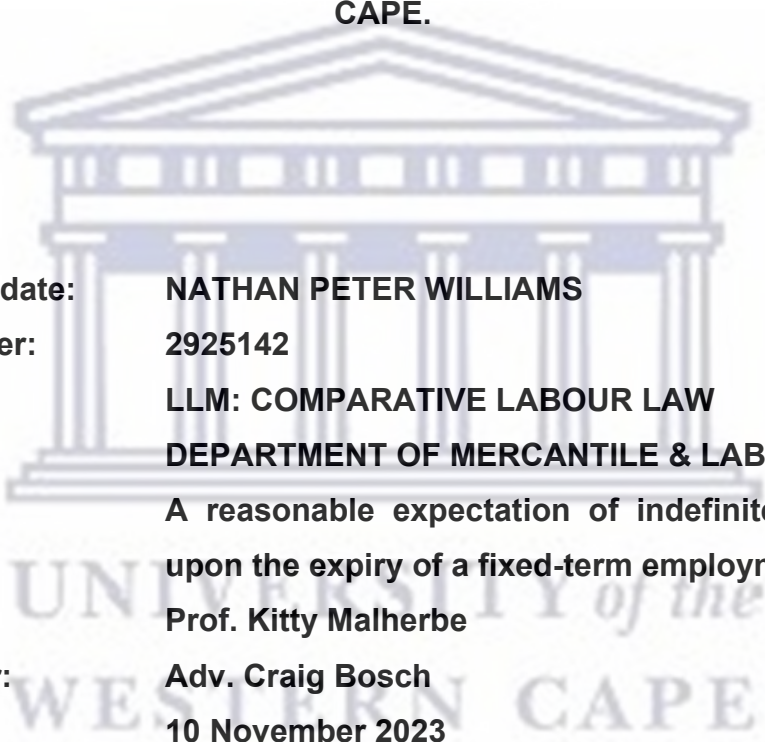


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upon the expiry of a fixed-term employment contract**  
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## PLAGIARISM DECLARATION

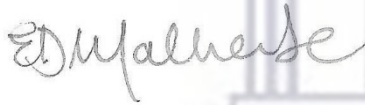
I declare that 'A reasonable expectation of indefinite employment upon the expiry of a fixed-term employment contract', is my work, that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Nathan Peter Williams



10 November 2023

Signed by Supervisor, Prof Kitty Malherbe



Signed by Co-Supervisor, Adv. Craig Bosch



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## DEDICATION AND ACKNOWLEDGEMENTS

I acknowledge and thank God, the All-Mighty Father, Jesus Christ, for His divine power and grace in my life. This research paper is dedicated to my family and in particular, I would like to acknowledge my wife, Liesl Williams, my mother Bonita Williams, my father Prof. Brian Williams, my two children as well as my two sisters. My entire family are pillars of strength, guidance, motivation and inspiration. I would also like to acknowledge the leadership of the UWC Law Faculty, for believing in me and granting the opportunity to fulfil my lifelong dream of obtaining an LLM. I would like to express my most sincere thanks and gratitude to my supervisor, Prof. Kitty Malherbe and co-supervisor, Adv. Craig Bosch for their invaluable support, contributions and wisdom.



## ABSTRACT

Section 186(1)(b)(ii) of the Labour Relations Act 66 of 1995 (LRA), as amended, came into effect on 1 January 2015. This section provides the special right, of an employee, to claim dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract of employment.

The LRA, as amended, does not define a reasonable expectation for indefinite employment, nor does it provide factors to consider for an assessment or determination of what constitutes a dismissal based on a reasonable expectation for indefinite employment.

This research paper provides an overview of the historical evolution of fixed term contracts in South Africa. It provides an understanding of the concept of a reasonable expectation and recommends a list of ten factors to be utilised in the assessment and determination of a dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract. In conclusion, it is recommended that the ten factors be codified in a Code of Good Practice in terms of the LRA.



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## KEYWORDS

Labour law

Contracts of employment

Renewal/s of contracts

Fixed-term contracts

Non-standard employment

Labour Relations Act

Reasonable expectation

Indefinite employment

Deeming of indefinite employment



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## ABBREVIATIONS

BCEA – Basic Conditions of Employment Act 75 of 1997

CCMA – Commission for Conciliation Mediation and Arbitration

Constitution – The Constitution of The Republic of South Africa, 1996

EEA – Employment Equity Act 55 of 1998

ICA – Industrial Conciliation Act 11 of 1924

IC – Industrial Court

Interim Constitution – Interim Constitution of The Republic of South Africa Act 200 of 1993

LAC – Labour Appeal Court

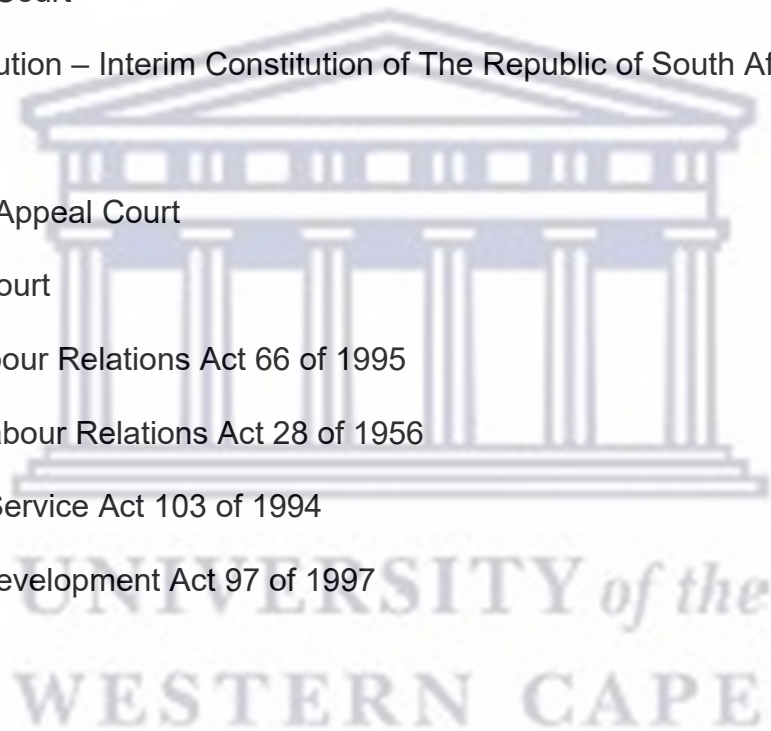
LC – Labour Court

LRA – The Labour Relations Act 66 of 1995

LRA, 1956 - Labour Relations Act 28 of 1956

PSA – Public Service Act 103 of 1994

SDA – Skills Development Act 97 of 1997



# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND AND PROBLEM STATEMENT

Labour relations is an all-encompassing term used to describe the complexities of parties in an employment relationship.<sup>1</sup> Employment law and labour relations in South Africa have undergone and continue to undergo dynamic changes.<sup>2</sup> To understand the significance of present day employment law, it is important to have a sense of its history.<sup>3</sup> South African law was inherited during colonial times and this law, which was developed by the courts since the country became a fully sovereign state, is referred to as the 'common law'.<sup>4</sup> The common law consists broadly of rules and principles emanating from Roman, English and strong Roman-Dutch law foundations.<sup>5</sup> Between 1841 and 1904, a series of Master and Servant legislation was enacted to regulate the control of labour and provided that certain breaches of the law, applicable only to unskilled black<sup>6</sup> workers, was rendered a criminal offence.<sup>7</sup>

Roman-Dutch law became entrenched and from 1920 the law sought to benefit only white skilled workers and ban the recognition of black workers.<sup>8</sup> Little changed from the 1950, as large groups of black workers and certain categories of work, were not recognised.<sup>9</sup> South Africa's transition from apartheid to a fully constitutional democratic state in the early 1990s is considered one of the most significant political events in the past century, with the introduction of the Interim Constitution of the

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<sup>1</sup> Venter R, Levy A & Bendeman H *Labour relations in South Africa* 5 ed (2014) 4.

<sup>2</sup> Grogan J *Workplace Law* 13 ed (2020) 1.

<sup>3</sup> Terreblanche S *A history of Inequality in South Africa 1652 – 2002* (2002) 3.

<sup>4</sup> Grogan J (2020) 1.

<sup>5</sup> Grogan J (2020) 1.

<sup>6</sup> The term 'black', as used in the sentence, refers to people of African, Coloured, Indian, and Chinese descent, aligned to the definition provided in the Employment Equity Act 55 of 1998.

<sup>7</sup> Mahamed R 'The socio-political and work environment as sources of workplace discrimination: implications for employment equity' (2000) 4 *Southern African Business Review (SABR)* 77 82.

<sup>8</sup> Maqutu L 'The Management of African Workers' Wages at South African Mines: Law and Policy Before 1948' (2022) 25 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 14. Categories that did not apply to the LRA, 1956 included farm workers, civil servants, educators, and domestic workers.

<sup>9</sup> Botha N & Mischke C 'A New Labour Dispensation for South Africa' (1997) 41 *Journal of African Law (JAL)* 135 136.



Republic of South Africa, Act 200 of 1993 (Interim Constitution) and the final Constitution of the Republic of South Africa, 1996 (The Constitution).<sup>10</sup> Section 27 of the Interim Constitution provided for the Constitutional right to fair labour practices as part of a Bill of Rights and set the legislative framework governing labour relations in South Africa.<sup>11</sup> In 1994, the democratic government formed a task team committee including representatives from government, labour and business to draft labour legislation which would provide much needed stability and radical reform in an area characterised by uncertainty and inequality.<sup>12</sup> These efforts culminated with the introduction of the Labour Relations Act of 66 of 1995, (LRA) representing a watershed moment in the development of employment law and labour relations in South Africa.<sup>13</sup> Section 27 of the Interim Constitution was replaced with section 23(1) of the Constitution in 1996, both confirming the constitutional right to fair labour practices.<sup>14</sup>

Since 1996, South Africa has operated under a constitutional democratic dispensation and courts are enjoined to bring the common law in line with the Constitution.<sup>15</sup> Indeed much progress has been made in developing the law regulating standard or typical employment however, several critical shortcomings became apparent in the development of the law regulating non-standard or atypical employment.<sup>16</sup> Typical employment is open-ended with no fixed term, date or event to end the contract.<sup>17</sup> Atypical employment is understood as temporary or fixed-term employment, which includes the likes of part-time, seasonal, domestic, casual workers and those employed in the informal economy.<sup>18</sup> Employment contracts are therefore essentially categorised as one of two types, 'indefinite' or 'fixed term'.<sup>19</sup> Fixed term contracts, as a form of atypical employment and in terms of the common law, automatically

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<sup>10</sup> Inman R & Rubinfeld D 'Understanding the Democratic Transition in South Africa' (2013) 15 *American Law and Economics Review (ALER)* 1 38.

<sup>11</sup> De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 4 ed (2001) 389 390.

<sup>12</sup> Subramanien D & Joseph J 'The Right to Strike under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) 22 *PER/PELJ* 1.

<sup>13</sup> Botha N and Mischke C 'A New Labour Dispensation for South Africa' (1997) 41 *Journal of African law* 134.

<sup>14</sup> De Waal J, Currie I & Erasmus G (2001) 390.

<sup>15</sup> Grogan J (2020) 1.

<sup>16</sup> Fourie E 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) 11 *PER/PELJ* 110 111.

<sup>17</sup> Levy A *Labour Law in Practice: A Guide for South African Employers* (2021) 30 31.

<sup>18</sup> Fourie E (2008) 11 *PER/PELJ* 110.

<sup>19</sup> Grogan J (2020) 33.

terminate on a specified date or identified occurrence of an event.<sup>20</sup> From 1995, section 186(1)(b) of the LRA took the common law further by regulating and protecting the position of an employee who can prove that the employer's conduct gave rise to a 'dismissal' when a 'reasonable expectation' is created that a fixed term contract would be renewed on the same or similar terms, but the employer renewed the contract on less favourable terms or did not renew it at all.<sup>21</sup>

As of 1 January 2015 section 186(1)(b)(ii) of the LRA, as amended, provides that an employee can claim dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract.<sup>22</sup> The problem is that the LRA, as amended, does not state what constitutes a reasonable expectation for indefinite employment and does not provide a list of factors which could be considered for the assessment of a claim for dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract. With the above in mind, this study aims to provide insight into the development of the concept and ideas related to a reasonable expectation for indefinite employment, list various factors to consider in the assessment of such a dismissal claim and extract relevant guiding principles from case law.

## 1.2 SIGNIFICANCE OF THE PROBLEM

The problem is significant because indefinite employment, as an end goal for employees, is considered more secure, stable, and beneficial compared to fixed term employment.<sup>23</sup> What gives rise to and informs the assessment of a reasonable expectation for indefinite employment upon the expiry of a fixed term contract is key to understanding what constitutes a claim for dismissal in terms of section 186(1)(b)(ii) of the LRA. This study aims to develop a list of factors to aid the consideration and

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<sup>20</sup> Levy A (2021) 33.

