 Preamble of NLA.
205 Section of NLA.
206 Section 49 and section 50 of NLA.
207 Section 15 of NLA.
208 Section 16 of NLA.
209 Section 17 of NLA.
210 Section 18 of NLA.
211 Section 19 of NLA.
212 Section 5 of NLA.
213 Section 33(3) of NLA.
215 Section 34 of NLA.
216 Section 33(1) (a) & (b).
It is to the NLA’s provisions on fair dismissal for misconduct that the discussion turns next.

3.3 DISMISSAL FOR MISCONDUCT IN TERMS OF THE NLA

3.3.1 VALID AND FAIR REASON FOR DISMISSAL

Section 33 of the NLA\textsuperscript{218} provides that:

“(1) An employer must not, whether notice is given or not, dismiss an employee –

(a) without a valid and fair reason; and

(b) without following –

(i) the procedure set out in section 34, if the dismissal arises from a reason set out in section 34 (1); or

(ii) subject to any code of good practice issued under section 137, a fair procedure, in any other case.

3. It is unfair to dismiss an employee because of such employee’s sex, race, colour, ethnic origin, religion, creed or social or economic status, political opinion or marital status.

4. In any proceedings concerning a dismissal –

(a) If the employee establishes the existence of the dismissal;

(b) It is presumed, unless the contrary is proved by the employer, that the dismissal is unfair.”

From the above, it is apparent that once an employee has proven the existence of a dismissal, the onus then shifts to the employer to prove that the dismissal was procedurally and substantively fair.\textsuperscript{219} Where the reason for dismissal is misconduct\textsuperscript{220},

\textsuperscript{218} Section 33 of NLA.
\textsuperscript{219} Tow in Specialist CC v Urinavi (LCA 55-2014) [2016] NALCMD 3 (20 January 2016), Benz Building Suppliers v Stephanus and Others 2014 (1) NR 283 (LC).
\textsuperscript{220} Section 35(2)(a) of NLA.
the seriousness of the offence is an important factor in determining the fairness of the dismissal. 221 Discipline must be applied consistently and must be in line with the disciplinary code of the employer. 222

To show that there was a valid and fair reason for dismissing an employee for misconduct, the employer needs to prove that the employee committed the misconduct as alleged, the rule the employee allegedly breached was reasonable, the employee had knowledge of the existence of the rule allegedly breached, and the employer acted consistently in ensuring that the rule is adhered to equally by all employees. 223

In Coca-Cola Namibia Bottling Company (Pty) Ltd v Thomas & Another 224 the employee was called to a disciplinary hearing on charges related to allowing the media to enter the premises of the employer and taking part in an interview with the media, insubordination and breach of the employee’s contractual confidentiality clause. The court held that the employer had failed to prove that the employee committed the misconduct as alleged and therefore there was no valid reason for dismissing the employee. Subsequently, the court ordered the employee's reinstatement.

Considering the issue of whether the employee had knowledge of the rule breached, in Gamatham v Norcross SA (Pty) Ltd t/a Tile Africa 225 the court held that the dismissal of the employee was fair because the employee had undergone training and was therefore aware of the procedure that had to be followed when selling goods or products to a customer. The employee had knowledge of the rule breached and therefore there was a valid reason for dismissing the employee.

In Windhoek Observer Publishers (Pty) Ltd v Mudrovc 226 the court upheld the dismissal of an employee who arrived late at work and stated that repeated absenteeism without any explanation and failure to show remorse rendered the dismissal of the employee fair.

In B2Gold Namibia (Pty) Ltd v PF Hoaseb 227 the employee was absent from work without authorisation for a period of eight days. The employer warned the employee through a
letter about a possible dismissal should the employee not report for work with immediate effect. The employee failed to heed the warning. The court held that failure by the employee to report for duty even after the employee had received a letter from the employer was a fair reason for dismissal.

3.3.2 FAIR PROCEDURE FOR DISMISSAL

The NLA does not define what constitutes a fair procedure. However, it was held in *Namibia Diamond Corporation (PTY) LTD v Henry Denzil Coetzee*\(^{228}\) that the requirements for fair procedure before dismissing an employee for misconduct include: the right to be informed of the nature of the misconduct contravened, the right to be given adequate notice prior to the disciplinary hearing, the right to be represented by a union shop steward, works council representative, or a fellow colleague, the right to call witnesses and to cross-examine witnesses who have testified against the employee, the right to be informed of the penalty imposed, and the right of appeal. The fair procedure includes the right to rebut evidence tendered against the employee.\(^{229}\) The court in *Hartlief Continental Meat Products (Pty) Ltd v Mutotua & others*\(^ {230}\) stated that “a fair procedure requires an employee ... to hear the evidence against him or her, to question witnesses and to tell his or her own side of the story”. The onus is on the employer to prove that a fair procedure was followed prior to the dismissal of the employee.\(^ {231}\)

3.3.3 REMEDIES FOR UNFAIR DISMISSAL

An employee who believes he was unfairly dismissed may lodge a dispute within 30 days of the date of dismissal with the Labour Commissioner’s office of Namibia.\(^ {232}\) The remedies for unfair dismissal in terms of NLA are reinstatement\(^ {233}\) or monetary compensation.\(^ {234}\) The arbitrator appointed in terms of section 85 of the NLA to resolve labour disputes may award only one of the two available remedies and not both.\(^ {235}\) In *Paulo v Shoprite Namibia (Pty) Ltd and others*\(^ {236}\) the court defined reinstatement as “… in the employment context means no more than putting a person again into his previous

\(^{228}\) (LCA 30/2015) [2016] NALCMD 45 (06 December 2016).
\(^{230}\) (2000) 21 ILJ 1421 (LCN) 1422.
\(^{232}\) *Musukubili F & Van der Walt A ‘Namibia labour dispute resolution system: Some lessons from South Africa’* 2014 Obiter 128.
\(^{233}\) Section 86(15)(d) of NLA.
\(^{234}\) Section 86(15)(e) of NLA.
\(^{235}\) *ABB Maintenance Services Namibia (Pty) Ltd v Moongela* (LCA 11/2016) [2017] NAHCMD 18 (07 June 2017).
job”. When compensation is awarded, such compensation must be at a level the employee earned, or could have earned, if he or she had not been dismissed.\textsuperscript{237}

3.4 DEEMED DISMISSAL IN TERMS OF THE PUBLIC SERVICE ACT 13 OF 1995 OF NAMIBIA (NPSA)

3.4.1 EMPLOYMENT IN THE PUBLIC SERVICE OF NAMIBIA

The NPSA provides for the regulation of employment, conditions of service, discipline, retirement and discharge of employees who are employed in the public service of Namibia.\textsuperscript{238} The public service of Namibia constitutes of ministries, departments and agencies that perform specific functions, such as formulation of policies and directives to serve the Namibian public.\textsuperscript{239} Similar to employees falling under the NLA, employees employed in the public service may be charged for committing acts of misconduct.\textsuperscript{240} Such acts of misconduct include contravention, or a failure to comply with, the NPSA, which include insubordination\textsuperscript{242}, negligence\textsuperscript{243}, disgraceful or improper conduct\textsuperscript{244}, being under the influence of alcohol or drugs\textsuperscript{245} and absenteeism without permission.\textsuperscript{246} Where an employee absents himself for a period exceeding 30 days, the employee is regarded as having been automatically dismissed, without the employer having to first convene a hearing.\textsuperscript{247}

The provisions of the NPSA on automatic termination of employment will be discussed next.