<sup>21</sup> Gericke S 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PER/PELJ* 105.

<sup>22</sup> Huysamen E 'An Overview of Fixed-Term Contracts if Employment as a Form of Typical Employment in South Africa' (2019) 22 *PER/PELJ* 14.

<sup>23</sup> Fourie E 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) 11 *PER/PELJ* 110 111.

assessment of what constitutes a dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract.

Section 198B of the LRA, as amended, also provides that an employer may not employ an employee on a fixed term contract or series thereof, for longer than three months unless the nature of their work was of limited duration or there was a justifiable reason for fixing the duration of the contract.<sup>24</sup> If there is no reasonable justification for the fixed term contract beyond three months, the employment contract will be deemed permanent through the operation of law in terms of section 198B of the LRA.<sup>25</sup> Importantly, while section 186(1)(b)(ii) of the LRA is available to all employees, section 198B of the LRA is not.<sup>26</sup> The principles underlying section 198B of the LRA have significance for this study, as it relates to the factors for consideration in assessing the claim of dismissal in terms of section 186(1)(b) (ii) of the LRA. There are critical issues which both bind and separate the concept of 'deeming of permanency', with the concept of a 'reasonable expectation for permanency'. This study aims to clarify the interplay between these concepts to establish the complementary principles with the purpose of extracting useful elements to recommend a list of factors to be considered in the assessment of section 186(1)(b)(ii) of the LRA.

### **1.3 RESEARCH QUESTION**

The research question this study intends to answer is: What factors should be considered when determining what constitutes a dismissal based on a reasonable expectation for indefinite employment in terms of section 186(1)(b)(ii) of the LRA?

### **1.4 RESEARCH METHODOLOGY**

This research paper is conducted by reviewing the literature published through primary and secondary sources of law. The primary sources will include the Constitution,

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<sup>24</sup> Grogan J (2022) 53.

<sup>25</sup> Grogan J (2022) 53.

<sup>26</sup> Huysamen E (2019) 22 *PER/PELJ* 14.

legislation, case law and law reports. The secondary sources will include academic textbooks, publications and journal articles.

The research paper will largely follow a conceptual analysis and interpretative approach to the question of what factors may be considered when determining what constitutes a dismissal based on a reasonable expectation for indefinite employment. Reference will be made to court judgments which highlight key factors to be considered as a guide and framework for the determination of an employee's claim of dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract.

## **1.5 CHAPTER OUTLINE**

In chapter two, the history of fixed-term contracts will be outlined, followed by chapter three, in which the issue of a reasonable expectation for an indefinite employment contract is explained and the link between sections 198B and 186 (b) (ii) of the LRA is discussed. In chapter four, the research paper examines potential factors which may be considered when determining whether or not a reasonable expectation for indefinite employment exists for employees employed on a fixed-term contract. In chapter five, final conclusions are drawn and a list of factors to be considered when determining whether or not a reasonable expectation for indefinite employment exists is recommended.

## CHAPTER 2

### AN OVERVIEW OF THE LEGAL DEVELOPMENTS RELATED TO THE CONCEPT OF A REASONABLE EXPECTATION

#### 2.1 INTRODUCTION

Colonialism and imperialism in South Africa from the period of 1652 to 1947 have resulted in deep-seated unfair discrimination and inequality across all spheres of life.<sup>27</sup> The economic and social subjugation of blacks under apartheid from 1948 to 1993, created further disparities and injustices that remain embedded in South Africa.<sup>28</sup> While recognising the history of unfair discrimination, inequality and injustice in the workplace, the introduction of the LRA marked a clear commitment by the newly democratic South African government in 1994, to address the past legacy through economic development, social justice, labour peace and the democratization of the workplace.<sup>29</sup>

#### 2.2 HISTORY OF LABOUR LAW IN SOUTH AFRICA

The Dutch East India Company first colonized the Cape Region in 1652, bringing the general body of Roman-Dutch law to South Africa.<sup>30</sup> Roman-Dutch law introduced the foundation for all employment contracts through the law of 'master and servant'.<sup>31</sup> Roman-Dutch law is a civil legal system based on two governing principles, first, case law prevails in common law and second, judicial decisions are binding.<sup>32</sup> This legal foundation has resulted in South African judges taking the lead in shaping the law and places courts at the centre of the legal system.<sup>33</sup> From 1652 to 1808, approximately 63000 slaves were imported to the Cape.<sup>34</sup> Although artisans and tradesmen had

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<sup>27</sup> Terreblanche S (2002) 17.

<sup>28</sup> Twyman CM 'Finding Justice in South African Labor Law: The use of Arbitration to Evaluate Affirmative Action' (2001) 33 *Case W. Res. J. Int'l L* 308.

<sup>29</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 321.

<sup>30</sup> Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* 141 142.

<sup>31</sup> Taylor E 'The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995' (1996) 9 *Transnational Lawyer* 623.

<sup>32</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 317.

<sup>33</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 317 318.

<sup>34</sup> Terreblanche S (2002) 157.

worked at the Cape, no culture of employment had developed by the time of British occupations in 1795 and 1806, mainly because the labour demands were met by imported slaves.<sup>35</sup> This regulation of slave labour remained limited until the abolition of slavery in 1834.<sup>36</sup> By the time slavery was abolished, more than 70% of slaves had been born in the colony.<sup>37</sup> Thereafter the first Master and Servant Ordinance, no 1 of 1841, was passed into law with the purpose of regulating labour.<sup>38</sup> The Master and Servant Ordinance of 1841, was replaced by the much harsher Master and Servant Act 15 of 1856, as well as similar legislation, introduced in other British territories, including the Boer Republics and Natal.<sup>39</sup> While English law did have an overall influence on Roman-Dutch law, in terms of employment law and labour relations it was only minimally influenced.<sup>40</sup>

The first legislation, in the development of modern South African employment law and labour relations, was enacted in 1909 with the Transvaal Industrial Disputes Prevention Act 20 of 1909, as a legislative response to the rise of militant and organised white workers.<sup>41</sup> Shortly thereafter, the Mines and Workers Act 12 of 1911, was enacted to reserved particular jobs for whites only and to ensure white workers were guaranteed satisfactory wages over black workers.<sup>42</sup> When the mining industry tried to implement wage cuts and changes to the labour process, white workers implemented a general strike in the mines known as the Rand Revolt of 1922.<sup>43</sup> The South African government resorted to a declaration of martial law and sent in army troops to put an end to the revolt.<sup>44</sup> Following the revolt in 1922, the Industrial Conciliation Act 11 of 1924 (ICA) was enacted, which ensured a dramatic decrease in labour unrest.<sup>45</sup>

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<sup>35</sup> Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* 142.

<sup>36</sup> Le Roux R 2010) 39 *ILJ* 142.

<sup>37</sup> Terreblanche S (2002) 158.

<sup>38</sup> Le Roux R 2010) 39 *ILJ* 142.

<sup>39</sup> Le Roux R (2010) 39 *ILJ* 142.

<sup>40</sup> Conradie M 'The constitutional right to fair labour practices: a consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) 22 *Fundamina* 163 204.

<sup>41</sup> Taylor E (1996) 9 *Transnational Lawyer* 623 624.

<sup>42</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 318.

<sup>43</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 319.

<sup>44</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 319.

<sup>45</sup> Du Toit D, Godfrey S & Cooper C *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 6.

The legislation in both 1909<sup>46</sup> and 1924,<sup>47</sup> excluded black workers from the definition of an employee, initially only applicable to men but from 1952, included women.<sup>48</sup> In 1948, the National Party government came to power and institutionalised the system of apartheid.<sup>49</sup> The ICA<sup>50</sup> was amended<sup>51</sup> and in 1956 again amended but introduced as the Labour Relations Act no 28 of 1956 (LRA, 1956).<sup>52</sup> It is important to note that the Master and Servant law were repealed in South Africa only in 1974, almost 20 years after the LRA, 1956.<sup>53</sup> Labour reforms for black workers took place when the economy began demonstrating large shortages of skilled white labour in the late 1970s, thereby creating new employment opportunities for black workers, driven additionally by market needs and socio-economic pressure.<sup>54</sup>

As a result of additional pressure from the international community particularly from 1976, the government appointed the Wiehahn Commission of Inquiry into South African Labour Legislation in 1977.<sup>55</sup> In 1979, the Commission recorded its findings in the publication of the Wiehahn Report, where it recommended that reference to race should be removed from the definition of an employee.<sup>56</sup> These recommendations were implemented in amendments in 1979, which allowed increased employment and labour rights for black workers.<sup>57</sup> Since 1979, labour law treated members of all races equally, yet up until the fall of apartheid in 1994, the legislation, which existed at the time, was ineffective in improving general living conditions for black workers.<sup>58</sup> The election of a former political prisoner under apartheid, Mr Nelson Mandela, as President of South Africa in 1994, was one of the iconic moments in history marking

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<sup>46</sup> Transvaal Industrial Disputes Prevention Act 20 of 1909.

<sup>47</sup> Industrial Conciliation Act 11 of 1924.

<sup>48</sup> Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* 161.

<sup>49</sup> Budeli M 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective' (2009) 15 *Fundamina* 57-74.

<sup>50</sup> Act 11 of 1924.

<sup>51</sup> Industrial Conciliation Act 36 of 1937.

<sup>52</sup> Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *ILJ* 161.

<sup>53</sup> Le Roux R (2010) 39 *ILJ* 142.

<sup>54</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 319.

<sup>55</sup> Budeli M 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective' (2009) 15 *Fundamina* 69.

<sup>56</sup> Le Roux R (2010) 39 *ILJ* 161.

<sup>57</sup> Le Roux R (2010) 39 *ILJ* 161.

<sup>58</sup> Taylor E (1996) 9 *Transnational Lawyer* 626.

an end of apartheid and the beginning of a new era in South Africa.<sup>59</sup> The Interim Constitution established a Bill of Rights and a Constitutional Court with the aim of guaranteeing a broad range of human rights.<sup>60</sup> The Interim Constitution specifically guaranteed the fundamental rights of workers and employers.<sup>61</sup> On 13 September 1995, after more than a year of drafting and negotiations among key stakeholders, the LRA<sup>62</sup> was passed by Parliament.<sup>63</sup> The stated purpose of the LRA was to advance economic development, social justice, labour peace and the democratization of the workplace.<sup>64</sup> The LRA codified the protection of employees against unfair dismissal and reformed the dispute resolution system for the workplace.<sup>65</sup>

From an international perspective, labour standards generated by the International Labour Organisation (ILO) constitute an important source of customary international law for South Africa.<sup>66</sup> The ILO forms part of the United Nations (UN) and prior to 1994 international standards played an indirect role in the development of South African labour law.<sup>67</sup> One of the most important ILO interventions occurred in 1992 when a Fact-find and Conciliation Commission (Commission) visited the country and the Commission filed a report on the poor state of South African labour relations and labour law.<sup>68</sup> The report became a significant point of reference when the LRA was drafted.<sup>69</sup> In 1996 the Constitution replaced the Interim Constitution and provided the fundamental right to fair labour practices in section 23 of its Bill of Rights.<sup>70</sup> South Africa has come a long way from colonialism to the Constitution. Since the Constitution, a range of new labour legislation and reform, including the enactment of the Basic Conditions of Employment Act 75 of 1997 (BCEA), the Employment Equity Act 55 of 1998 (EEA) and the Skills Development Act 97 of 1997 (SDA).<sup>71</sup>

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<sup>59</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 321.

<sup>60</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 321.

<sup>61</sup> Taylor E (1996) 9 *Transnational Lawyer* 629.

<sup>62</sup> Act 66 of 1995.

<sup>63</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 321.

<sup>64</sup> Section 1 of Act 66 of 1995 chap 1.

<sup>65</sup> Twyman CM (2001) 33 *Case W. Res. J. Int'l L* 321.

<sup>66</sup> Van Niekerk A *Law@work* 5 ed (2019) 23.

<sup>67</sup> Van Niekerk A (2019) 23.

<sup>68</sup> Van Niekerk A (2019) 24.

<sup>69</sup> Van Niekerk A (2019) 24.

<sup>70</sup> Taylor E (1996) 9 *Transnational Lawyer* 629.

<sup>71</sup> Grogan J (2020) 5.