3.4.2 DISMISSAL BY OPERATION OF LAW IN TERMS OF THE NPSA: SECTION 24(5)

Section 24(5) of the NPSA provides that:

\textsuperscript{237}Pep Stores (Namibia) (Pty) Ltd v Iyambo and Others 2001 NR 211 (LC).
\textsuperscript{238}Preamble of NPSA.
\textsuperscript{239}Section 3 of NPSA.
\textsuperscript{240}Section 26 of NLA.
\textsuperscript{241}Section 25(1)(a) of NPSA.
\textsuperscript{242}Section 25(1)(c) of NPSA.
\textsuperscript{243}Section 25(1)(d) of NPSA.
\textsuperscript{244}Section 25(1)(h) of NPSA.
\textsuperscript{245}Section 25(1)(j) of NPSA.
\textsuperscript{246}Section 25(1)(o) of NPSA.
\textsuperscript{247}Section 24(4) of NPSA.
(i) absents himself or herself from his or her office or official duties for any period exceeding 30 days; or

(ii) absents himself or herself from his or her office or official duties and assumes duty in any other employment,

shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of employment.

(c) The Prime Minister may, on the recommendation of the Commission, and notwithstanding anything to the contrary contained in any law, reinstate any staff member so deemed to have been discharged in the public service in the post or employment previously held by him or her …'

Dismissal in terms of section 24(5)(a) of the NPSA comes into effect through the operation of law\textsuperscript{248} where an employee absented himself from the workplace without permission for more than 30 days.\textsuperscript{249} Such dismissal by operation of law in Namibia does not require the employer to first institute a disciplinary hearing before confirming dismissal, and the principle of the audi alterem partem rule is therefore not applicable.\textsuperscript{250} The jurisdictional requirements to invoke dismissal by operation law in terms section 24(5)(a) of the NPSA are that the employee was absent from the workplace for a period exceeding 30 days, and such absence was without the permission of the employer.\textsuperscript{251} The 30 days are exclusive of the first day and inclusive of the last day unless the last day is a Sunday or public holiday.\textsuperscript{252} It is only the permanent secretary of the office, ministry or agency where the employee is employed who can grant permission for vacation leave or extension of vacation leave, and not the supervisor of the employee.\textsuperscript{253} The employee who absents himself without permission places the employer in a difficult position where the employer does not know the reason, nor the anticipated period, for the absence.\textsuperscript{254}

\textsuperscript{248}Tjivikua v Minister of Works Transport and Communication (LCA6/03) [2005] NALC 1 (07 July 2005).
\textsuperscript{249}Njathi v Permanent Secretary, Ministry of Home Affairs NLLP 2002.
\textsuperscript{250}Tjivikua v Minister of Works Transport and Communication (LCA6/03) [2005] NALC 1 (07 July 2005).
\textsuperscript{251}Gouws v Office of the Prime Minister (2011) 32 ILJ 2319 (LCN).
\textsuperscript{252}Gouws v Office of the Prime Minister (2011) 32 ILJ 2319 (LCN), section 4 of Interpretation of Laws Proclamation 37 of 1920.
\textsuperscript{253}Tjivikua v Minister of Works Transport and Communication (LCA6/03) [2005] NALC 1 (07 July 2005).
\textsuperscript{254}Tjivikua v Minister of Works Transport and Communication (LCA6/03) [2005] NALC 1 (07 July 2005).
Where an employee is deemed to have been dismissed by operation of law in terms of the NPSA, the employee may apply to be reinstated. The matter will be considered by the Public Service Commission of Namibia and based on the favourable recommendations of the aforesaid commission, the Prime Minister of the country may reinstate the employee. Should an employee be reinstated; the period of absence will, however, be regarded as unpaid vacation leave.

3.5 CONCLUSION

In this chapter, it has been shown that the relevant labour legislation in Namibia provides rights to employees against unfair dismissal, which rights are similar to those available to employees in SA. The NLA was drafted in line with the ILO Termination of Employment Convention of 1982 to enhance the rights of employees. In line with the Convention, it is a requirement in Namibia that dismissal should be procedurally and substantively fair.

It was also shown that in the public service of Namibia the NPSA deals with dismissal issues of public service employees. The NPSA provides for the termination of employment without a hearing in instances where the employee was absent without the permission of the permanent secretary of the office, ministry or agency where the employee is employed for a period exceeding 30 days. The jurisdictional requirements that need to be met in Namibia before dismissal by operation of law may be invoked are: (i) the employee must be an employee employed in terms of the NPSA; (ii) the employee must have been absent without the permission from the permanent secretary of the office, ministry or agency where the employee is employed, and (iii) the period of the absence must be for a period exceeding 30 days. The courts in Namibia have held that it is only the secretary of the office, ministry or agency where the employee is employed who has the authority to grant permission for vacation leave or extension of vacation leave.

The employee whose employment is terminated in terms section 24(5)(a) of NPSA has the right to apply for reinstatement to the Prime Minister of Namibia. The Prime Minister, based on the favourable recommendations of the Public Service Commission of Namibia, may reinstate the employee. It is not an easy task to be reinstated in the public service after dismissal in terms of section 24(5)(a) of the NPSA.

256 Section 24(5)(b) of NPSA
CHAPTER FOUR

DEEMED DISMISSAL IN TERMS OF THE PUBLIC SERVICE ACT 103 OF 1994

4.1 INTRODUCTION

In this chapter the requirements that must be met before a dismissal by operation of law in terms of the Public Service Act 103 of 1994 ('the PSA') can be utilised will be discussed. Court judgements in which the requirements have been dealt with will be considered. The chapter will also address recourses available for employees dismissed by operation of law in terms of the PSA. This will include the application to review the decision to dismiss the employee in terms of the PSA, as well as the jurisdiction of the relevant bargaining council to hear disputes emanating from such dismissals by operation of law. The relevant bargaining councils in the public service are the national Public Service Co-ordinating Bargaining Council ('the PSCBC) and four sectoral bargaining councils, i.e, the General Public Service Sectoral Bargaining Council ('the GPSSBC'), the Public Health and Social Development Sectoral Bargaining Council ('the PHSDSBC'), the Safety and Security Sectoral Bargaining Council ('the SSSBC') and the Education Labour Relations Council ('the ELRC').