## 2.3 FORMS OF EMPLOYMENT

Work is an essential everyday phenomenon that influences society's direction, development and socio-economic circumstances.<sup>72</sup> South African employment law and labour relations is largely premised on the regulation of typical or standard employment also known as permanent or indefinite employment.<sup>73</sup> Typical employment is considered the norm and the key elements include continuity as well as certainty.<sup>74</sup> Indefinite employment could be described as ongoing employment, between an employee and an employer, with agreed working schedules and rates of pay, expected to endure until terminated on legally recognised grounds, including resignation, retirement, fair dismissal or death of the employee.<sup>75</sup>

Atypical or non-standard employment arrangements may be described as temporary and commonly includes casual labour, independent contractors, part-time employees and fixed-term contracts of employment.<sup>76</sup> Fixed term contracts have been utilised as a legal instrument by parties who wish to engage in an employment relationship based on predictability and freedom to control the duration of the contractual relationship.<sup>77</sup> A fixed term contract has a defined time period<sup>78</sup> or is linked to the conclusion of a specific project.<sup>79</sup> For fixed term contracts, the mutual intention of the parties should be linked to the purpose and duration, unlike that of the traditional contract of permanent employment, which continues for an indefinite period.<sup>80</sup> In terms of the common law, a fixed term contract expires on a pre-determined date or event, naturally through the operation of law, releasing the parties from their obligations.<sup>81</sup>

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<sup>72</sup> Rapatsa M 'Atypical or Non-Standard Work: A Challenge to Workers' Protection in South Africa' (2014) 5 *Mediterranean Journal of Social Sciences* 1067.

<sup>73</sup> Huysamen E (2019) 22 *PER/PELJ* 2.

<sup>74</sup> Huysamen E (2019) 22 *PER/PELJ* 2.

<sup>75</sup> Huysamen E (2019) 22 *PER/PELJ* 2.

<sup>76</sup> Van Niekerk A (2019) 70.

<sup>77</sup> Gericke S 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PELJ* 105.

<sup>78</sup> Vettori S 'Fixed term employment contracts: The permanence of the temporary' (2008) 2 *Stellenbosch Law Review* 189.

<sup>79</sup> Grogan J (2020) 33.

<sup>80</sup> Gericke S 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PELJ* 105.

<sup>81</sup> Grogan J *Dismissal* 4 ed (2022) 22.

Once the specific timeframe expires or the task has been completed the employer will have no need for the fixed term contracted employee, in that particular capacity and terms, given the justification for continued employment would no longer exist.<sup>82</sup> However, when the task or work takes longer to complete than was originally foreseen, it is not unusual for the fixed term contract to be renewed for an additional, finite period/s of time.<sup>83</sup>

## 2.4 ABUSE OF FIXED TERM CONTRACTS

It is important to acknowledge the use, importance and legitimate circumstances which require the utilisation of fixed term contracts.<sup>84</sup> The use of fixed term contracts is considered essential in business operations and employment law because they form an integral part of the job market, particularly in roles that are temporary in nature, such as short term project work or where business is seasonal.<sup>85</sup> Fixed term contracts were considered to make work arrangements more flexible for employers and lessen the legal burden on employers.<sup>86</sup> However, employers do not have unlimited discretion to renew or not renew fixed-term contracts.<sup>87</sup> Fixed term contracts must be fit for purpose as the labour market is vulnerable to the increasing potential for abuse.<sup>88</sup> Employers began to notice the difference between the easier option of terminating a fixed term contract based on the expiry of the contract and the more regulated process of dismissal which required a fair process and fair reason for termination.<sup>89</sup> The result was that employers increasingly chose the easier option of renewal of short duration fixed term contracts which usually came to an abrupt end due to the effluxion of time,

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<sup>82</sup> Vettori S 'Fixed term employment contracts: The permanence of the temporary' (2008) 2 *Stell LR* 189.

<sup>83</sup> Vettori S (2008) 2 *Stell LR* 189.

<sup>84</sup> Geldenhuys J 'Reasonable expectations: Real protection or false security for fixed-term employees' (2008) 20 *SA Mercantile Law Journal* 268; Geldenhuys J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER/PELJ*; Huysamen E 'An overview of fixed-term contracts of employment as a form of a typical employment in South Africa' (2019) 22 *PER/PELJ*.

<sup>85</sup> Grogan J (2022) 54.

<sup>86</sup> Smit N 'Everything fixed about fixed-term contracts of employment: or not?' (2005) 1 *TSAR* 201.

<sup>87</sup> *Cremerk - A Division of the Triple P - Chemical Ventures (Pty) Ltd v SA Chemical Workers Union & others* (1994) 15 ILJ 289 (LAC) 296.

<sup>88</sup> Smit N (2005) 1 *TSAR* 207.

<sup>89</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1244 para 120; Gericke S 'The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law' (2016) 1 *TSAR* 94.

often when the underlying reason related to suspected misconduct, alleged poor performance or operational requirements.<sup>90</sup> Effectively, the easier option became a business means of cutting costs and ensuring flexibility at the expense of employees on fixed term contracts.<sup>91</sup>

An employee on a fixed term contract generally has little prospect of promotion and is not granted the same benefits as employees on indefinite contracts.<sup>92</sup> An employee in a fixed term contract who renders the same standard of service and delivers the same amount of work as an employee in an indefinite position is generally also deprived of a certain level of status within the workplace, differentiated remuneration, fewer employment benefits, disadvantaged in upward career prospects and excluded from training opportunities available to permanent members of staff.<sup>93</sup> The issue of unfair discrimination becomes prominent in the context of fixed term contract employees as a group or category of vulnerable employees.<sup>94</sup> Fixed term contract employees are classified as a vulnerable species and susceptible to indirect unfair discrimination in respect of employment conditions, benefits and remuneration, reflecting less favourable terms and conditions compared with those of indefinitely employed comparable employees, unless such differentiation is justifiable on objective grounds.<sup>95</sup> Fixed term contracts are therefore often abused by unscrupulous employers who aim to circumvent the law.<sup>96</sup> Abuse of fixed term contracts have an incentives due to its positive influence on bottom-line profit, thereby saving time, resources and money for the employer.<sup>97</sup>

As a result, fixed term employment offers an employee little job security, less stability and is viewed as lower in status to that of permanent employees.<sup>98</sup> Over time it has

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<sup>90</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1244 para 120.

<sup>91</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1244 para 120.

<sup>92</sup> Vettori S (2008) 2 *Stell LR* 189.

<sup>93</sup> Huysamen E (2019) 22 *PER/PELJ* 3.

<sup>94</sup> Gericke S (2011) 14 *PELJ* 113.

<sup>95</sup> Gericke S (2011) 14 *PELJ* 113 – 114.

<sup>96</sup> Van Niekerk A, (2019) 242; Raguel M & Odeku K 'Critical Analysis of the Failure of Labour Law to Adequately Protect Atypical Workers and Its Impact on Human Rights and Fair Labour Practice' (2023) 13 *Juridical Tribune* 77.

<sup>97</sup> Vettori S 'Fixed term employment contracts: The permanence of the temporary' (2008) 2 *Stell LR* 189; *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1244 para 123.

<sup>98</sup> Vettori S (2008) 2 *Stell LR* 189; Geldenhuys J (2008) 20 *SA Merc LJ* 273.

become common for employers to therefore appoint employees on such fixed term contracts as an alternative to permanent employment.<sup>99</sup> This practice deprives fixed term contract employees of their human dignity and employment benefits.<sup>100</sup>

## 2.5 CONCLUSION

The legal position on the rules related to fixed term contracts in South Africa has undergone many changes.<sup>101</sup> What has not changed is the general principle that a fixed term contract may not be cancelled unilaterally during its currency in the absence of good cause based on the terms of the contract.<sup>102</sup> Premature termination of a fixed term contract of employment therefore will not constitute a breach, as long as there is compliance with the standard requirements of good cause<sup>103</sup> and lawful notice.<sup>104</sup> In the absence of a reasonable expectation for continued employment, a fixed term contract automatically expires when the period contracted for comes to an end.<sup>105</sup> Section 186(1)(b) of the LRA represents an exception to the common law position on fixed term contracts and must be understood in terms of the Constitutional right to fair labour practices enshrined in section 23.<sup>106</sup> Relevant case law and the legislative developments of section 186(1)(b) of the LRA affected the common law on fixed-term contracts.<sup>107</sup> The case law and legislative developments are discussed in the next chapter to provide further insights into the concepts of a reasonable expectation for renewal of a fixed term contract as well as a reasonable expectation of indefinite employment.

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<sup>99</sup> Geldenhuys J 'Reasonable expectations: Real protection or false security for fixed-term employees' (2008) 20 *SA Merc LJ* 268; Geldenhuys J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER/PELJ*; Huysamen E 'An overview of fixed-term contracts of employment as a form of a typical employment in South Africa' (2019) 22 *PER/PELJ*.

<sup>100</sup> Gericke S (2011) 14 *PELJ* 130.

<sup>101</sup> Gericke S 'The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law' (2016) 1 *TSAR* 97.

<sup>102</sup> *Buthlezi v Municipal Demarcation Board* [2004] JOL 13391 (LAC) para 12.

<sup>103</sup> *Buthlezi v Municipal Demarcation Board* [2004] JOL 13391 (LAC) para 12; Geldenhuys J (2008) 20 *SA Merc LJ* 270.

<sup>104</sup> Grogan J (2022) 22.

<sup>105</sup> Vettori S (2008) 2 *Stell LR* 189.

<sup>106</sup> Huysamen E (2019) 22 *PER/PELJ* 5.

<sup>107</sup> *South African Clothing and Textile Worker's Union and Another v Cadema Industries (Pty) Ltd* [2008] 8 *BLLR* 790 (LC) para 13.

## CHAPTER 3

### FIXED TERM CONTRACTS IN SOUTH AFRICA

#### 3.1 INTRODUCTION

In response to the potential for abuse of fixed-term contracts, several key legal developments sought to address the problem.<sup>108</sup> This chapter provides insight into the legal developments related to the concepts of legitimate expectation, dismissal as it relates to a reasonable expectation for renewal of a fixed-term contract, reasonable expectation of indefinite employment and the deeming of permanency.

#### 3.2 LEGITIMATE EXPECTATION

The problem caused by the abuse of fixed term contracts by employers was initially picked up by the IC and subsequently, through the implementing section 186(1)(b) of the LRA. The IC case in *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools*<sup>109</sup> was the one of the first to raise the concept of an employee's 'legitimate expectation'.<sup>110</sup> This case involved an employee employed since 2 February 1978 but entered into a statutory migrant labour contract on 1 April 1979, which was to end on 28 March 1980.<sup>111</sup> At the expiry of the contract the employer did not renew the contract despite an alleged expectation to that effect.<sup>112</sup> The reason for the employer's failure to renew the contract was alleged to be the employee's status and membership of a trade union as well as his participation in the union activities.<sup>113</sup> The employee and trade union contended that the failure to renew a migrant contract, where there was an expectation of renewal, constituted an unfair labour practice.<sup>114</sup>

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<sup>108</sup> Gericke S (2016) 1 TSAR 96 97.

<sup>109</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC).

<sup>110</sup> *South African Clothing and Textile Worker's Union and Another v Cadema Industries (Pty) Ltd [2008] 8 BLLR 790 (LC)* para 14.

<sup>111</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC) para 230-231.

<sup>112</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC) para 231.

<sup>113</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC) para 231.

<sup>114</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC) para 231.

The dispute was referred to the Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries for settlement but failed and was accordingly referred to the IC for determination on points *in limine*.<sup>115</sup> These facts gave birth to the first alleged 'unfair labour practice' where it was contended as 'unfair' for an employer to rely on the natural termination of a fixed-term contract, where there was a legitimate expectation of renewal by the employee and the fixed term contract was not renewed on bad faith grounds by the employer.<sup>116</sup> The employee and trade union argued that the IC should prevent the employer from relying on the common law right of termination through normal notice and the 'unfair labour practice' provisions of the LRA, 1956, should prevent an employer from defeating social policy considerations such as joining a trade union, when such an employer attempts to rely on the natural termination of a fixed-term contract as a way out.<sup>117</sup> As it was argued, the 'unfair labour practice' was no more than 'concealed victimization'.<sup>118</sup> The IC weighed the interests of the employer to dismiss who they wish and to hire whom they choose, given the predominant values of the free enterprise system, against the employee's interest in job security at one level and the social interest in protecting collective bargaining at the other.<sup>119</sup> The balance struck at the time was to restrain the employer's interest in so far as it threatened the orderly development of trade unions and collective bargaining.<sup>120</sup> Although the IC did not hold that the alleged practice was an 'unfair labour practice', the IC left the door open by rejecting the arguments *in limine* that it could not be one.<sup>121</sup> By letting the matter proceed to evidence, it was the first confirmation that an employee's legitimate expectation for renewal, which was not met by an employer, could amount to an 'unfair labour practice'.<sup>122</sup>

The Appellate Division (AD) ruled that the concept of a legitimate expectation was recognized and acknowledged as being linked to the LRA, 1956, in the case of

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<sup>115</sup> *Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC) para 231.

<sup>116</sup> Cheadle H 'The first unfair labour practice case' (1980) 1 ILJ 201.

<sup>117</sup> Cheadle H (1980) 1 ILJ 202.

<sup>118</sup> Cheadle H (1980) 1 ILJ 202.

<sup>119</sup> Cheadle H (1980) 1 ILJ 202.

<sup>120</sup> Cheadle H (1980) 1 ILJ 202.

<sup>121</sup> Cheadle H (1980) 1 ILJ 202.

<sup>122</sup> Cheadle H (1980) 1 ILJ 202.