4.2 CASE LAW

South African courts and other dispute resolution forums have dealt with several cases relating to dismissal by operation of law in terms of the PSA. The primary purpose in many of these cases was to establish whether the jurisdictional requirements for invoking the deemed dismissal provisions of the PSA had been met.\(^\text{257}\) The courts have also been called upon to deal with the recourses available to employees who have been automatically dismissed in terms of the PSA.\(^\text{258}\) The courts have on occasion also dealt with the question of whether dismissal by operation of law is constitutional.\(^\text{259}\) Judicial precedent is an important factor that any court considers when dealing with a specific case before it.\(^\text{260}\) A court is bound by a decision of a higher court, unless the decision was disregarded by a higher court.\(^\text{261}\) An overview of selected case law is therefore of vital importance. The discussion below will be divided into separate themes or issues that courts have commonly been required to decide upon.

\(^{258}\) Section 158 (1)(h) of LRA.
\(^{259}\) Phenithi v Minister of Education & others (2006) 27 ILJ 477 (SCA).
4.2.1 DISMISSAL BY OPERATION OF LAW IN TERMS OF THE PSA IS NOT A DISMISSAL FOR PURPOSES OF THE LRA

In *Nkopo v Public Health & Welfare Bargaining Council & others* 262 the employee informed his employer that his life was in danger, which is why he did not come to work. After an extended period of absence from work, the employer invoked the provisions of the PSA and the employee was deemed dismissed in terms of the PSA. The employee subsequently lodged an unfair dismissal dispute in terms of the LRA263 with the relevant bargaining council. The commissioner found that the employee had been absent for more than one calendar month, no proof had been provided that his life had been in danger and he, therefore, had no justification for his absence. The commissioner found that the dismissal was procedurally and substantively fair. The Labour Court (LC) had to consider whether the dismissal that took place was a dismissal for the purposes of the LRA. The LC confirmed that a termination of employment in terms of the PSA was not a dismissal for purposes of the LRA. The LC as such concluded that the termination of employment in terms of the PSA was a dismissal by operation of law and that the bargaining council had lacked jurisdiction to deal with the matter. The court set aside the arbitration award.

In *Minister of Social Development v Mabuza and others*264 the LC again held that dismissal by operation of law in terms of the PSA is not a dismissal for the purposes of the LRA and consequently bargaining councils lack jurisdiction to arbitrate over such matters. However, if the jurisdictional requirements of the PSA to invoke dismissal by operation of law are not met, bargaining councils will then have jurisdiction to consider the fairness of the dismissal through a factual enquiry.265 The Constitutional Court (CC) in *Horn and others v LA Health Medical Scheme and another*266 has subsequently also confirmed that in cases of dismissal by operation of law in terms of the PSA there is no decision by the employer to dismiss an employee and therefore no dismissal for the purposes of the LRA.

Through the cases above and other similar cases, it has been established that dismissal by operation of law in terms of the PSA is not as a result of the decision of the employer to dismiss an employee and consequently not a dismissal for purposes of the LRA.

263 Section 191(1) of LRA.
266 2015 (7) BCLR 780 (CC).
4.2.2 JURISDICTIONAL REQUIREMENTS FOR INVOKING A DEEMED DISMISSAL IN TERMS OF THE PSA

In HOSPERSA & another v MEC for Health267 the LC had to consider a matter in which an employee’s employment had been automatically terminated in terms of the PSA. The employer seconded the employee to a trade union in terms of a collective agreement between the employer and the trade union. On termination of the collective agreement, the employee was instructed by the employer to report back for duty to work at the Department of Health. The employee, however, refused to do so.

The LC proceeded to discuss the five jurisdictional requirements which need to be met before an employer could invoke the dismissal by operation of law provisions of the PSA268. The LC listed these requirements as:

(1) “The person concerned must be an officer or employee of the employer as defined. The section does not apply to a member of the permanent force of the National Defence Force; the South African Police Service and the Department of Correctional Services, an educator, a member of the intelligence agency or the intelligence service.

(2) The employee must absent herself from her official duties.

(3) Such absence must be without permission.

(4) Such absence must be for more than one calendar month one.

(5) The circumstances must be such that the Disciplinary Code and Procedure, Resolution 2 of 1999 and annexure A (“the code”) thereto have no application”.269

The LC held that there were two approaches to deal with employees who absent themselves without permission. The first approach was to discipline employees in terms of the relevant disciplinary code and convene a disciplinary hearing. In order to do so, the employer, however, requires knowledge of the whereabouts of the employee so

267 [2003] 12 BLLR 1242 (LC).
269 The code the LC referred to above was the PSCBC’s Resolution 1 of 1999, which had since been amended by the PSCBC Resolution 1 of 2003
that a charge sheet may be served on the employee. The second approach was for the employer to automatically terminate the employment of the employee in terms of the PSA. For the employer to invoke termination of employment in terms of the PSA, the whereabouts of the employee must, however, be unknown to the employer. The court acknowledged that dismissal by operation of law in terms of the PSA deprived employees of the right to be heard before being dismissed. Consequently, in terms of the second approach, the employee must have deserted his employment and it should be clear that the employee does not intend to return to work. The situation should be such that the disciplinary code and its procedures could not be applied.

Under the present circumstances, the LC concluded that the employer knew the whereabouts of the employee and therefore could have initiated disciplinary proceedings in terms of its disciplinary code and as such the jurisdictional requirements for the purposes an automatic dismissal in terms of the PSA had not been met.

The approach adopted in the HOSPERSA case above with regard to first utilising relevant disciplinary codes rather than invoking dismissal by operation of law in terms of the PSA has been widely criticised and not been followed in many subsequent court decisions.  

In Solidarity obo Kotze v Public Health & Welfare Sectoral Bargaining Council and Others 271 the employee was placed on precautionary suspension pending an investigation into allegations of misconduct. While on suspension the services of the employee were terminated in terms of the PSA’s provisions on dismissal by operation of law. The employee lodged an unfair dismissal dispute with the relevant bargaining council, at which arbitration hearing the commissioner ruled that the bargaining council lacked jurisdiction to hear the matter.

The employee then approached the LC to review the ruling of the commissioner. The employee argued that dismissal by operation of law could only be invoked if the employer was unable to trace the employee. The employee relied on the judgement made in SABC v CCMA & Others.272 The court did not agree with this argument and held that the argument of the employee was the approach adopted in the private sector. The LC stated that the employer did not have to prove that attempts were made to establish the whereabouts of the employee before invoking the PSA’s dismissal by operation of

law provisions. The court in *Grootboom v National Prosecuting Authority & another*\(^{273}\) also rejected the approach adopted in *HOSPERSA*. Consequently, the application to review was dismissed.

In *Grootboom v National Prosecuting Authority and Another*\(^{274}\) allegations of misconduct were brought against the employee and the employee was placed on precautionary suspension. It was during the period of the precautionary suspension that the employee undertook a study trip to the United Kingdom for a period of 12 months. Prior to going to the United Kingdom, the employee attempted to obtain permission from his employer to study abroad, but no agreement could be reached with his supervisor. The employee subsequently left for the United Kingdom without the permission of the employer. During the period the employee was abroad the employer terminated the employment of the employee through dismissal by operation of law. The employee applied for reinstatement to the Minister of Justice and Constitutional Development in terms of the PSA. The employee attempted to show good cause as to why he should be reinstated, but the application was unsuccessful.

The employee thereafter approached the LC to have his dismissal set aside under the Promotion of Administrative Justice Act 3 of 2000 (‘the PAJA’). The LC rejected the argument and held that the employer did not take a decision that required it to be reviewed in terms of the PAJA. The LC concluded that that the employee went to the United Kingdom without permission of the employer and therefore the jurisdictional requirements to invoke dismissal by operation of law in terms of the PSA had been met.

The employee then appealed to the Labour Appeal Court (LAC). The LAC concurred with the LC and dismissed the application. The LAC also concluded that the employee went to the United Kingdom without the permission of the employer and that the employer had not taken any decision or action under PAJA that required to be reviewed.

As a last resort, the employee referred the matter to the (CC). The CC mentioned three jurisdictional requirements that had to be met before an employer could invoke dismissal by operation of law in terms of the PSA. These were that the employee had to be employed in terms of PSA, the employee must have absented himself from official duties without permission from his head of department or another delegated official, and the period of absence must have exceeded one calendar month.

\(^{273}\) (2013) 34 ILJ 280 (LAC)
\(^{274}\) [2014] 1 BLLR 1 (CC).
However, in contrast to the views expressed by both the LC and LAC the CC held that the employee’s absence from work had been with permission. Because he was on suspension, the employee did not come to work because the employer had told him not to. The employer had therefore permitted the employee to remain absent for the period of suspension. The employer did not recall the employee and the employee was not instructed to come to work at any stage, despite the fact that the parties remained in email contact during the period the employee was in the United Kingdom. Based on the above the CC upheld the appeal.

Similar to the facts *Grootboom*, in *Solidarity v PHWSBC*275 there were allegations of misconduct against the employee and as a result he was placed on precautionary suspension pending the finalisation of the investigation. The employee sourced alternative employment during the period of the precautionary suspension without first obtaining permission from his employer, the Department of Health. The Department of Health subsequently terminated the employment of the employee through dismissal by operation of law in terms of the PSA. The Department of Health informed the employee that the reason for the dismissal by operation of law was because he had accepted alternative employment during the period of the precautionary suspension whilst he was still employed by the Department of Health.

The employee applied for reinstatement in terms of the PSA, which application was unsuccessful. The employee then lodged an unfair dismissal dispute with the relevant bargaining council. At arbitration the commissioner ruled that the bargaining council lacked jurisdiction to entertain the matter as there had been no dismissal in terms of the LRA.

Consequently, the employee approached the LC to have the arbitration award reviewed and set aside. The LC dismissed the application on grounds that the employee did not obtain permission from the Department of Health to apply for alternative employment and that working for another employer during precautionary suspension constituted absenteeism without permission. The employee then appealed to the LAC without success. The LAC held that the jurisdictional requirements for dismissal by operation of law were that the employee had to be absent from work and that the absenteeism must have been without permission of the employer. The LAC held that the jurisdictional requirements to institute dismissal by operation of law had been met and the bargaining council had indeed lacked jurisdiction to preside over the matter.

The employee then appealed to the Supreme Court of Appeals (SCA). In rejecting the findings of both the LC and LAC, the SCA held that the employee had not been absent from work without permission when he assumed alternative employment whilst he was on precautionary suspension. The employee was absent with the permission of the employer since it was the employer who had placed him on suspension and therefore permitted him to be absent from work. The jurisdictional requirements to effect dismissal by operation of law had not been met. The SCA remitted the matter back to the bargaining council for arbitration.

In Gangaram v Member of Executive Council for the Department of Health and another276 the employee sustained an injury at work which made it difficult for her to perform some of her field work duties. The employer referred the employee to a doctor who confirmed the employee’s medical condition and recommended that she be confined to office duties. The employer initially followed the recommendation of the doctor. The medical condition of the employee did not improve, and she provided the employer with medical reports on a continuous basis.

The employer eventually instructed the employee to return to field work duties despite the employee’s insistence that she was unable to do so. It became a regular occurrence that the employee would consult her doctors and submit medical reports booking her off sick. The employer offered the employee permanent office duties on condition that her salary be dropped from level 10 to level 4. Alternatively, the employer advised the employee to apply for medical boarding due to ill-health. The employee did not agree to either of the two suggestions. Ultimately, the employer invoked dismissal by operation of law and claimed that the employee was absent from work without permission for a period exceeding one calendar month.

The employee lodged an unfair dismissal dispute with the relevant bargaining council and the council ruled that it lacked jurisdiction.

After having no success before the LC as well, the employee approached the LAC. The LAC confirmed that before an employer could invoke dismissal by operation of law in terms of the PSA the jurisdictional requirement had to be met. The jurisdictional requirements were confirmed as that the employee must have been absent without permission for a period exceeding one calendar month. The LAC held that the jurisdictional requirements were not met because the employer was aware of the

medical condition and the whereabouts of the employee. The LAC reinstated the employee retrospectively.

The case law above illustrates that the decision made in HOSPERSA with regard to the jurisdictional requirements had been overtaken by recent judgements. The jurisdictional requirements are now accepted as: an employee must be absent from work for a period exceeding one calendar month, the absence must be without the permission of the employer, and the employer is not required to establish the whereabouts of the employee before invoking dismissal by operation of law.

### 4.2.3 EMPLOYEE REPORTING FOR DUTY AT A DIFFERENT PLACE

In *Department of Health v PHSDBSC*\(^{277}\) the employee was employed at the Mbokweni Health Centre and was assigned to work at the King Sandile Dalidyebo Local Service Area. In 2007 the employer instructed the employee to return to the Mbokweni Health Centre but the employee refused to do so. As a result, the employee was disciplined for insubordination. After having been disciplined the employee still refused to report at the Mbokweni Health Centre and instead continued to report for duty at the King Sandile Dalidyebo Local Service Area. The employer then terminated the employment of the employee through invoking dismissal by operation of law in terms of the PSA.