*Administrator of the Transvaal & Others v Traub & Others*.<sup>123</sup> In this case members of the medical staff for the medical faculty of the University of Witwatersrand had complained for many years about the poor working conditions prevailing in the wards serving the Department of Medicine. Matters came to a head when the South African Medical Journal published a letter signed by 101 doctors, who worked at the Department of Medicine.<sup>124</sup> The letter drew attention to the conditions in the medical wards at the hospital and the inaction of the authorities despite repeated complaints over the years.<sup>125</sup> All six respondent employees were signatories of the letter.<sup>126</sup> Each of the respondents applied for the post of Senior Health Officer (SHO) at the hospital and were recommended.<sup>127</sup> Four of the six respondents' application for the new appointment as SHO had not been approved.<sup>128</sup> It was common cause that their applications had been rejected because they had signed the letter published by the South African Medical Journal.<sup>129</sup> The respondents brought an urgent application in the Witwatersrand Local Division.<sup>130</sup> Goldstone J granted an order setting aside the decision of the appellant not to approve the appointment of each of the respondents.<sup>131</sup> The AD ruled that each of the respondents had a 'legitimate expectation' that once his or her application for the post of SHO had been recommended by the departmental head concerned, approval of the appointment would follow as a matter of course and found that the respondents should have been given a fair hearing before the decision not to appoint them.<sup>132</sup> The AD upheld the decision of the court a quo and dismissed the appeal with costs.<sup>133</sup> The case is important for its acceptance in law of a legitimate expectation and the duty to act fairly by observing the principles of natural justice.<sup>134</sup>

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<sup>123</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A).

<sup>124</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 824.

<sup>125</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 824.

<sup>126</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 824 825.

<sup>127</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 825.

<sup>128</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 826.

<sup>129</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 826.

<sup>130</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 826.

<sup>131</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 826.

<sup>132</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 841.

<sup>133</sup> *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 841.

<sup>134</sup> Lyster R 'The new right to be heard' (1990) 5 SA Public Law 137.

In *Food and General Workers Union and Others v Lanko Co-operative Ltd*,<sup>135</sup> the IC ruled that the employer had, by its conduct, given all the farm workers who returned at the beginning of the season a tacit undertaking to re-employ them.<sup>136</sup> The basis of the finding was that the employer's conduct in the past, which represented its normal custom and practice, had created a legitimate expectation of re-employment amongst the labourers.<sup>137</sup> The IC ruled that the employer's conduct had created a subjective expectation in the minds of the employees which was objectively reasonable.<sup>138</sup> Alternatively stated, if an employer conducts itself in a manner that creates reasonably held expectations on the part of its employees, such an employer will be precluded from denying these expectations.<sup>139</sup>

### 3.3 DISMISSAL AND THE CONCEPT OF A REASONABLE EXPECTATION

Since early 1980, employees appointed on fixed-term contracts have been able to rely on the principle of fairness, should an employer unreasonably fail or refuse to renew the fixed-term employment contract.<sup>140</sup> In the transition to the LRA, the legislature embedded the refusal or failure to renew a fixed term contract within the confines of dismissal law.<sup>141</sup> In terms of legislative developments on the concept of dismissal, as it relates to a reasonable expectation of renewal, section 186(1)(b) of the LRA provides the following definition for 'dismissal':

*“... an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it...”*

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<sup>135</sup> *Food and General Workers Union and Others v Lanko. Co-operative Ltd* (1994) 15 ILJ 876 (IC).

<sup>136</sup> *Food and General Workers Union and Others v Lanko. Co-operative Ltd* (1994) 15 ILJ 876 (IC) 884 885.

<sup>137</sup> *Food and General Workers Union and Others v Lanko. Co-operative Ltd* (1994) 15 ILJ 876 (IC) 884 885.

<sup>138</sup> Vettori S (2008) 2 *Stell LR* 194.

<sup>139</sup> Vettori S (2008) 2 *Stell LR* 189.

<sup>140</sup> Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 *ILJ* 1001.

<sup>141</sup> Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 *ILJ* 1001.



While it is important to note that section 186(1)(b) of the LRA envisages two forms of dismissal, either where the employer that the renewal was qualified by an offer to renew it on less favourable terms or did not renew the contract at all,<sup>142</sup> this study focuses on the latter. Section 192 of the LRA provides that the onus is on the employee to prove the existence of a dismissal and if it is proven, the employer must prove that the dismissal was fair.<sup>143</sup> In terms of section 188 of the LRA a dismissal will be unfair if the employer fails to prove the dismissal was effected in accordance with a fair reason and fair procedure.<sup>144</sup>

As to whether section 186(1)(b) of the LRA allowed for an interpretation to allow for a claim of dismissal based on a reasonable expectation for 'indefinite employment', the answer was not immediately clear and left room for debate on the issue.<sup>145</sup> This question was initially decided in the Labour Court (LC) case of *Dierks v University of South Africa*.<sup>146</sup> In *Dierks v University of South Africa* the employee/applicant had been employed on multiple fixed term contracts from January 1995 to December 1997.<sup>147</sup> When the last fixed term contract expired at the end of 1997, the applicant claimed that he had been dismissed based on a reasonable expectation of indefinite employment. The LC concluded that an expectation of indefinite employment did not satisfy the requirements of dismissal for the purposes of section 186(1)(b) of the LRA as it only allows for a claim of dismissal based on a reasonable expectation for the

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<sup>142</sup> Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 *ILJ* 1002.

<sup>143</sup> Section 192 of the LRA 1995:

*"192. Onus in dismissal disputes*

*(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*

*(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair."*

<sup>144</sup> Section 188 of the LRA 1995:

*"Other unfair dismissals*

*(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*

*(a) that the reason for dismissal is a fair reason-*

*(i) related to the employee's conduct or capacity; or*

*(ii) based on the employer's operational requirements; and*

*(b) that the dismissal was effected in accordance with a fair procedure."*

<sup>145</sup> *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) 1248 para 148 149; *University of Pretoria v CCMA* (2012) 33 *ILJ* 183 (LAC) 190 para 21 22.

<sup>146</sup> *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC).

<sup>147</sup> *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) 1228 para 2.

'renewal' of a fixed term contract and not for 'indefinite' employment.<sup>148</sup> Intuitively, the LC stated that a claim for dismissal based on a reasonable expectation of indefinite employment would require legislative intervention for a specific statutory provision to that effect.<sup>149</sup> The judgement in *Dierks v University of South Africa* held the following when ruling that a reasonable expectation of permanent employment is not included in section 186(1)(b) of the LRA<sup>150</sup>:

*“Accordingly, I agree with Professor Olivier’s opinion as quoted and find that Section 186(b) does not include a reasonable expectation of permanent employment. This finding means that this Court does not have the jurisdiction to decide the crisp issue insofar as it concerns the reasonable expectation of permanent employment.”*

In *McInnes v Technikon Natal*<sup>151</sup> the LC in Durban subsequently disagreed with the LC in Johannesburg in *Dierks v University of South Africa* and held a different view.<sup>152</sup> In *McInnes v Technikon Natal*, the applicant had been employed in terms of two successive fixed term contracts, the first from 1 February 1996 to 31 January 1997 and the second from 1 February 1997 to 31 January 1998.<sup>153</sup> The position was advertised and the employee expected to be appointed to the new position as she was the selection committee's preferred choice.<sup>154</sup> However, the decision to appoint the applicant was overturned due to the respondent's affirmative action policy.<sup>155</sup> The finding of the LC was that section 186(1)(b) of the LRA does indeed include an interpretation which would allow for an employee to claim dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract.<sup>156</sup> The judgement of *McInnes v Technikon Natal*<sup>157</sup>, directly challenged the

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<sup>148</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1248 para 149.

<sup>149</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1248 para 148.

<sup>150</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1247 1248 para 143 149.

<sup>151</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1143 para 20.

<sup>152</sup> Gericke S (2011) 14 *PER/PELJ* 121.

<sup>153</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1141 para 2 3.

<sup>154</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1141 para 4.

<sup>155</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1141 para 4.

<sup>156</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1143 para 20.

<sup>157</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1143 para 19 and 20.

finding of *Dierks v University of South Africa* and made the following pronouncements on the matter:

*“In Dierks v University of South Africa (1999) 20 ILJ 1227 (LC) Oosthuizen AJ at 1246 H to 1248 F considered whether a reasonable expectation as defined in section 186 (b) can ever include an expectation of permanent employment where the employee is engaged in a fixed term contract. His Lordship concluded, at 1248 F, that it cannot.*

*I with respect fail to see why this should always be so. What section 186 (b) clearly seeks to address is the situation where an employer fails to renew fixed term employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation, and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the expectation which the employer creates is that the renewal is to be indefinite, then the section must be held to also cover that situation... **I must accordingly conclude that in arriving at this finding His Lordship was clearly wrong.** (my emphasis)”*

Less than two months after the LC ruling in *McInnes v Technikon Natal*, the LC in Cape Town in *Auf der Heyde v University of Cape Town*,<sup>158</sup> ruled in alignment the decision held in *Dierks v University of South Africa*, that an employee cannot claim a dismissal based on a reasonable expectation of indefinite employment in terms of the wording of section 186(1)(b) of the LRA.<sup>159</sup> In *Auf der Heyde v University of Cape Town* the applicant was appointed on a three-year fixed term contract from 8 May 1995 to 7 May 1998.<sup>160</sup> On 11 August 1997, the university advertised the permanent position to which the employee applied but was unsuccessful and the fixed term contract terminated.<sup>161</sup> The employee contended that the employer’s failure to appoint him in a permanent position constituted a dismissal based on a reasonable expectation for

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<sup>158</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC).

<sup>159</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) para 32.

<sup>160</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) para 7.

<sup>161</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) para 9.

indefinite employment in terms of section 186(1)(b) of the LRA.<sup>162</sup> The LC held that section 186(1)(b) of the LRA does not allow for an interpretation which would include an expectation for indefinite.<sup>163</sup> On appeal, the LAC in *University of Cape Town v Auf der Heyde*<sup>164</sup> upheld the decision of the LC but did not decisively pronounce on the question as to whether section 186(1)(b) of the LRA extended its scope to include a dismissal based on a reasonable expectation of indefinite employment.<sup>165</sup>

The above three LC cases, only two years apart, in three separate provinces, illustrated the two opposing views on the correct interpretation of the provisions of section 186(1)(b) of the LRA.<sup>166</sup> The legal debate continued for over a decade and in *University of Pretoria v CCMA*<sup>167</sup> the LAC definitively ruled that in the absence of an amendment to the legislation, section 186(1)(b) of the LRA does not include an interpretation that allows for a claim of dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract.<sup>168</sup> In *University of Pretoria v CCMA*, the applicant was employed on a series of fixed term contracts from 1 February 2004 to 30 November 2007.<sup>169</sup> On 30 November 2007, the employee was interviewed for one of several permanent positions which the employer sought to fill but the employee was unsuccessful.<sup>170</sup> The employee was offered a further fixed term contract for the first semester of 2008, which she rejected on the basis that she was not willing to accept another fixed-term contract.<sup>171</sup> The employee contended that she had been dismissed in terms of s 186(1)(b) of the LRA based on a reasonable expectation for indefinite employment.<sup>172</sup> The LAC did not agree with her

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<sup>162</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) para 11.

<sup>163</sup> *Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC) para 28.

<sup>164</sup> *University of Cape Town v Auf der Heyde* 2001 JOL 9004 (LAC).

<sup>165</sup> *University of Cape Town v Auf der Heyde* 2001 JOL 9004 (LAC) para 20.

<sup>166</sup> Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 *ILJ* 1006.

<sup>167</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC).

<sup>168</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 190 para 21.

<sup>169</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 185 para 1.

<sup>170</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 185 para 1.

<sup>171</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 185 para 1.

<sup>172</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 185 para 3.

arguments.<sup>173</sup> The reasons provided by the LAC in the *University of Pretoria* case included the following<sup>174</sup>:

*“The words chosen by the legislature, absent an amendment to the legislation, cannot carry the burden of third respondent’s case in that it covers a restrictive set of circumstances, namely a reasonable expectation of a renewal of that which had previously governed the employment relationship, namely a fixed term contract which had previously been enjoyed, which had now expired and, by virtue of the factual matrix created, at best, a reasonable expectation of a renewal.”*

Parallel to the developments in the judiciary, legislative reforms to section 186(1)(b) of the LRA were advanced by the Labour Relations Amendment Bill, 2010<sup>175</sup> and Labour Relations Amendment Bill, 2012<sup>176</sup>. The legislature sought to directly address the limitations in section 186(1)(b) of the LRA directly with the introduction of the LRA, as amended, effective as of 1 January 2015.

The LRA, as amended, included a new provision in section 186(1)(b)(ii), which provides the following definition for dismissal related to a reasonable expectation for indefinite employment:

*“Dismissal means that –*

*(b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer –*

*(ii) to retain the employee in employment on an **indefinite basis** (my emphasis) 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 offer to retain the employee.”*

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<sup>173</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 190 para 21.

<sup>174</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 190 para 21.