The employee lodged an unfair dismissal dispute with the relevant bargaining council. At the arbitration proceedings, the commissioner found that the jurisdictional requirements for dismissal by operation of law had not been met and held that the dismissal of the employee was unfair for the purposes of the LRA. The commissioner argued that reporting at an alternative venue could not be equated to being absent from work. The employer applied to have the commissioner’s award reviewed by the LC, which application was the LC dismissed by the court.

In *Makade v Public Health and Social Development Sectoral Bargaining Council and Others*\(^{278}\) the employee was placed on precautionary suspension pending a disciplinary hearing. After the suspension was lifted the employee was instructed to report for duty at a different work station. The employee refused to do so and reported for duty at the workstation he worked at before the precautionary suspension. The employer warned the employee that his failure to report for duty as instructed would lead to dismissal by

\(^{277}\) (2014) 35 ILJ 2166 (LC).

\(^{278}\) (PA2/2012) [2014] ZALAC 43.
operation of law. The employer advised the employee to rather lodge a grievance in terms of applicable rules and regulations about his dissatisfaction regarding the placement and to report for duty at the instructed workstation. The employee continued to disobey the instruction and reported for duty at his old workplace. The employer terminated the employment of the employee through dismissal by operation of law.

The employee lodged a dispute with the bargaining council at which arbitration process the commissioner found that since the termination of employment had occurred by operation of law the bargaining council lacked jurisdiction to hear the matter. On review the LC agreed with the commissioner’s findings.

The employee approached the LAC. The LAC held that the jurisdictional requirements for dismissal by operation of law had been met, and as such, the appeal was dismissed.

The two cases above dealt with similar situations, but came to different conclusions. The question that remains is whether employees who report for duty at another workplace may be dismissed by operation of law in terms of the PSA. The decision in Makade confirmed that the earlier discussed HOSPERSA judgement had been rejected in that the LAC in Makade dismissed the application of the employee even though the employer knew the whereabouts of the employee but still dismissed the employee in terms of section 17(3) of the PSA. The deduction from the above case law is that employees who report at another workplace will be dismissed in terms of section 17(3) of the PSA.

4.2.4 FAILURE BY EMPLOYER TO INVOKE DISMISSAL BY OPERATION OF LAW IN TERMS OF THE PSA

In Ramonetha v Department of Roads and Transport, Limpopo279 the employee was absent without authorisation for a period exceeding one calendar month. On his return to work, the employee provided the employer with a letter from a traditional healer explaining his absence. The employer decided to conduct an investigation into allegations of absenteeism against the employee. Pending the investigation, the employee was allowed to continue rendering his services to the employer. After a period of seven months the employer served the employee with a charge sheet in which the employee was charged with being absent from work without authorisation for a period of 84 days. The chairperson of the disciplinary hearing found that since the employee

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279 [2018] 1 BLLR 16 (LAC).
had been absent for a period exceeding one calendar month he should have been dismissed by operation of law in terms of the PSA, and that a disciplinary hearing should not be held.

The employer followed the chairperson’s findings and invoked the automatic dismissal provisions of the PSA. The result was that the employee was dismissed by operation of law some 11 months after his return to work and without the opportunity to defend himself at a disciplinary hearing. The employee lodged an unfair dismissal dispute with the GPSSBC. The GPSSBC ruled that it lacked jurisdiction to deal with the matter since the dismissal of the employee had been by operation of law and not in terms of the LRA.

The employee applied to the LC to have the award reviewed and argued that the employer had waived the right to invoke section 17(3) of the PSA. The LC, however, dismissed the application.

The employee then appealed to the LAC. The LAC concluded that “in accepting the appellant’s tender of performance and remunerating him for his services, the only conclusion to be drawn on the facts is that, on his return to work, the Department implicitly reinstated the appellant into his employment with it”. The LAC was of the opinion that the employer had waived the right to invoke section 17(3) of the PSA when the employee was allowed to render his services.

The above case illustrates the procedure that employers need to follow when dealing with employees who return to work after having been absent without permission for a period exceeding one calendar month. Employers would be well advised to act swiftly and to not allow such employees to resume duties before invoking dismissal by operation of law in terms of the PSA. Failing the aforesaid, the employer’s actions could be interpreted as having waived the right to invoke section 17(3) of the PSA.

4.2.5 CONSTITUTIONALITY OF DISMISSAL BY OPERATION OF LAW

The Constitution of South Africa, 1996 (‘the Constitution’) is the supreme law of the country and provides mechanisms for the people of South Africa to challenge any legislation that is contrary to constitutional principles. The SCA and High Court (HC) may hear constitutional matters, except in circumstances where only the CC may hear

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such matters.\textsuperscript{282} The LC has the same status as that of the (HC).\textsuperscript{283} A constitutional matter “includes any issue involving the interpretation, protection or enforcement of the Constitution”.\textsuperscript{284} The CC may not be approached directly by any party where legislation is argued to be contrary to the principles of the Constitution.\textsuperscript{285}

In \textit{Phenithi v Minister of Education \& others}\textsuperscript{286} the employee’s employment was terminated in terms of dismissal by operation of law, albeit in terms of section 14(2) of the Employment of Educators Act 76 of 1998 (‘the EOEA’). The working of section 14(2) of the EOEA is similar to that of section 17(3) of the PSA’s dismissal by operation of law provisions.

The employee lodged an unfair dismissal dispute with the Education Labour Relations Council (‘the ELRC’). The ELRC declared that it lacked jurisdiction to deal with the matter. The employee then unsuccessfully attempted to approach the CC directly with a claim that dismissal by operation of law was unconstitutional. The employee thereafter approached the HC for an order to set aside her dismissal by operation of law in terms of the EOEA and to declare that the provisions of section 14(2) of the EOEA were unconstitutional since it deprived her with an opportunity to state her case before she was dismissed. The HC dismissed the application with costs. The HC held that a dismissal by operation of law was not a dismissal for the purposes of the LRA and that the ELRC commissioner correctly ruled that the council lacked jurisdiction to deal with the matter. It was also held that dismissal by operation of law is not unconstitutional simply because of the fact that it does not require a hearing prior to dismissal.

Being dissatisfied with the HC’s ruling the employee proceeded to lodge an appeal with the SCA. Before the SCA the employee again argued that a dismissal by operation of law in terms of the provisions of section 14(2) of the EOEA was unconstitutional and invalid. The SCA concluded that such dismissal in terms of the EOEA was constitutional.

In \textit{Grootboom v National Prosecuting Authority and Another}\textsuperscript{287} the court dealt with dismissal by operation of law in terms of the PSA. Mr Grootboom was employed by the National Prosecuting Authority (‘the NPA’) as a prosecutor. He was dismissed for misconduct after a disciplinary hearing. He lodged an unfair dismissal dispute with the

\textsuperscript{282} Sections 168 \& 169 of Constitution.
\textsuperscript{283} Grogan \textit{Workplace Law} 11 ed (2014) 55.
\textsuperscript{284} Section 167(7) of Constitution.
\textsuperscript{285} \textit{SA National Defence Union v Minister of Defence and others} [2007] 9 BLLR 785 (CC).
\textsuperscript{286} [2006] 27 ILJ 477 (SCA).
\textsuperscript{287} [2014] 1 BLLR 1 (CC).
GPSSBC. The parties settled the dispute and agreed to dispense with the outcome of the disciplinary hearing. Both parties agreed to take the pre-dismissal arbitration route and Mr Grootboom remained on precautionary suspension.

However, before the pre-dismissal arbitration process could be concluded Mr Grootboom went to the United Kingdom on a scholarship with the permission of the NPA. Whilst Mr Grootboom was in the United Kingdom, the NPA informed him that he had been dismissed by operation of law. After about nine months Mr Grootboom returned to South Africa and made representations to Minister of Justice and Constitutional Development to show good cause why he should be reinstated. The NPA informed him later that while his representations were considered, his dismissal by operation of law was upheld.

Mr Grootboom then approached the LC to have his dismissal by operation of law set aside under the PAJA. The LC held that there was no administration act for the purposes the of PAJA committed and the jurisdictional requirements to invoke dismissal by operation of law in terms of the PSA had been satisfied. Mr Grootboom unsuccessfully appealed to the LAC. He attempted to apply for leave to appeal to the SCA, but that application also failed. He then applied for leave to appeal to the CC. The CC granted such leave to appeal, reasoning that the matter revolved around the correct interpretation and application of the previous section 17(5) of the PSA (now section 17(3)). The CC held that the interpretation and application of section 17(5) of the PSA might have an impact on section 23 of the Constitution and therefore a constitutional issue was at stake. The court addressed the right to fair labour practice as prescribed in the Constitution in relation to the dismissal by operation of law. The CC took into account that employees dismissed by operation of law did not have the right to insist on or claim any form of internal hearing before a dismissal is instituted. The CC, however, found no issue with the constitutionality of dismissal by operation of law in terms of the PSA.

From the above, it has been established that even though dismissal by operation of law deprives employees of the right to a disciplinary hearing prior to a dismissal, the automatic dismissal provisions of the PSA are not unconstitutional.

**4.2.6 COURTS’ JURISDICTION TO REVIEW DECISIONS OF THE EXECUTING AUTHORITY**

An employee whose employment is terminated by operation of law in terms of the PSA is permitted to make an application for reinstatement to the Executing Authority and must show good cause why he or she should be reinstated. Executing Authority in this context is “in relation to-

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288 Section 23 of Constitution of South Africa.
(a) the Presidency or a national government component within the President's portfolio, means the President;

(b) a national department or national government component within a Cabinet portfolio, means the Minister responsible for such portfolio;

(c) the Office of the Commission, means the Chairperson of the Commission;

(d) the Office of a Premier or a provincial government component within a Premier's portfolio, means the Premier of that province; and

(e) a provincial department or a provincial government component within an Executive Council portfolio, means the member of the Executive Council responsible for such portfolio.²⁹⁰

South African labour courts may review, set aside or substitute the decision of the Executing Authority.²⁹¹

In Mahlangu v Minister of Sports and Recreation²⁹² the employee was absent without authorisation for a period exceeding one calendar month. The employer terminated the employment of the employee in terms of section 17(3) of the PSA. The employee subsequently made an application to the Executing Authority to be reinstated. The application was however unsuccessful.

The employee thereafter applied to the LC to review the decision of the employer not to reinstate him. The LC held that the decision to not reinstate an employee whose employment had been terminated in terms section 17(3) of the PSA could be reviewed by the LC in terms of section 158(1) (h) of the LRA. The court also held that the PSA required the Executing Authority on behalf of the employer to apply its mind before making a decision on reinstatement, failing which the decision of the employer could be reviewed.

In Public Servants Association on behalf of Smit v Mphaphuli NO & others²⁹³ the employee was employed by the Department of Health. The employee was absent for a period exceeding one calendar month and the Department of Health terminated the employment of the employee in terms of section 17(3) of the PSA. The Public Servants

²⁹⁰ Section 1 of PSA.
²⁹¹ NEHAWU obo Ndweni v Member of Executive Council, Social Development and Another (JR1488/15) [2017] ZALCJHB 90 (14 March 2017).
²⁹² [2010] 5 BLLR 551 (LC).
²⁹³ (2014) 35 ILJ 2260 (LC).
Association on behalf of the employee made an application for reinstatement to the Executing Authority. The application was declined, and the Executing Authority failed to provide reasons for the decision.

The employee subsequently lodged an unfair dismissal dispute with the Public Health and Social Development Sectoral Bargaining Council (‘the PHSDSBC’). The PHSDSBC found that since the employee had been dismissed by operation of law, it lacked jurisdiction over the matter.

The employee thereafter applied to the LC to have the decision of the PHSDSBC, and consequently the refusal by the Executing Authority not to reinstate her, set aside. The LC held that the PHSDSBC’s conclusion that the employee had been dismissed by operation of law in terms of section 17(3) was reasonable. The court, however, found that the Executing Authority’s failure to provide reasons for not reinstating the employee could not be reasonable. The court remitted the matter to the Executing Authority to decide the matter afresh.

In DENOSA obo Mangena v MEC for Department of Health, Western Cape and Weder v MEC Department of Health, Western Cape the employees were employed by the same employer. Both employees were booked off sick by their medical practitioners for a period exceeding one calendar month. The employer terminated the employees’ employment through invoking the PSA’s dismissal by operation of law provisions. The employees made an application for reinstatement to the Executing Authority, which applications were unsuccessful. Both employees then applied to the LC to review the decision of the Executing Authority not to reinstate them. The LC in both instances set aside the decision of the Executing Authority not to reinstate the employees on the basis that the Executing Authority had failed to provide reasons for its decisions. The LC ordered that the two employees be reinstated.

The employer then appealed to the LAC and both matters were heard simultaneously because of their similarity. The LAC found that even though the employees were at fault for not informing their managers that they were booked off sick, their absence was not wilful or deliberate. The LAC held that the LC had jurisdiction to review the decision of the Executing Authority. The LAC further held that the Executing Authority was obliged to provide adequate reasons for not reinstating the employees. The LAC concluded that

294 [2013] 5 BLLR 479 (LC).
295 [2013] 1 BLLR 94 (LC)
it would be difficult to establish if the decision of the employer had been rational without reasons having been provided. The appeal was dismissed.

In *NEHAWU obo Ndweni v Member of the Executive Council, Department of Social Development and Another (JR1488/15)* 297 the employee was dismissed through dismissal by operation of law in terms of the PSA. The employee made representations to be reinstated, which application was unsuccessful. The Executing Authority failed to provide reasons for its decision to not reinstate the employee.