<sup>175</sup> Labour Relations Amendment Bill regulations in GN 1112 GG 33873 of 17 December 2010.

<sup>176</sup> Labour Relations Amendment Bill 2012.

The wording of the provisions of the LRA, as amended, specifically provide the right to claim dismissal based on a reasonable expectation of indefinite employment.<sup>177</sup> The much needed statutory recognition, has filled a legal gap, namely the inclusion of a right to claim dismissal based on a reasonable expectation of ‘indefinite’ employment upon the expiry of a fixed term contract.<sup>178</sup>

### 3.4 DEEMING OF PERMANENCY UNDER SECTION 198B OF THE LRA

In addition to section 186(1)(b)(ii) of the LRA, another important amendment, is the ‘deeming of permanency’ provisions in section 198B of the LRA.<sup>179</sup> Section 198B however does not apply to all employees, as provided in section 198B(2) of the LRA as follows:

*“This section does not apply to—*

- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;<sup>180</sup>*
- (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—*
  - (i) the employer conducts more than one business; or*
  - (ii) the business was formed by the division or dissolution for any reason of an existing business; and*
- (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination, or collective agreement.”*

<sup>177</sup> Huysamen E (2019) 22 *PER/PELJ* 8.

<sup>178</sup> Grogan J *Dismissal* 4 ed (2022) 60.

<sup>179</sup> Huysamen E (2019) 22 *PER/PELJ* 14.

<sup>180</sup> In terms of s 6(3) of BCEA it amounts to R241,110.59 per annum.

For employees who fall under the protection of section 198B of the LRA, section 198B(1) of the LRA provides a definition of a 'fixed term contract', as follows:

*“For the purpose of this section, a ‘fixed term contract’ means a contract of employment that terminates on -*

- (a) the occurrence of a specified event;*
- (b) the completion of a specified task or project; or*
- (c) a fixed date, other than an employee’s normal or agreed retirement age, subject to subsection (3).”*

The above description of a fixed term contract is in accordance with the historical understanding of the definition and use of a fixed term contract.<sup>181</sup> Section 198B(3) provides for the deeming of permanency through the operation of law if the employer cannot demonstrate a justifiable reason for entering into a fixed term contract:

*“An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if:*

- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or*
- (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.”*

Section 198B(4) of the LRA is relevant because it links directly to the purpose and justification for entering into a fixed term contract, as this would affect the reasonableness of an expectation for indefinite employment. Section 198B(4) of the LRA provides the following:

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<sup>181</sup> Huysamen E (2019) 22 PER/PELJ 15.

*“Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee:*

- (a) is replacing another employee who is temporarily absent from work;*
- (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;*
- (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;*
- (d) is employed to work exclusively on a specific project that has a limited or defined duration;*
- (e) is a non-citizen who has been granted a work permit for a defined period;*
- (f) is employed to perform seasonal work;*
- (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;*
- (h) is employed in a position which is funded by an external source for a limited period; or*
- (i) has reached the normal or agreed retirement age applicable in the employer’s business.”*

Section 198B(5) of the LRA provides that if there is no justifiable reason for the use of a fixed term contract, the fixed term contract is “... *deemed to be of indefinite duration.*”  
Section 198B(6) of the LRA provides that the reason for fixing the term of the contract



must be in writing and subsection (7) states that “[i]f it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.” Section 198B(8)(a) of the LRA provides that “an employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.” Section 198B(9) of the LRA states that “...an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.”

The above principles in section 198B of the LRA will be extracted to link with a list of factors recommended by this research paper as relevant topics to consider when determining a claim for dismissal based on a reasonable expectation for indefinite employment in terms of section 186(1)(b)(ii) of the LRA.

### **3.5 CONCLUSION**

It is crucial to note at this stage that although the LRA provides a primary list of instances and factors for the determination of a ‘reasonable justification’ in the deeming of permanency in terms of section 198B, the LRA does not provide a primary list of instances or factors for the consideration and determination of a ‘reasonable expectation’ for indefinite employment in terms of section 186(1)(b)(ii) of the LRA. There is an important link between section 186(1)(b)(ii) and section 198B of the LRA.<sup>182</sup> Both sections 198B and 186 (1) (b) (ii) of the LRA have indefinite employment as the relief or end goal if successfully proven, first, through the deeming provisions assessing a ‘justifiable reason’ and second, assessing a ‘reasonable expectation’.<sup>183</sup> The next chapter addresses the interaction and interplay between the two sections as it relates to the claim of dismissal based on a reasonable expectation of indefinite employment.

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<sup>182</sup> *Naidoo v Nsibanyoni NO and Others* (JR54/18) [2020] ZALCJHB 263 para 11.

<sup>183</sup> Benjamin P & Cheadle H 'South African Labour Law Mapping the Changes - Part 2: The History of Labour Law and Its Institutions' (2020) 41 *ILJ* 19.

## CHAPTER 4

### FACTORS TO CONSIDER WHEN DETERMINING A DISMISSAL BASED ON A REASONABLE EXPECTATION FOR INDEFINITE EMPLOYMENT

#### 4.1 INTRODUCTION

The assessment of an employee's claim of dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract is concerned with both the 'subjective expectation' of the employee and the 'objective expectation', taking into account all the evidence and facts of a case.<sup>184</sup> Disputes about the interpretation and application of the sections dealing with fixed term contracts in terms of section 198B and section 186(1)(b)(ii) of the LRA may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or a bargaining council with jurisdiction to conciliate and arbitrate.<sup>185</sup> A large number of disputes referred to the CCMA relate to fixed term contracts.<sup>186</sup> Where the dismissal of an employee on a fixed term contract is placed in dispute, the enquiry invariably transcends into a question of jurisdiction because without the fact of a dismissal, the CCMA would lack jurisdiction to determine fairness or otherwise.<sup>187</sup>

#### 4.2 THE APPLICATION OF SECTION 198B AND SECTION 186(1)(b)(ii) OF THE LRA

In *Nama Khoi Local Municipality v South African Local Government Bargaining Council and Others*,<sup>188</sup> the LC held that section 198B has its own dispute resolution process in terms of section 198D<sup>189</sup> of the LRA related to the proactive declaring of

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<sup>184</sup> *Naidoo v Nsibanyoni NO and Others* (JR54/18) [2020] ZALCJHB 263 para 11.

<sup>185</sup> Benjamin P & Cheadle H (2020) 41 *ILJ* 21.

<sup>186</sup> Benjamin P & Cheadle H (2020) 41 *ILJ* 21.

<sup>187</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 *ILJ* 2829 (LC) 2839 para 33.

<sup>188</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC).

<sup>189</sup> Section 198D of the LRA:

*“General provisions applicable to sections 198A to 198C*

(1) *Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.*

the deeming of permanency and does not consider the legal question of dismissal.<sup>190</sup> Unfortunately, in this case, the trade union referred a dispute in terms of section 198B of the LRA but failed to refer a dismissal dispute in terms of section 186(1)(b)(ii) of the LRA.<sup>191</sup> Given that there was no 'dismissal' dispute referred and only a declaratory dispute on the deeming of permanency in terms of section 198D, the LC rightfully ruled that it cannot make a ruling on dismissal in terms of section 186(1)(b)(ii) of the LRA.<sup>192</sup> That being said, the LC ruled that if a dismissal dispute was referred as well, section 198B could then be utilised as part and parcel of an employee's case in an unfair dismissal dispute, contemplated in terms of section 186(1)(b)(ii) of the LRA.<sup>193</sup> Section 198B therefore can form part of the factors for consideration in the determination of a claim of dismissal in terms of section 186(1)(b)(ii) of the LRA.<sup>194</sup>

In *UASA - The Union obo Maribe and Others v Coca Cola Fortune Pty Ltd and Others*<sup>195</sup> the LC endorsed the above principles laid out in *Nama Khoi Local*

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- (2) *For the purposes of sections 198A(5), 198B(8) and 198C(3)(a), a justifiable reason includes that the different treatment is a result of the application of a system that takes into account—*
    - (a) *seniority, experience or length of service;*
    - (b) *merit;*
    - (c) *the quality or quantity of work performed; or*
    - (d) *any other criteria of a similar nature, and such reason is not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act 55 of 1998).*
  - (3) *A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A(4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.*
  - (4) *The party that refers a dispute must satisfy the Commission or the bargaining council that a copy of the referral has been served on every party to the dispute.*
  - (5) *If the dispute remains unresolved after conciliation, a party to the dispute may refer it to the Commission or to the bargaining council for arbitration within 90 days.*
  - (6) *The Commission or the bargaining council may at any time, permit a party that shows good cause to, refer a dispute after the relevant time limit set out in subsection (3) or (5)."*

<sup>190</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC) para 34 35.

<sup>191</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC) para 2.

<sup>192</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC) para 36.

<sup>193</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC) para 36.

<sup>194</sup> *Nama Khoi Local Municipality v South African Local Government Bargaining Council and others* [2019] 8 BLLR 830 (LC) para 38.

<sup>195</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC).

*Municipality v South African Local Government Bargaining Council and Others* and provided a four-stage test for the determination of a dismissal in terms of section 186(1)(b)(ii) of the LRA.<sup>196</sup>

- 4.2.1 First, whether the provisions of section 198B were applicable in terms of the provisions of section 198B(2) of the LRA.<sup>197</sup>
- 4.2.2 Second, if it was found that section 198B was applicable, then consideration and a determination would be needed on whether there was a justifiable reason for entering into the fixed term contracts of employment.<sup>198</sup> This would require an evaluation of subjective and objective factors as well as whether there was a justifiable reason for fixing the term of the contract.<sup>199</sup> Such consideration would be measured against the provisions of sections 198B(3), read with sections 198B(4), 198B(6) and 198B(7) of the LRA.<sup>200</sup>
- 4.2.3 Third, if it was found that there was no justifiable reason, then a determination would be required on whether entering into a fixed term contract of employment was concluded in contravention of section 198B(3) of the LRA, and if so, then a finding must be that such an applicants' employment was deemed indefinite in duration, which consideration would be in accordance with the provisions of section 198B(5) of the LRA.<sup>201</sup>

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<sup>196</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 13 14.

<sup>197</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 19.

<sup>198</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 20.

<sup>199</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 20.

<sup>200</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 20.

<sup>201</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 21.

4.2.4 Fourth, consideration would be needed to be given to whether a dismissal was established, within the context of section 186(1)(b)(ii) of the LRA, which would have required an evaluation of whether there was a reasonable expectation by the employee that the employer would retain them in their employment on an indefinite basis, thus tying in with the consideration of the provisions of section 198B(5) of the LRA.<sup>202</sup> If it was established that there was such expectation, then the finding would have to have been that there was indeed a dismissal, as per section 186(1)(b)(ii) of the LRA.<sup>203</sup>

Although complicated, in summary the theory adopted by the LC was that an arbitrator should first determine if an employee was deemed to be indefinitely employed under the provisions of section 198B of the LRA and, if so, to use such deeming as part of the motivation for the employee's reasonable expectation of indefinite employment upon the expiry of a fixed term contract.<sup>204</sup> The LC in *UASA - The Union obo Maribe and Others v Coca Cola Fortune Pty Ltd and Others*, confirmed the value and link between section 198B and section 186(1)(b)(ii) of the LRA.<sup>205</sup> However and for the purpose of the recommendations of this research paper, the focus and link of section 198B to section 186(1)(b)(ii) of the LRA is on the 'justifications' for a fixed term contract specifically provided for in section 198B(4) of the LRA.

The LC case of *Stellenbosch Municipality v SA Local Government Bargaining Council & Others*<sup>206</sup> cautioned against the collapsing of section 198B and section 186(1)(b)(ii) of the LRA as there could be a potential for confusion.<sup>207</sup> The caution is warranted because, in principle, it must be understood that hypothesising about an employee's status under section 198B is not a prerequisite for determining the existence of a

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<sup>202</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 22.

<sup>203</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 22.

<sup>204</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 18.

<sup>205</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 13.

<sup>206</sup> *Stellenbosch Municipality v SA Local Government Bargaining Council & others* (2023) 44 ILJ 388 (LC).

<sup>207</sup> *Stellenbosch Municipality v SA Local Government Bargaining Council & others* (2023) 44 ILJ 388 (LC) para 21.

dismissal under s 186(1)(b)(ii) of the LRA.<sup>208</sup> Other than the caution against confusion, the LC in *Stellenbosch Municipality v SA Local Government Bargaining Council & Others* acknowledged that there is merit in linking the two provisions for the purpose of assessing a claim for dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract.<sup>209</sup>

#### **4.3 POTENTIAL FACTORS TO CONSIDER WHEN DETERMINING SECTION 186(1)(b)(ii) OF THE LRA**

While the LRA does not provide a list of factors for consideration for the determination of dismissal in terms of section 186(1)(b)(ii) of the LRA, as it does in section 198B(4) of the LRA, the courts have on various occasions made mention of them. In the case of *Dierks v University of South Africa*,<sup>210</sup> the following factors were listed as being significant in the consideration and determination of the question of a reasonable expectation upon the expiry of a fixed term contract:

*“These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer’s business.”*

The link between section 198B(4) of the LRA and the factors for a reasonable expectation, relate to the factor of the ‘justification and purpose’ for concluding the fixed term contract’.<sup>211</sup> The *Pik-it-Up Johannesburg (Pty) Ltd v SALGBC and Others*<sup>212</sup> case provided the following additional factors to what the *Dierks v University of South Africa* case had established:

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<sup>208</sup> *Stellenbosch Municipality v SA Local Government Bargaining Council & others* (2023) 44 ILJ 388 (LC) para 21.

<sup>209</sup> *Stellenbosch Municipality v SA Local Government Bargaining Council & others* (2023) 44 ILJ 388 (LC) para 21.

<sup>210</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1246 para 133.

<sup>211</sup> *UASA — The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 ILJ 2702 (LC) para 20.

<sup>212</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 2736 para 25.

*“The LRA does not provide a definition of the concept ‘reasonable expectation.’ The concept has however been defined by case law to include, (a) equity and fairness; (b) existence of substantive expectation that the fixed term contract would be renewed; (c) the employee, subjectively expecting the contract to be renewed or extended; (d) objective factors that supports the expectation.”*

The above factors are reasonable and should be considered as part of the general framework for the assessment of a reasonable expectation for indefinite employment upon the expiry of a fixed term contract. Other factors such as the duration and number of previous contract renewals,<sup>213</sup> successive fixed term contracts,<sup>214</sup> nature of employee’s expectation,<sup>215</sup> an employee’s work ethic and work performance,<sup>216</sup> the employee’s formal disciplinary record and any informal misconduct<sup>217</sup> and working beyond the end date of a fixed term contract<sup>218</sup> should form part of the list of factors to consider in the assessment of an employee’s claim of a reasonable expectation of indefinite employment in terms of section 186(1)(b)(ii) of the LRA.

#### **4.4 TEN FACTORS TO CONSIDER**

For the determination of dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract, an employee must place facts which, objectively considered, established a reasonable expectation.<sup>219</sup> The enquiry is therefore whether an employee in the circumstances prevailing at the time would have reasonably expected indefinite employment.<sup>220</sup> This research proposes a distilled list of ten factors to consider in the determination and assessment. The ten

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<sup>213</sup> *Black v The John Snow Public Health Group* (2010) 31 ILJ 1152 (LC) 1164 para 58.

<sup>214</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

<sup>215</sup> *City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) SAFLII 9 para 27; *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1142 para 17.

<sup>216</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 1735 – 1736 para 21 22.

<sup>217</sup> *Njikelana v Werner Kruger N.O and Others* (2019) JOL 44853 (LC) 44852 44853 para 26 29.

<sup>218</sup> *SACTWU & another v Cadema Industries (Pty) Ltd* (2008) JOL 21394 (LC) para 29 30.

<sup>219</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2230 para 44.

<sup>220</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2230 para 44.

factors are not a closed list and may be inter-related when assessing a dispute. These factors are as follows:

- 4.4.1 Justification or purpose for concluding the fixed term contract;
- 4.4.2 The significance or otherwise of the contractual stipulations;
- 4.4.3 Nature of the business and undertakings by the employer;
- 4.4.4 The duration and number of previous fixed term contract renewals;
- 4.4.5 Nature of employee's expectation;
- 4.4.6 Work ethic, work performance and disciplinary record;
- 4.4.7 Future availability of the post;
- 4.4.8 Failure to give reasonable notice;
- 4.4.9 Working beyond the end date;
- 4.4.10 Surrounding circumstances.

## **4.5 CONCLUSION**

It is submitted that necessary interplays exist between section 198B and section 186(1)(b)(ii) of the LRA which serves as guiding principles to the list of factors. The list of ten factors serves as a recommended aid on topics for consideration by any party or decision-maker to assess the claim of a dismissal in terms of section 186(1)(b)(ii) of the LRA. If dismissal is established, the onus shifts to the employer to prove procedural and substantive fairness.<sup>221</sup> In chapter five, final conclusions will be drawn and final insight on listed ten factors.

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<sup>221</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2230 para 44.



## CHAPTER 5 RECOMMENDATION AND CONCLUSION

### 5.1 INTRODUCTION

There is a need for a legal code of good practice that regulates the assessment of a dismissal based on a reasonable expectation for indefinite employment upon the expiry of fixed term contract of employment.<sup>222</sup> A 'Code of Good Practice' in terms of section 203 of the LRA may be used to apply and interpret provisions of the law. This final chapter will extract and recommend the relevant principles which can aid the understanding of what factors could be considered in determining what constitutes this unique form of dismissal.

### 5.2 RECOMMENDATION OF A LIST OF TEN FACTORS TO CONSIDER

It is recommended that the below list of ten factors be utilised to assess the claim of a dismissal based on a reasonable expectation of indefinite employment in terms of section 186(1)(b)(ii) of the LRA:

#### 5.2.1 Justification or purpose for concluding the fixed term contract

The purpose for concluding a fixed term contract must be temporary in nature.<sup>223</sup> To better understand the genuine purpose for the fixed term contract, principles derived from section 198B(4) of the LRA may be used to objectively consider the purpose for entering into a fixed term contract based on any of the following reasons:<sup>224</sup>

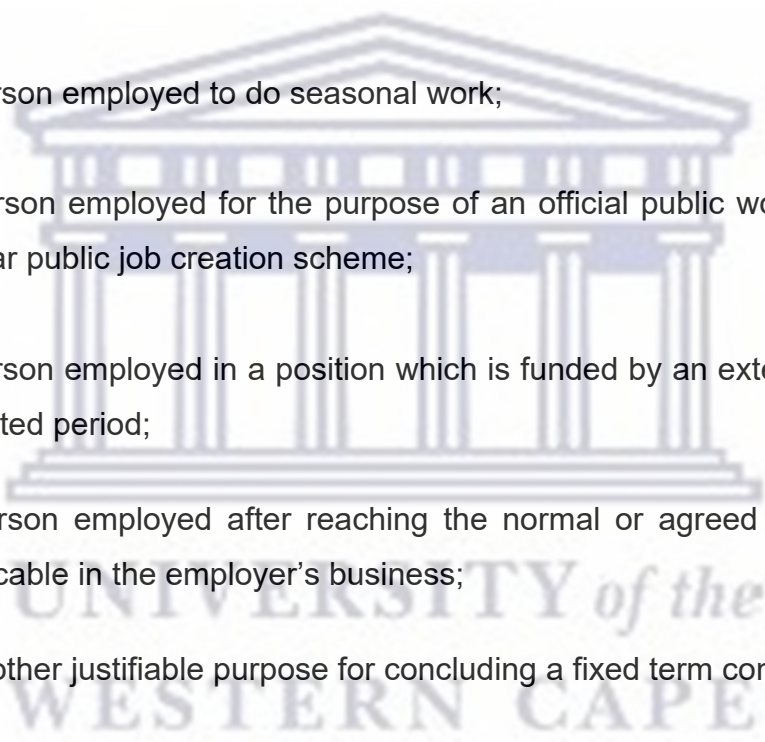
5.2.1.1 A person employed for a fixed period as a replacement due to a temporary staff absence;

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<sup>222</sup> Gericke S 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PELJ* 130.

<sup>223</sup> Du Toit D, Godfrey S & Cooper C *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 427.

<sup>224</sup> Grogan J (2022) 48.

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- 5.2.1.2 A person employed due to temporary increase in work not expected to endure beyond 12 months;
  - 5.2.1.3 A student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
  - 5.2.1.4 A person employed to work exclusively on a specific project that has a limited or defined duration;
  - 5.2.1.5 A non-citizen who has been granted a work permit for a defined period;
  - 5.2.1.6 A person employed to do seasonal work;
  - 5.2.1.7 A person employed for the purpose of an official public works scheme or similar public job creation scheme;
  - 5.2.1.8 A person employed in a position which is funded by an external source for a limited period;
  - 5.2.1.9 A person employed after reaching the normal or agreed retirement age applicable in the employer's business;
  - 5.2.1.10 Any other justifiable purpose for concluding a fixed term contract.

In relation to the determination of a dismissal based on a reasonable expectation of indefinite employment in terms of section 186(1)(b)(ii) of the LRA, the above factors do not serve as 'deeming' provisions, as in section 198B(4) of the LRA. It is not proposed that section 198(B)(4) be collapsed with section 186(1)(b)(ii) of the LRA but rather that the principles of section 198B(4) be incorporated as part of assessing the justification and purpose for entering into fixed term contract, in relation to a claim of dismissal based on a reasonable expectation for indefinite employment. Thus, when assessing the claim of a reasonable expectation of indefinite employment upon the expiry of a fixed term contract, it is recommended that the above sub-categories support the factor of 'purpose' for the use of a fixed term contract.

## 5.2.2 The significance or otherwise of the contractual stipulations

The contractual stipulations serve as a guide to the expectations, intentions and motives of the parties.<sup>225</sup> Therefore it is important to consider what has specifically been included as a contractual stipulation to which parties bind themselves.<sup>226</sup> The chosen words of contractual clauses are important but not conclusive because conduct subsequent to the commencement of a fixed term contract may give rise to a reasonable expectation of indefinite employment upon the expiry of a fixed term contract, notwithstanding a contractual clause to the contrary.<sup>227</sup> The reason disclaimers are important is because the onus on an employee is considered heavier in the face of a 'non-expectation' clause and it is the duty of the employee to produce credible facts to the contrary.<sup>228</sup> In the case of *Foster v Stewart Scott Inc*<sup>229</sup>, the LAC held that although agreement on the duration of the contract does not signal agreement between the parties that the contract would come to an end on expiry of the contract period, it was an important indicator that the parties did have such an intention<sup>230</sup>:

*“This does not mean that contractual terms agreed to by the parties can now simply be ignored by the employee and that he can demand that the date of determination be ignored, and that the termination of his contract be determined in accordance with principles formulated for retrenchment and retirement.”*<sup>231</sup>

The wording of the contract alone does not suffice to exclude an expectation of indefinite employment upon the expiry of a fixed term contract.<sup>232</sup> It is well established that the written provisions of the fixed term employment contract also play an important

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<sup>225</sup> Du Toit D, Godfrey S & Cooper C *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 428.

<sup>226</sup> *SA Rugby (Pty) Ltd v SA Rugby Players Association* (2008) 29 ILJ 2218 (LAC) 2231 F para 46

<sup>227</sup> Du Toit D, Godfrey S & Cooper C (2015) 428.

<sup>228</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2231 para 46; Grogan J *Dismissal* (2022) 59.

<sup>229</sup> *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

<sup>230</sup> *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) 368.

<sup>231</sup> *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) 368.

<sup>232</sup> *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) 1250 para 161.

role in the evaluation of the existence of the expectation albeit not decisive.<sup>233</sup> The mere fact that the employer inserted a clause into the employment contract, which has become fairly standard practice, stating that the employee 'has no expectation of indefinite employment' will not in itself preclude an employee from claiming a reasonable expectation because the circumstances may change.<sup>234</sup> Thus a reasonable expectation of renewal or indefinite employment upon the expiry of a fixed term contract can exist even though the written contract of employment expressly stipulates that the employee fully understands that there is no expectation of continued employment beyond the end date.<sup>235</sup>

### 5.2.3 Nature of the business and undertakings by the employer

The nature of the business provides insight into the economic rationale for the use of either fixed term contracts or indefinite employment.<sup>236</sup> If the nature of the business is dependent on discretionary funds for a limited period or future funds dependent on the performance of the business, a series of fixed term contracts may be necessary and justified.<sup>237</sup> In contrast, the creation of an indefinite post would require a more permanent source of funding to cater for the long-term sustainability of the post.<sup>238</sup> If an employee claims dismissal as a result of a reasonable expectation of indefinite employment on the basis of an undertaking by the employer, the nature of such undertakings as well as whether such a person has the requisite authority are important issues to assess.<sup>239</sup> Any undertaking made on behalf of an employer must be lawful and competent.<sup>240</sup> This would exclude persons who do not hold the authority to make undertakings and exclude any form of 'corridor talk'.<sup>241</sup>

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<sup>233</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 2737 para 27.

<sup>234</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2841 para 38; Grogan J *Dismissal* (2022) 59.

<sup>235</sup> *Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (1998) 19 ILJ 731 (SCA) at 733 4.

<sup>236</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 189 para 18.

<sup>237</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 189 para 18.

<sup>238</sup> *University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC) 189 para 18.

<sup>239</sup> Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 ILJ 1032.

<sup>240</sup> *SAMWU obo Moreroa and others v SA Local Government Bargaining Council and Others and related matters* (2022) JOL 57391 (LC) 19 para 59.

<sup>241</sup> *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC) 5 para 8.