The employee subsequently lodged an unfair dismissal dispute with the PHSDSBC. The PHSDSBC commissioner issued a ruling that the bargaining council lacked jurisdiction to determine the matter. The employee applied to have the commissioner’s ruling reviewed by the LC. The grounds for review included the failure by the Executing Authority to provide reasons for the decision to not reinstate the employee. The LC found that the employee absented himself for a period exceeding one calendar month without permission from his head of department or relevant authority. There was, therefore, good reason to invoke dismissal by operation of law in terms of the PSA. The fatal blow for the employer was however that the Executing Authority did not indicate any reasons for its decision to not reinstate the employee. The Executive Authority merely indicated that it had noted the representations and had applied its mind to the application, but failed to provide further reasons for declining the application. The LC confirmed that the employee was entitled to be provided with reasons why the application for reinstatement. The LC found in favour of the employee.

The case law above serves to illustrate that employees dismissed in terms of section 17(3) of the PSA have the right to make an application to the Executing Authority to be reinstated. The Executing Authority is required to consider and make a decision on reinstatement and to provide reasons for its decision.

4.3 CONCLUSION

The case law discussion embarked on in this chapter indicates how South Africa courts have dealt with disputes emanating from dismissal by operation of law in terms of the PSA. The courts’ interpretation and implementation of the dismissal by dismissal by operation of law provisions of the PSA is important for clarity and fairness.

Dismissal by operation of law in terms of the PSA is not a dismissal in terms of the LRA and therefore employees do not have a right to a disciplinary hearing prior to being dismissed. Because no dismissal for the purposes of the LRA occurred, bargaining councils do not have jurisdiction to consider disputes over dismissal by operation of law in terms of the PSA. Bargaining councils will, however, have jurisdiction to consider such disputes where the jurisdictional requirements for such automatic dismissals were not met.

Even though employees are not afforded the opportunity to be heard before an employer invokes dismissal by operation of law, the CC has confirmed that these automatic termination provisions do not infringe constitutional principles.

Regarding jurisdictional requirements that should be met before invoking dismissal by operation of law, despite the initial finding made to the contrary in HOSPERSA & another v MEC for Health, it is now trite that employers do not have to prove that attempts were made to establish the whereabouts of the employee before invoking dismissal by operation of law. Three procedural requirements for invoking the dismissal by operation of law provisions of the PSA have been identified, i.e., the employee must have absented himself from official duties, the absence must be without permission from employee’s Head of Department or another delegated official, and the period of absence must exceed one calendar month.

Where the employee applies for reinstatement to the Executing Authority, the latter is required to provide reasons for not reinstating the employee, where so decided. The Executing Authority is required to apply its mind when dealing with such applications for reinstatement. In NEHAWU obo Ndweni v Member of the Executive Council, Department of Social Development and Another (JR1488/15) it was held that where the employer, through the Executing Authority, failed to provide the employee with reasons for not reinstating him, the court could order the reinstatement of the employee.

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298 [2003] 12 BLLR 1242 (LC).
CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The central focus of this research, as set out in chapter one, was to discuss the requirements (both procedural and substantive) that must be met for a dismissal by operation of law in terms of the Public Service Act 103 of 1994 (‘the PSA’) to be fair. The objective was to gain understanding and provide certainty on what is expected from employers who decide to utilise the automatic termination provisions of the PSA.

The research also discussed similar dismissals in Namibia with the aim to see if there is anything South Africa can learn from the approach adopted in Namibia.

The International Labour Organisation (‘the ILO’) states that before employees are dismissed, they should be provided with the opportunity to state their case and be heard.300 The audi alteram partem rule is a cornerstone of fair dismissals for purposes of the Labour Relations Act 66 of 1995 (‘the LRA’). However, in terms of the PSA employees who are absent for a period exceeding one calendar month may be dismissed without the opportunity to appear before a disciplinary hearing or state their case otherwise.

The case law studies in South Africa confirmed that dismissal by operation of law is not a dismissal in terms of the LRA and therefore there is no need to hold a hearing prior to a dismissal. It also identified the jurisdictional requirements that must be met prior to evoking dismissal by operation of law in terms of the PSA.

Namibia’s Public Service Act 13 of 1995 (‘the NPSA’) requires the employer to hold a disciplinary hearing before dismissing an employee for absenteeism for periods not exceeding 30 days. However, the NPSA prescribes that employees who are absent for a period exceeding 30 days will be dismissed by operation of law and consequently without the opportunity to state a case. The case law studies in Namibia also identified jurisdictional requirements that must be met prior to evoking dismissal by operation of law in terms of the NPSA.

5.2 DISMISSAL BY OPERATION OF LAW IN SOUTH AFRICA AND NAMIBIA

The research found that the PSA does not list the acts of misconduct. The PSA is, however, complemented by the Disciplinary Code and Procedures in the Public Service that lists acts of misconduct. The NPSA lists offences that require disciplinary action and includes absenteeism for a period not exceeding 30 days and absenteeism for a period exceeding 30 days. The NPSA also prescribe the approach to deal with acts of misconduct.

It has been argued in chapter one that there are no clear specific guidelines in legislation available to managers to assist them with dismissal by operation of law in terms of the PSA. This leads to a lack of understanding and uncertainty in the public service sphere over the exact jurisdictional requirements that have to be met to render a dismissal by operation of law in terms of the PSA fair. It has also been shown that one consequence of this uncertainty has been the reinstatement by the courts of some employees whose employment was terminated by dismissal by operation of law in terms of the PSA.

The research proceeded to discuss the legislative protection available to employees against unfair dismissals in both South Africa and Namibia, as well as legislative provisions providing for automatic termination of employment by operation of law in both countries. Both countries are members of the ILO and accordingly adhere to various ILO Conventions and Recommendations, including the Termination of Employment Convention 158 of 1982.

In South Africa, the LRA provides for protection against unfair dismissal in both the private and public sector and requires dismissal to be both substantively and procedurally fair to be classified as overall. Similarly, Namibia has the NLA which provides that dismissal can only be for a fair and valid reason and in accordance with a fair process. Both South Africa and Namibia provide employees, as a general rule, with the right to a hearing prior to a dismissal.

In South Africa, the LRA provides that only under exceptional circumstances may an employee be dismissed without first being afforded a hearing. The LRA does not, however, provide a list, or define exceptional circumstances. Case law such as the matter

301 Annexure A of the PSCBC Resolution 1 Of 2003.
of *Lefu v Western Areas Gold Mining Co*,\(^{302}\) suggest that *exceptional circumstances* include the foregoing of a disciplinary hearing in order to protect the lives and property.