An assurance, express or implied, given by the employer at some stage before the date on which a fixed term contract is set to expire may contribute to an expectation on the part of the employee that the employment relationship will continue.<sup>242</sup> An employer may also create a reasonable expectation of indefinite employment by arranging the employee's work schedule for the future or by indicating in some other way that the employee will still be working after the date on which the contract is due to expire.<sup>243</sup> Whether the expectation is reasonable depends on the nature of the alleged assurance, the position of the person who gave it and the strength of warnings by the employer that the contract would in fact expire.<sup>244</sup> The employer's conduct in the past, which represents its normal custom and practice, can create a reasonable expectation of indefinite employment.<sup>245</sup> Practices or customs relate to how the conduct of the employer contributes to increasing or decreasing expectations of employees.<sup>246</sup> Some employers allow for the practice of conversion of fixed term contracts to indefinite contracts after a certain period of time regardless of remuneration threshold.<sup>247</sup> When assessing the validity of certain practices, such practices must be assessed against existing internal policies, commitments or principles of legal fairness in terms of section 186(1)(b)(ii) of the LRA.<sup>248</sup> Therefore, if an employer conducts itself in a manner that creates reasonably held expectations of indefinite employment upon the expiry of a fixed term contract, it could constitute a dismissal in terms of section 186(1)(b)(ii) of the LRA.<sup>249</sup>

#### **5.2.4 The duration and number of previous fixed term contract renewals**

Both the amount of previous renewals and the duration of employment are factors to consider but the mere fact that a fixed term contract has been renewed repeatedly or for a longer duration does not itself give rise to the existence of a reasonable

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<sup>242</sup> Grogan J (2022) 58.

<sup>243</sup> Grogan J (2022) 58

<sup>244</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2233 para 52; Grogan J (2022) 58.

<sup>245</sup> Vettori S (2008) 2 *Stell LR* 194.

<sup>246</sup> *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1145 para 26.

<sup>247</sup> *Black v The John Snow Public Health Group* (2010) 31 ILJ 1152 (LC) 1165 para 63.

<sup>248</sup> Olivier M (1996) 17 *ILJ* 1032.

<sup>249</sup> Vettori S (2008) 2 *Stell LR* 194.

expectation for indefinite employment upon the expiry of a fixed term contract.<sup>250</sup> Where a pattern is established based on successive renewals and sudden unforeseen notice of expiry of a fixed term contract occurs, the prospects of proving a reasonable expectation of indefinite employment may be increased.<sup>251</sup> The duration and number of previous fixed term contract renewals must be viewed within the context of the justifications and purpose of the fixed term contract.<sup>252</sup> The longer the contract and the existence of wording in the contract which discourages the formation of any expectation, the higher the chance of increasing an employee's expectation, while conversely, where there is a history of no prior renewals and a practice of compliance with the expiry date of a fixed term contract, the employee's expectation should naturally decrease.<sup>253</sup>

### 5.2.5 Nature of employee's expectation

In terms of the nature of an employee's expectations, an employee can have only one of two claims for dismissal in terms of section 186(1)(b) of the LRA based on a reasonable for the renewal of a fixed-term contract *or* a reasonable expectation of indefinite employment.<sup>254</sup> An employee cannot have both the expectation of renewal and an expectation of indefinite employment, as the two types of expectations are mutually exclusive.<sup>255</sup>

Another aspect of the nature of an employee's expectation relates to an expectation arising from a selection and recruitment process.<sup>256</sup> If an employer in good faith decided to advertise a position that was previously occupied by a fixed term contract employee, such a decision would be in accordance with the employer's discretion and prerogative towards its operational requirements.<sup>257</sup> To the extent that such a fixed

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<sup>250</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2841 para 36.

<sup>251</sup> Olivier M, (1996) 17 ILJ 1031.

<sup>252</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2841 para 37.

<sup>253</sup> *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC) 12 para 20.

<sup>254</sup> *City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) SAFLII 9 para 27.

<sup>255</sup> *City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) SAFLII 9 para 27; *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) 1142 para 17.

<sup>256</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2842 para 42.4.

<sup>257</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2843 para 42.6.

term contract employee applies for the advertised permanent position and participates in the selection and recruitment processes but is unsuccessful, the nature of the expectation for indefinite employment may be diluted in terms of section 186(1)(b)(ii) of the LRA.<sup>258</sup> A dispute about the outcome of an advertised position and open competition, flowing from a selection and recruitment process may lead to a different dispute about non-appointment and not dismissal, which may have different rules, processes and applicable criteria.<sup>259</sup> The employee's active participation in the selection and recruitment process of an advertised post directly minimizes the nature of the employee's expectation upon the expiry of a fixed term contract because it is a competitive process and where it is known that job applicants are not guaranteed appointment.<sup>260</sup>

An employee's expectation for conversion from a fixed term contract to an indefinite contract may also be inconsistent with the requirements and what needs to be proven in terms of section 186(1)(b)(ii) of the LRA.<sup>261</sup> To this end, a distinction should be made between an employer's decisions to convert fixed term contract 'positions' from fixed term to indefinite, as opposed to converting the status of 'individuals' occupying the posts.<sup>262</sup> An employer does have the prerogative to advertise in good faith, positions previously occupied by fixed term contract employees, to ensure the employer appoints the most suitable candidate following a selection and recruitment process.<sup>263</sup>

An interesting related debate arose about the legal position applicable to 'public sector' employees. In the case of *Nowalaza and Others v Office of the Chief Justice and Another*,<sup>264</sup> the LC was called upon to decide on whether an expectation for indefinite employment can be reasonable if subject to a prescribed statutory process such a recruitment, advertising, and selection before temporary status can be converted into

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<sup>258</sup> *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC) 547 para 14; *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2843 para 42.9.

<sup>259</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2843 para 42.9.

<sup>260</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2843 para 42.9 2844 para 42.13.

<sup>261</sup> *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC) 547 para 14; *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2842 para 42.5.

<sup>262</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2842 para 42.3.

<sup>263</sup> *Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC) 2842 para 42.4.

<sup>264</sup> *Nowalaza and others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC).

indefinite employment. The Public Service Act 103 of 1994 (PSA) demands that the employer in the public service must follow a recruitment, selection and appointment process for the appointment of permanent staff.<sup>265</sup> The LC rejected the argument that public service employees can never harbour an expectation of indefinite employment because an appointment is always subject to a prescribed statutory recruitment process.<sup>266</sup> The LC found a clear conflict between section 186(1)(b)(ii) of the LRA and the PSA but ruled that the LRA trumps the PSA where employees rely upon a reasonable expectation of indefinite employment upon the expiry of a fixed term contract.<sup>267</sup> The ruling confirms there is nothing in law that prevents a public service employee on a fixed term contract from harbouring a reasonable expectation of indefinite employment without having to comply with the provisions of the PSA related to recruitment, selection and appointment.<sup>268</sup>

### **5.2.6 Work ethic, work performance and disciplinary record**

A clean disciplinary record may contribute to the factors for consideration in assessing the reasonableness of an employee's expectation for indefinite employment upon the expiry of a fixed term contract.<sup>269</sup> Good performance is also a factor that can raise a reasonable expectation of indefinite employment and is sufficient to discharge the onus of showing the existence of a dismissal.<sup>270</sup> It stands to reason that if a fixed term contract employee receives positive performance reviews, such evidence may contribute to proving a reasonable expectation for indefinite employment.<sup>271</sup> Conversely, it also follows that poor work performance and having a bad disciplinary record are more likely to have a negative impact on realistic and reasonable expectations for indefinite employment upon the expiry of a fixed term contract.<sup>272</sup>

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<sup>265</sup> *Nowalaza and others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC) 4 para 16.

<sup>266</sup> *Nowalaza and others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC) 13 para 93 94.

<sup>267</sup> *Nowalaza and others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC) 13 para 95 96.

<sup>268</sup> *Nowalaza and others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC) 13 para 97.

<sup>269</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 1735 1736 para 21 22.

<sup>270</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 1735 1736 para 21 22.

<sup>271</sup> *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 1735 1736 para 22.

<sup>272</sup> *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC) 10 para 19.4.



Dishonest conduct by an employee has also been found by the LC to be a fair justification for an employer to not renew a fixed-term contract.<sup>273</sup> The fact an employer does not take remedial steps during the course of the fixed term contract does not detract from the reasonable inference that such performance could militate against the prospect of a reasonable expectation for indefinite employment.<sup>274</sup> How employees' conduct themselves during the fixed term contract therefore serves as valid issues for consideration as it relates to the claim of an expectation for indefinite employment upon the expiry of a fixed term contract.<sup>275</sup>

### 5.2.7 Future availability of the post

The future availability of a post is an important factor to consider to establish the true nature of a fixed term contract.<sup>276</sup> If the post and work related to that post remain available beyond the stipulated end date, this may give rise to an expectation of indefinite employment upon expiry of a fixed term contract.<sup>277</sup> If a post no longer exists at the end of a fixed term contract, it would be difficult for an employee to have an expectation of indefinite employment.<sup>278</sup> In the same way therefore the non-availability of work will decrease the probability that such an expectation for indefinite employment could be viewed as reasonable.<sup>279</sup> The LC has ruled that when a budget is included for a fixed term post beyond the termination date and such funding is obtained, this may indicate the availability of the post and contribute as factors for consideration.<sup>280</sup> In the case of budget planning for a post, this alone cannot give rise to a reasonable expectation for indefinite employment especially where funding has not been obtained in relation to a budget planned for a post.<sup>281</sup> In the LC case of *Dube and Others v*

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<sup>273</sup> *Njikelana v Werner Kruger N.O and Others* (2019) JOL 44853 (LC) 44852 44853 para 26 29.

<sup>274</sup> *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC) 10 para 19.4.

<sup>275</sup> *Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC) 10 para 19.4.

<sup>276</sup> Grogan J *Dismissal* (2022) 58.

<sup>277</sup> *South African Clothing and Textile Worker's Union and Another v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 790 (LC) para 29.

<sup>278</sup> *City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) para 20.

<sup>279</sup> Smit N 'Everything fixed about fixed-term contracts of employment: or not?' (2005) 1 *TSAR* 203.

<sup>280</sup> *Black v The John Snow Public Health Group* (2010) 31 ILJ 1152 (LC) 1164 para 58.

<sup>281</sup> *Black v The John Snow Public Health Group* (2010) 31 ILJ 1152 (LC) 1165 para 58.

*University of Zululand and Others*<sup>282</sup> the Applicants, who worked in the Catering Department of the University of Zululand (University), argued that they had a reasonable expectation of indefinite employment because they were employed on a series of fixed term contracts but suddenly their contracts were not renewed.<sup>283</sup> The University's defence was that its operations in relation to the provision of dining hall services to students were affected by a change in the funding model which saw a decrease in demand.<sup>284</sup> The LC ruled that a claim of dismissal based on a reasonable expectation for indefinite employment upon the expiry of a fixed term contract could not succeed where an employer proves redundancy and reduction of certain operational requirements or needs of a business.<sup>285</sup>

### **5.2.8 Failure to give reasonable notice**

The giving of notice is ordinarily inconsistent with employment on a fixed term of the contract, which, by definition, terminates naturally through the operation of law by the pre-determined end date or the happening of a specified event.<sup>286</sup> However, the failure to give reasonable notice has been found to constitute an unfair labour practice and it remains a factor for consideration when assessing the reasonableness of an expectation for indefinite employment upon the expiry of a fixed term contract.<sup>287</sup> The rule was that the contract may be deemed to be tacitly renewed if reasonable notice of expiry has not been provided and the employee continues working beyond the end date.<sup>288</sup> However, the LAC in the case of *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others*,<sup>289</sup> called for a much closer scrutiny on the impact of a failure to give reasonable notice to an employee on a fixed term contract. The LAC ruled the fact that an employer does not notify an employee, on a fixed term contract, prior to the expiry thereof, does not mean that the fixed term contract is either automatically extended or that the employment has become indefinite, unless provisions of the law specifically

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<sup>282</sup> *Dube and Others v University of Zululand and Others* (2019) 3 BLLR 285 (LC).

<sup>283</sup> *Dube and Others v University of Zululand and Others* (2019) 3 BLLR 285 (LC) 286 para 3.

<sup>284</sup> *Dube and Others v University of Zululand and Others* (2019) 3 BLLR 285 (LC) 286 para 6.

<sup>285</sup> *Dube and Others v University of Zululand and Others* (2019) 3 BLLR 285 (LC) 289 para 15.

<sup>286</sup> *Owen and others v Department of Health, KwaZulu Natal* (2009) 30 ILJ 2461 (LC) para 11.

<sup>287</sup> Olivier M (1996) 17 ILJ 1013.

<sup>288</sup> Olivier M (1996) 17 ILJ 1035.

<sup>289</sup> *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC).

provided for that.<sup>290</sup> A failure by the employer to give reasonable notice of expiry to an employee on a fixed term contract, must be viewed in context and in combination with other factors to establish the reasonableness of an expectation for indefinite employment upon the expiry of a fixed term contract.

### 5.2.9 Working beyond the end date

When an employee on a fixed term contract works beyond the end date, the circumstances must be understood to establish whether such a contract can be regarded as being tacitly renewed or novated on the same terms and conditions.<sup>291</sup> An employee working beyond the end date of a fixed term contract is not a guarantee the employee would have a reasonable expectation for indefinite employment as there may be valid reasons and justifications.<sup>292</sup> The employee's reasonable expectations must therefore be viewed in light of the prevailing events and circumstances.<sup>293</sup> In *Department of Agriculture, Forestry and Fisheries v Teto and Others*<sup>294</sup> the LAC held that:

*“If after the expiry of a fixed-term contract, an employee continues to render services to an employer and receives remuneration for the rendering of those services, the contract is deemed to be tacitly relocated or novated. The new contract may be on varied terms and its duration period must be determined in the light of the circumstances of each case. Unless a contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration, terminable by reasonable notice given by either party.”*

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<sup>290</sup> *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC) 548 para 15.

<sup>291</sup> *City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) SAFLII 7 para 54.

<sup>292</sup> *SAMWU obo Moreroa and others v SA Local Government Bargaining Council and Others and related matters* (2022) JOL 57391 (LC) 18 para 54.

<sup>293</sup> *SAMWU obo Moreroa and others v SA Local Government Bargaining Council and others and related matters* (2022) JOL 57391 (LC) 18 para 54.

<sup>294</sup> *Department of Agriculture, Forestry and Fisheries v Teto and others* (2020) 41 ILJ 2086 (LAC) 2092 para 20.

In *Gauteng Provincial Legislature v CCMA and Others*,<sup>295</sup> LAC went further and held if an employee continues to tender services after the expiry of the fixed term contract, the new contract will be deemed to be of indefinite duration only if “... a contrary intention could not be inferred from the facts”.<sup>296</sup> The LAC further held that:

*“In order to establish a tacit contract, it is necessary to prove, on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the preponderance of probabilities that the parties reached agreement in that manner, it may find that tacit contract established.”*

The fact that an employee continues to work in the same position for the same employer after his or her fixed term contract has come to an end, does not mean that his or her fixed term contract has ‘morphed’ into indefinite employment.<sup>297</sup>

#### **5.2.10 Surrounding circumstances**

In terms of the assessment of the factors, the LAC has cautioned against using a technical approach which does not take into account the real and practical way in which parties deal with each other.<sup>298</sup> Key to a fair assessment of a claim of dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract, is the consideration of the totality of evidence and all surrounding circumstances.<sup>299</sup>

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<sup>295</sup> *Gauteng Provincial Legislature v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 ILJ 616 (LAC).

<sup>296</sup> *Gauteng Provincial Legislature v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 ILJ 616 (LAC) 629 para 48.

<sup>297</sup> *Gauteng Provincial Legislature v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 ILJ 616 (LAC) 629 para 49; *Buthelezi v Rurik McKaiser Attorneys Inc & another* (2023) 44 ILJ 1512 (LC) 1525 para 59.

<sup>298</sup> *Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC) 547 para 13.

<sup>299</sup> *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC) 2229 para 35; *Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & others* (2011) 32 ILJ 2728 (LC) 2737 para 29.

In *Joseph v University of Limpopo & Others*,<sup>300</sup> the LAC stated:

*“The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justifies such an expectation. Such circumstances could be for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact.”*

As confirmed by the LAC, the list of factors is not a closed list but serves as a convenient, inter-related guide to assess circumstances and facts of a case to assist in the determination of a dismissal based on reasonable expectation for indefinite employment upon the expiry of a fixed term contract.

### **5.3 CONCLUSION**

The LRA does not provide a definition of the concept of a reasonable expectation for indefinite employment and does not provide a related Code of Good Practice but the need exists for a distilled and summarised list of factors which can be applied to any given set of circumstances and facts.<sup>301</sup> The absence, in the LRA, of definitions in respect of the concepts of ‘reasonable expectation of indefinite employment’, is amplified by a delineation of factors which fall to be considered in determining whether a dispute falls within the ambit of section 186(1)(b)(ii) of the LRA. The conclusion of this research paper is to propose the legislative development of a Code of Good Practice that offers factors to consider in the assessment and determination of a claim for dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract in terms of section 186(1)(b)(ii) of the LRA. Chapter 5 provided a recommended list of ten factors to be included in such a Code of Good Practice. A compelling argument exists therefore for the concepts to be codified. This

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<sup>300</sup> *Joseph v University of Limpopo & Others* (2011) JOL 27270 (LAC) 11 para 35.

<sup>301</sup> Gericke S ‘The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law’ (2016) 1 *TSAR* 106.

will serve not only to provide more certainty in related disputes but perhaps more importantly in the labour market. In conclusion and until such time as legislative intervention occurs, it is proposed that the ten factors which have been discussed above serve as a guide on relevant factors to consider and assess in the determination of dismissal based on a reasonable expectation of indefinite employment upon the expiry of a fixed term contract. This guide can be utilised as a foundational reference in disputes related to section 186(1)(b)(ii) of the LRA, for applicants or their representative, respondents or their representatives and relevant decision-makers or arbitrators.



## BIBLIOGRAPHY

### Books

De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 4 ed (2001)  
Lansdowne: Juta.

Du Toit D, Godfrey S & Cooper C *Labour Relations Law: A Comprehensive Guide* 6  
ed (2015) Cape Town: LexisNexis

Grogan J *Dismissal* 4 ed (2022) Cape Town: Juta

Grogan J *Workplace Law* 13 ed (2020) Cape Town: Juta

Levy A *Labour Law in Practice: A Guide for South African Employers* (2021) Cape  
Town: Penguin Random House

Terreblanche S *A history of Inequality in South Africa 1652 – 2002* (2002)  
Pietermaritzburg: University of Natal Press

Van Niekerk A *Law@work* 5 ed (2019) Cape Town: LexisNexis

Venter R, Levy A & Bendeman H *Labour relations in South Africa* 5 ed (2014) Cape  
Town: Oxford University Press

### Articles

Benjamin P & Cheadle H 'South African Labour Law Mapping the Changes - Part 2:  
The History of Labour Law and Its Institutions' (2020) 41 *ILJ* 1 41

Botha N & Mischke C 'A New Labour Dispensation for South Africa' (1997) 41 *Journal  
of African Law* 134 140

Budeli M 'Workers' right to freedom of association and trade unionism in South Africa: an historical perspective' (2009) 15 *Fundamina* 57 74

Cheadle H 'The first unfair labour practice case' (1980) 1 *ILJ* 200 202

Conradie M 'The constitutional right to fair labour practices: a consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) 22 *Fundamina* 163 204

Fourie E 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) 11 *PER/PELJ* 110 184

Geldenhuis J 'Reasonable expectations: Real protection or false security for fixed-term employees' (2008) 20 *SA Mercantile Law Journal* 268 279

Geldenhuis J 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER/PELJ* 1 56

Gericke S 'A new look at the old problem of a reasonable expectation: the reasonableness of repeated renewals of fixed-term contracts as opposed to indefinite employment' (2011) 14 *PER/PELJ* 105 136

Gericke S 'The regulation of successive fixed-term employment in South Africa: lessons to be gleaned from foreign and international law' (2016) 1 *TSAR* 94 109

Huysamen E 'An Overview of Fixed-Term Contracts if Employment as a Form of Typical Employment in South Africa' (2019) 22 *PER/PELJ* 1 42

Inman R & Rubinfeld D 'Understanding the Democratic Transition in South Africa' (2013) 15 *American Law and Economics Review (ALER)* 1 38

Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) *ILJ* 139 165



Lyster R 'The new right to be heard' (1990) 5 *SA Public Law* 132 137

Mahamed R 'The socio-political and work environment as sources of workplace discrimination: implications for employment equity' (2000) 4 *Southern African Business Review (SABR)* 77 82

Maqutu L 'The Management of African Workers' Wages at South African Mines: Law and Policy Before 1948' (2022) 25 *PER/PELJ* 1 32

Olivier M 'Legal Constraints on the Termination of Fixed-Term Contracts of Employment: An Enquiry into Recent Development' (1996) 17 *ILJ* 1001 1040

Raguel M & Odeku K 'Critical Analysis of the Failure of Labour Law to Adequately Protect Atypical Workers and Its Impact on Human Rights and Fair Labour Practice' (2023) 13 *Juridical Tribune* 63 81

Rapatsa M 'Atypical or Non-Standard Work: A Challenge to Workers' Protection in South Africa' (2014) 5 *Mediterranean Journal of Social Sciences* 1067 1072

Smit N 'Everything fixed about fixed-term contracts of employment: or not?' (2005) 1 *TSAR* 200 207

Subramanien D & Joseph J 'The Right to Strike under the Labour Relations Act 66 of 1995 (LRA) and Possible Factors for Consideration that Would Promote the Objectives of the LRA' (2019) 22 *PER/PELJ* 1 39

Taylor E 'The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labour Relations Act 66 of 1995' (1996) 9 *Transnational Lawyer* 611 650

Twyman CM 'Finding Justice in South African Labor Law: The use of Arbitration to Evaluate Affirmative Action' (2001) 33 *Case W. Res. J. Int'l L* 308 329

Vettori S 'Fixed term employment contracts: The permanence of the temporary' (2008)  
2 *Stell LR* 189 208

### **Case law**

*Administrator of the Transvaal & Others v Traub & Others* (1989) 10 ILJ 823 (A)

*Auf der Heyde v University of Cape Town* 2000 21 ILJ 1758 (LC)

*Black v The John Snow Public Health Group* (2010) 31 ILJ 1152 (LC)

*Buthelezi v Municipal Demarcation Board* [2004] JOL 13391 (LAC)

*City of Cape Town v SALGBC and Others* (C494/2016) [2017] ZALCCT 34 (2 August 2017) SAFLII

*Cremerk - A Division of the Triple P -Chemical Ventures (Pty) Ltd v SA Chemical Workers Union & Others* (1994) 15 ILJ 289 (LAC)

*Department of Agriculture, Forestry and Fisheries v Teto and Others* (2020) 41 ILJ 2086 (LAC) 2092

*Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC)

*Dube and Others v University of Zululand and Others* (2019) 3 BLLR 285 (LC)

*Food and General Workers Union and Others v Lanko. Co-operative Ltd* (1994) 15 ILJ 876 (IC)

*Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC)

*Gauteng Provincial Legislature v Commission for Conciliation, Mediation & Arbitration & Others* (2022) 43 ILJ 616 (LAC)

*Jones v Commissioner for Mediation, Conciliation and Arbitration and Others* (C709/2018) [2021] SAFLII (LC)

*Joseph v University of Limpopo & Others* (2011) JOL 27270 (LAC)

*McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC)

*Metal and Allied Workers Union & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC)

*Naidoo v Nsibanyoni NO and Others* (JR54/18) [2020] ZALCJHB

*Nama Khoi Local Municipality v South African Local Government Bargaining Council and Others* [2019] 8 BLLR 830 (LC)

*Njikelana v Werner Kruger N.O and Others* (2019) JOL 44853 (LC)

*Nowalaza and Others v Office of the Chief Justice and Another* (2017) JOL 38064 (LC)

*Owen and Others v Department of Health, KwaZulu Natal* (2009) 30 ILJ 2461 (LC)

*Pik-It-Up Johannesburg (Pty) Ltd v SA Local Government Bargaining Council & Others* (2011) 32 ILJ 2728 (LC)

*Pikitup Johannesburg (SOC) Ltd v Muguto & Others* (2019) 40 ILJ 2829 (LC)

*SACTWU & another v Cadema Industries (Pty) Ltd* (2008) JOL 21394 (LC)

*SAMWU obo Moreroa and Others v SA Local Government Bargaining Council and Others and related matters* (2022) JOL 57391 (LC)

*SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 ILJ 2218 (LAC)

*South African Clothing and Textile Worker's Union and Another v CADEMA Industries (Pty) Ltd* (2008) 8 BLLR 790 (LC)

*Stellenbosch Municipality v SA Local Government Bargaining Council & Others* (2023) 44 ILJ 388 (LC)

*UASA - The Union obo Maribe and Others v Coca Cola Fortune Pty Ltd and Others* (2021) 42 ILJ 2702 (LC)

*Ukweza Holdings (Pty) Ltd v Nyondo NO and Others* (2020) 6 BLLR 544 (LAC)

*University of Pretoria v CCMA* (2012) 33 ILJ 183 (LAC)

*Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* (1998) 19 ILJ 731 (SCA)

### **Legislation**

Basic Conditions of Employment Act 75 of 1997

Employment Equity Act 55 of 1998

Industrial Conciliation Act 11 of 1924

Industrial Conciliation Act no 36 of 1937

Interim Constitution of the Republic of South Africa, Act 200 of 1993

Labour Relations Act of 66 of 1995

Labour Relations Amendment Act 6 of 2014

Labour Relations Amendment Act 8 of 2018

Master and Servant Act 15 of 1856

Master and Servant Ordinance, 1 of 1841

Mines and Workers Act 12 of 1911

Public Service Act 103 of 1994

Skills Development Act 75 of 1997

The Constitution of the Republic of South Africa, 1996

Transvaal Industrial Disputes Prevention Act 20 of 1909