Both South Africa and Namibia have legislation that is only applicable to the public service, that is, the PSA in South Africa and the NPSA in Namibia. Amongst others, the PSA and NPSA both regulate dismissal by operation of law in the public service of the respective jurisdictions.

In terms of the PSA, an employee who is absent from work without the permission of the Head of Department or another delegated official for a period exceeding one calendar month is deemed to be dismissed by operation of law. The case law discussion in chapter four established that such dismissal by operation of law in terms of the PSA is valid and does not infringe constitutional principles. Various cases were also discussed which highlighted the jurisdictional requirements set by the courts before an employer can invoke dismissal by operation of law in terms of the PSA.

The case law discussion indicated that a lot has happened since the judgement in *HOSPERSA & another v MEC for Health*.\(^{303}\) In the aforesaid matter the court identified five jurisdictional requirements that must be met before an employer could invoke dismissal by operation of law. The jurisdictional requirements identified were: the person concerned must an employee; the individual must have absented him-/herself from official duties; such absence must have been without permission; the period of absence must have exceeded one calendar month; and the circumstances of the matter must have been such that applicable disciplinary code and procedures could not be applied. Most notably, however, the court also that stated the whereabouts of the employee must have been unknown to the employer, as such rendering it difficult for the employer to contact the employee for the purposes instituting disciplinary steps.

The case law discussion, however, showed that South African courts have departed from the approach adopted in the *HOSPERSA* matter, particularly in as far as the requirement that the employer must have lacked knowledge of the employee’s whereabouts. In *Solidarity obo Kotze v Public Health & Welfare Sectoral Bargaining Council and Others*\(^{304}\) the employee argued that dismissal by operation of law could only be invoked where the employer was unable to trace the employee. The court rejected this argument and

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\(^{302}\) *Lefu v Western Areas Gold Mining Co* (1985) 6 ILJ 307 (IC).

\(^{303}\) [2003] 12 BLLR 1242 (LC).

\(^{304}\) (2010) 31 ILJ 3022 (LC).
held that the employer did not have to prove that attempts were made to establish the whereabouts of the employee before invoking the PSA’s dismissal by operation of law provisions. In *Grootboom v National Prosecuting Authority and Another*\(^{305}\) the court re-identified the jurisdictional requirements for the automatic termination provisions of the PSA to become applicable. These were that the employee must have absented himself/herself from official duties; the absence must have been without the permission from the employee’s Head of Department or another duly delegated official, and the period of absence must have exceeded one calendar month. The same approach was followed in several subsequent judgements, including *Solidarity v PHWSBC*\(^{306}\) and *Gangaram v Member of Executive Council for the Department of Health and another.*\(^{307}\)

This research showed that employers could not lawfully invoke the PSA’s automatic termination provisions where the employee’s absence was because of suspension,\(^{308}\) alternative employment taken by the employee during a period of suspension,\(^{309}\) sickness,\(^{310}\) or where employer was aware of the medical condition of the employee\(^{311}\) and the employee reported for duty at another place other than where he or she was required to report at.\(^{312}\) The research also indicated that where an employer allowed an employee who was absent from work for more than one calendar month to simply resume on return to work, the employer could not later terminate the employee’s employment through dismissal by operation of law in terms of the PSA. Essentially the employer waived the right to invoke section 17(3) of the PSA.

An employee whose employment has been terminated by operation of law has the right to make an application for reinstatement to the designated authority and must show good cause why he or she should be reinstated.\(^{313}\) The research indicated that the designated authority, by the mouth of the employer, is required to provide reasons for not reinstating employees who made an application to be reinstated. Where no such reasons were provided, the courts may reinstate the employee concerned. In *DENOSA obo Mangena v MEC for Department of Health, Western Cape*\(^{314}\) and *Weder v MEC*

\(^{305}\) *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC).

\(^{306}\) *Solidarity v PHWSBC* [2014] 8 BLLR 727 (SCA).

\(^{307}\) *Gangaram v Member of Executive Council for the Department of Health and another* [2017] JOL 38087 (LAC).

\(^{308}\) *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC).

\(^{309}\) *Solidarity v PHWSBC* [2014] 8 BLLR 727 (SCA).


\(^{311}\) *Gangaram v Member of Executive Council for the Department of Health and another* [2017] JOL 38087 (LAC).

\(^{312}\) *Department of Health v PHSDSBC* (2014) 35 ILJ 2166 (LC).


\(^{314}\) [2013] 5 BLLR 479 (LC).
The courts reinstated the employees because no reasons were provided by the employers for not reinstating the employees. The research has indicated that the recourse for employees whose employment is terminated in terms of dismissal by operation of law in Namibia is more complex than in South Africa. In Namibia the NPSA requires an application for reinstatement to be made to the Prime Minister of the country who must consider a favourable recommendation from the Public Service Commission of Namibia.

5.3 CONCLUSION AND RECOMMENDATIONS

Three jurisdictional requirements must be met before dismissal by operation of law under the PSA can be invoked in South Africa. These are that the employee must have absented him-/herself from official duties; the absence must have been without the permission from the employee’s Head of Department or another duly delegated official, and the period of absence must have exceeded one calendar month. The law has evolved since the judgement in HOSPERSA & another v MEC for Health\textsuperscript{316} case, with the result that employers no longer need to show that attempts were made to establish the whereabouts of the employee before the automatic termination provisions of the PSA may be invoked. Therefore managers in the public service may invoke dismissal by operation of law immediately after the aforesaid three jurisdictional requirements are met.

The PSA’s automatic termination provisions may however not be utilised where the employee’s manager is aware that the reason for the absence of the employee is due to ill-health. Under such circumstances, managers should assist employees to submit the necessary medical certificates and assist to gain access to available employee health and wellness programmes.

The services of employees who are placed on precautionary suspension by the employer can also not be terminated in terms dismissal by operation of law unless these employees failed to heed instructions to avail themselves at the workplace when the suspension is lifted.

\textsuperscript{315} [2013] 1 BLLR 94 (LC)
\textsuperscript{316} [2003] 12 BLLR 1242 (LC).
The services of an employee who reports for duty at a workplace other than where he or she is instructed to report should not be terminated in terms of dismissal by operation of law. The employer should rather discipline the employee for insubordination. The dismissal after a pre-dismissal hearing of an employee who is charged for gross insubordination will be fair though such dismissal must be done in accordance with the fairness requirements of the LRA.317

With all the aforesaid in mind, government departments will be advised to develop transversal policies in line with the developments with regard to dismissal by operation of law as highlighted in recent court decisions. Such policies should be reviewed regularly to remain up to date with developments in this area of law.

There should be on-going workshops and round table discussions for managers, labour relations practitioners, organised labour and employees about the developments in labour law pertaining to dismissal by operation of law so that certainty is achieved for all concerned parties.

All in all, the research has identified jurisdictional requirements for automatic termination provisions of the PSA.

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